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(May - June, 2018)

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adverse possession – RSA – Plaintiff contending before High Court that District Judge was not competent to reverse findings of adverse possession in absence of cross-objections - Held- Defendants could have assailed findings of trial court on issue of adverse possession without filing cross-objections – Finding of District Judge on issue of adverse possession upheld – RSA dismissed.

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Code of Criminal Procedure, 1973- Section 216- **Indian Penal Code, 1860-** Sections 302 and 376- Framing of additional charge(s) – Stage - Trial Court ordering framing of additional charge for offence under Section 376 of I.P.C. – Petition against – Accused arguing that Trial Court had earlier dismissed an application of prosecution under Section 216 of Code for framing additional charge for offence under Section 376 of I.P.C. and it was not open to frame charges for the same offence particularly when there was no change in facts and circumstances of the case – And it was not the case of prosecution that accused had raped the deceased – High Court found that when earlier application under Section 216 of Code for framing additional charge was dismissed by Trial Court on 5.11.2016, there was only the DNA profiling report without any corroborating evidence – However, after recording statements of Assistant Director, DNA Reports and Medical

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Code of Criminal Procedure, 1973- Section 256- **Negotiable Instruments Act, 1881-** Section 138- Trial Court dismissed complaint for non-appearance of complainant or his counsel on date fixed for appearance of accused and acquitted him (accused) – Appeal against – Held – Plea of complainant that he remained under impression that case was for formal hearing whereas his counsel could not appear as he was busy in some other court, appears to be genuine – Order of trial court set aside – Case remanded to trial court to proceed in accordance with law.

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Code of Criminal Procedure, 1973- Section 311- Additional Evidence – In a complaint case, complainant filing application for permission of Court to lead additional evidence to prove statement of his bank account indicating that he had made payments through cheques to accused and the 'dishonoured cheque' was issued by accused to discharge that liability – Trial Court allowing application of complainant- Petition against – Accused assailing order of Trial Court on ground that by way of additional evidence, complainant was filling lacuna – Held, it is duty of court to determine truth and render a just decision after discovering all relevant facts – Power conferred by Section 311 of Code can be invoked at any stage of the case – By way of additional evidence, complainant intended to show that payments were made to accused from his account through cheques – This evidence was relevant and proper for just decision of case - Petition dismissed – Order of Trial Court upheld.

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Code of Criminal Procedure, 1973- Section 319- **Factories Act, 1948-** Section 101- Exemption of occupier or manager from liability– When can be availed – Complaint was filed against A.L. Kapoor before trial court for offences under the Act – Complainant moved an application for his deletion and substitution by one Ajay Kapur as an accused – Trial Court allowing the application – Petition against by Ajay Kapur– State justifying order of trial court by recourse to Section 101 of Act - Held, In certain cases, Manager or occupier of a factory when charged with an offence under Act, can (i) file written application in trial Court showing that some other person was the actual offender (ii) and satisfy that he used due diligence to enforce execution of Act and (iii) such other person committed offence in question without his knowledge or consent or connivance – As no such application was filed by A.L. Kapoor before trial court, Section 101 of Act has no applicability – A.L. Kapoor could not have been substituted by recourse to Section 319 of Code – Petition allowed- Order of trial court set aside.

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Code of Criminal Procedure, 1973- Section 319- Impleadment of accused- Complainant instituted a complaint against one A.L. Kapoor – During pendency of complaint, complainant filing application under Section 319 of Code for 'deletion' of A.L. Kapoor as an accused and his substitution by one Ajay Kapur as 'accused' – Trial court allowing this application, directing deletion of A.L. Kapoor and substitution of Ajay Kapur as an accused in his place – Petition against – Held – This section of Code can be invoked only when i) during enquiry or trial some 'evidence' comes on record against left out persons and (ii) when 'such left out person can be jointly tried' for some offences with accused already before court- Application of complainant filed under Section 319 of Code was for deletion of accused already arrayed and impleadment of new accused in his place - There was not to be any joint trial of A.L. Kapoor and Ajay Kapur in that

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Title: Ajay Kapur Vs. State of H.P. Page-120

Code of Criminal Procedure, 1973- Section 345- **Indian Penal Code, 1860-** Section 228- Contempt in presence of court - Procedure thereof – Held - After taking cognizance, Court is required to give an opportunity to contemnor to lead evidence in support of his reply – Additional Sessions Judge didn't give any opportunity to contemnor to lead evidence – Conviction for offence under Section 228 of I.P.C. thus illegal and set aside – Appeal allowed.

Title: Kamal Kishore Vs. State of H.P. Page-465

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Rash and Negligent driving – What is ? – Accused, a driver of bus was charged and tried by court on allegations that by his rash and negligent driving, he struck it against 'P' and her son 'R' and caused grievous injuries to them – Trial Court acquitted accused of said offences – Appeal against by State on ground that acquittal is not based on proper appreciation of evidence – On facts, statement of 'P' found not reliable – Site plan totally contrary to what witnesses deposed on oath – Complainant not stating anything from which inference of rash or negligent driving can be drawn – Held – When evidence on record is inconsistent, presumption of rash or negligent driving cannot be drawn by invoking principle of res ipsa loquitur – Accused's acquittal upheld – Appeal dismissed.

Title: State of H.P. Vs. Surinder Page-184

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Sections 279, 337 and 304-A – **Motor Vehicles Act, 1988-** Section 185- Trial Court convicting and sentencing accused for offences punishable under Sections 279, 337 and 304-A of I.P.C. on proof that he was driving car rashly and also under influence of liquor which led to motor accident resulting in death of 'B' – In appeal, Sessions Judge setting aside conviction and sentences and acquitting accused on ground that his identity as a driver of vehicle not clearly established - On facts, High Court found that none of witnesses stated before trial court that he had seen accused driving car at relevant time or he was pulled out from driver's seat from fallen vehicle – Held – Identity of accused as driver of offending vehicle not proved beyond doubt – Appeal dismissed- Acquittal upheld.

Title: State of Himachal Pradesh Vs. Sanjay Dahiya Page- 52

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Section 436- Mischief by fire- Trial Court convicted and sentenced accused on finding that he collected grass on roof of village temple and set it on fire- Appeal against on ground that evidence was misread by trial court - High Court found that accused was caught red handed accumulating grass on roof top of village temple and setting it ablaze – Statements of complainant and other eye-witnesses corroborate each other and are trustworthy - Conviction upheld, appeal dismissed.

Title: Mehar Singh Vs. State of H.P. Page-601

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Sections 342 and 376(2)(f)- Accused, a priest (Gur) of local deity was tried and convicted by trial court on allegations that he called prosecutrix to his house to cure her so that she could bear a child, and then wrongfully confined and raped her – Appeal against- Accused contending before High Court that prosecutrix was not believable as she had made improvements in her deposition during trial on material particulars including factum of penetration vis-à-vis narration given in FIR and statement recorded under Section 164 Cr.P.C. - On facts, High Court found that victim was not cross-examined with reference to previous statements - Held – Since no cross examination was

done by defence upon prosecutrix with respect to improvements made in her statement on oath during trial vis-à-vis statement given under Section 154 and under Section 164 Cr.P.C., version given in court cannot be ignored and has to be accepted as correct.

Title: Chandermani Vs. State of H.P. Page-484

Code of Criminal Procedure, 1973- Section 374- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Section 20- Appeal against conviction – Special Judge convicted and sentenced accused for offence under Section 20 of Act on proof that he was found possessing 1.700 kg. of charas in a carry bag concealed under a jacket worn by him near Samiti Guest House, Anni, District Kullu - Appeal against – Accused contending before High Court that investigation was not fair as independent witnesses were not deliberately associated in it, and possibility that case property was tampered with could not be ruled out and official witnesses should not be relied upon - Held – Public witnesses are not available all times and at all places – Non-joining of independent witnesses is not fatal and conviction can be based on testimony of official witnesses, if found credible – Recovery was effected from accused at dead hours of night in winter month of November – Non- availability of public witnesses in a small bazaar like Anni at that time is understandable – Statements of official witnesses found reliable - Possibility of planting of huge quantity of contraband is extremely doubtful - Contradictions regarding 'shape' of recovered contraband, are minor – Conviction upheld and appeal dismissed.

Title: Mohar Singh Vs. State of H.P. (D.B.) Page-644

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal – Accused was tried by trial court on allegations that he gave beatings to complainant "P" and also threatened to kill him – Accused acquitted by Trial Court – Appeal by the State on ground that acquittal is based on wrong appreciation of evidence by trial court- High Court found that FIR was belatedly filed and no reason for delay was given, there was no medical evidence qua injuries, one of eye-witness "A" was not examined by prosecution during trial- Held – Prosecution failed to establish guilt of accused beyond reasonable doubts – Acquittal upheld- Appeal dismissed.

Title: State of Himachal Pradesh Vs. Ramesh Chand Page-589

Code of Criminal Procedure, 1973- Section 378- Appeal by complainant/victim against judgment of acquittal - On complaint of victim that accused wrongfully restrained him when he was working in his field with JCB and then they took him to their house, confined there and gave beatings to him and his wife, accused were tried for different offences and eventually acquitted by trial court – Appeal against by complainant - Complainant arguing before High Court that judgment of acquittal is based on gross mis-appreciation of evidence by trial court – On facts, High Court found that statement of complainant was not corroborated by medical evidence, eye witnesses did not support his case, no recovery of stick(s) was effected either from place of occurrence or from accused, complainant himself gave some sticks to I.O. alleged to have been used by accused- Further, FIR in respect of same incident was recorded at instance of accused also but charge sheet was silent as what happened to FIR of accused – Held – Prosecution case is not proved beyond reasonable doubts – Judgment of trial court upheld – Appeal of complainant dismissed.

Title: Ram Sorup Chauhan Vs. Devi Lal & others Page-498

Code of Criminal Procedure, 1973- Section 378- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Accused was tried and acquitted by trial court for said offences - Appeal against – State submitting before High Court that accident was result of rash driving of accused – However, plea of accused being that accident was on account of sudden breakage of suspension of vehicle – On facts, High Court observed that auto mechanic found main suspension of offending bus broken at time of its examination – Mechanic also admitting in cross-examination that breakage of main suspension can lead to occurrence of accident – Eye-witnesses/occupants of bus also stating of

eruption of loud sound from lower part of bus before accident – Held - Plea of accused that accident was because of sudden developing of mechanical defect thus is probablized – Allegations of rashness/negligence while driving a motor vehicle on public highway, not proved - Acquittal of accused upheld – Appeal dismissed.

Title: State of Himachal Pradesh Vs. Pritam Chand Page-449

Code of Criminal Procedure, 1973- Section 378**- Indian Penal Code, 1860**- Sections 279, 337 and 338- Appeal against acquittal- Accused was tried on allegations that he was driving a Maruti Car on public highway in a rash and negligent manner – Also that he came to wrong side of road and hit against jeep of complainant coming from opposite side – Accused acquitted by trial court- Appeal by State - Plea of accused being that complainant suddenly flashed head lights of his jeep and same caused accused's vehicle uncontrollable - Further, pleading that accident was not on account of any rash or negligent act on his part – On facts, High Court found prosecution witnesses clearly denying flashing of head light by driver of jeep i.e. complainant, site plan showing that vehicle of accused had gone to its extreme right side of road – Held – Plea of accused of his having been rendered momentarily blind because of flash of head light, is not worth credence – Accident was result of his rash and negligent driving- Appeal of State allowed – Judgment of acquittal set aside - Accused convicted for offences under Sections 279, 337 and 338 of IPC.

Title: State of H.P. Vs. Rajinder Kumar Cr. Appeal No. 702 of 2008 Page-631

Code of Criminal Procedure, 1973- Section 378**- Negotiable Instruments Act, 1881-** Section 138- Leave to appeal – Complainant alleged before trial court that accused had issued post dated cheque to discharge its remaining liability accruing against two bills regarding supply of goods by complainant- Accused issuing direction to its banker for stoppage of payment – Accused taking plea in his reply to demand notice of having made payment in cash on complainant's request against receipts with respect to amount covered by cheque – Also averring in reply that goods supplied by complainant were defective- Trial Court acquitting accused for said offence - Leave to appeal by complainant – On facts, complainant was found having admitted various written communications between him and accused including a document that he had received payment against (blank) cheque and nothing was due towards him – If liability of accused was to the extent of Rs.1,71,191/- and complainant, as per evidence had already received a sum of Rs. 1,62,100/-, then, cheque in question could not have been issued for a sum of Rs.40,000/- as remaining liability was only to tune of Rs. 9,091/- - Held – No valid ground exists to grant leave to complainant to file appeal – Leave refused – Application dismissed.

Title: M/s Ashok Kumar Sharma and Company Vs. M/s Kapil Electronics and another Page-625

Code of Criminal Procedure, 1973- Section 397/401- Revision- Accused were convicted and sentenced for offences under Sections 323, 451, 504 and 506/34 IPC by trial Court – Accused were found to have trespassed in house of complainant and gave beatings to him and his mother on ground that victim had taken away wood cut and kept by accused in jungle without their consent- Appeal of accused dismissed by Additional Sessions Judge- Revision against – On facts, statement of complainant on oath was found at variance with his version given to police on many counts – His statement not worth credence – Alleged eye-witnesses also did not support prosecution case during trial – Held – Evidence on record does not prove guilt of accused for said offences beyond reasonable doubts- Revision allowed- Judgments of lower courts set aside- Accused acquitted.

Title: Om Parkash & ors. Vs. State of Himachal Pradesh Page-584

Code of Criminal Procedure, 1973- Section 408- **Protection of Women from Domestic Violence Act, 2005**- Section 12- Transfer of complaint - On application of complainant, Sessions

Judge ordering transfer of complaint filed by wife in a Court at Dehra to Court of CJM, Dharamshala – Husband challenging order of transfer on ground that wife was already pursuing another case filed by her under Section 23 of the Act at Dehra and there was no reason for her to get only one case transferred to Dharamshala – High Court found that wife was pursuing an appeal under DV Act at Dehra, which she had withdrawn – It was found convenient for wife to pursue case at Dharamshala than at Dehra vis-à-vis husband – Order of Sessions Judge upheld – Petition dismissed.

Title: Rakesh Kumar & anr. Vs. Vishal Priaya Page-332

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Grant of – CBI in its inquiry conducted on court orders, finding misconduct on part of applicant, a police officer – CBI also registering FIR against applicant under various penal provisions – Allegations against applicant being that he by threatening complainant 'R' to implicate him in a drug case, demanded Rs. 20 lacs – Accused-applicant submitting that he got many drug peddlers convicted and FIR aforesaid against him was result of enmity – CBI contesting bail on ground that custodial interrogation was necessary - On finding that applicant/accused is a police officer and there is no chance of his fleeing away or tampering with evidence, High Court granted conditional pre-arrest bail.

Title: Ram Lal Vs. Central Bureau of Investigation Page-349

Code of Criminal Procedure, 1973- Section 438- **Narcotic Drugs & Psychotropic Substances Act, 1985-** Sections 20 & 29- Pre-arrest bail- Entitlement - Recovery of charas from a car- Petitioner-owner of vehicle fled away leaving car and other occupants in it- Petitioner seeking bail on ground of his illness- However, three other cases under Act already registered against him- State opposing bail on ground of petitioner being an habitual offender but admitting that he suffered stroke, when he was in jail in some other case and he was suffering from paralysis – Petitioner found having joined investigation and his custodial interrogation was found unnecessary – Recovered stuff was an intermediate quantity (111.34 grams) – Rigors of Section 37 of Act not attracted – Petitioner granted pre-arrest bail subject to conditions.

Title: Gulshan Kumar Vs. State of Himachal Pradesh Page-97

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- Petitioner, sister-in-law(Nanad) of deceased was named as one of the accused in an FIR registered for offences under Sections 304-B, 498-A read with 34 IPC and Section 4 of Dowry Prohibition Act – The allegations against petitioner being that she used to torture deceased whenever she (petitioner) visited her parental house – Deceased died because of burn injuries received on 13.4.2018- Petitioner seeking pre-arrest bail on ground that her involvement in the case is not made out – High Court found that petitioner was married to one 'R' in 2010 and since then she was residing with her husband - She used to visit her parental house occasionally – Petitioner was not present in her parental house when incident had happened – Her custody was not required by police for further investigation - She had joined the investigation – Petitioner enlarged on pre-arrest bail but subject to conditions.

Title: Indu Bala Vs. State of Himachal Pradesh Page-344

Code of Criminal Procedure, 1973- Section 438- Pre-arrest Bail- Petitioner apprehending his arrest in case FIR registered for offences under Sections 376 and 506 of I.P.C. seeking pre-arrest bail on ground that he has falsely been implicated – On facts, High Court found that (i) petitioner and prosecutrix, aged 32 years, were well known to each other for the last more than five years (ii) during this period, they developed physical relations (iii) Prosecutrix got pregnancy terminated (iv) and even thereafter, she kept on meeting the petitioner – Held, in these circumstances, petitioner entitled for pre-arrest bail subject to conditions of his joining investigation and not making any inducement, threat or promise to any person acquainted with facts of the case etc.

Title: Harish Kumar Vs. State of Himachal Pradesh Page- 388

Code of Criminal Procedure, 1973- Section 439- Grant of bail- **Indian Penal Code, 1860-** Sections 217, 218, 468, 420 and 120B - Section 13(i)(d)(ii) of Prevention of Corruption Act- Sections 5 and 7 of Prevention of Specific Corrupt Practices Act- Petitioner seeking regular bail in case FIR registered for aforesaid offences – State though admitting that investigation was complete but opposing bail on the ground of seriousness of offences and possibility of accused tampering with evidence, if enlarged on bail – On finding that investigation was complete and the relevant record had also been taken into possession by investigating agency, High Court ordered release of accused on bail subject to conditions.

Title: Vinay Sharma Vs. State of Himachal Pradesh Page-392

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs & Psychotropic Substances Act, 1985-** Section 29- Grant of bail- Petitioner was sitting on rear seat, whereas charas weighing over 2 kg. was recovered from one 'K', another occupant of same vehicle – Petitioner implicated in case by virtue of Section 29 of Act - Petitioner seeking bail on ground that independent witnesses 'R' and 'RV' have not supported prosecution case during trial – And that recovery was effected from exclusive possession of 'K' – Also contending that he required surgery imminently – State though admitted bad health of petitioner but submitting that he is already in hospital and amount stood sanctioned for his surgery – Without commenting upon the merits of evidence, High Court granted bail in view of medical status of petitioner who was to be operated on the very next day.

Title: Naveen Bura Vs. State of Himachal Pradesh Page-172

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 18- Regular bail – Accused seeking regular bail in case FIR registered against him for offence under Section 18 of Act for possessing 259 grams opium – Bail sought on grounds of ailment and old age – Bail resisted on ground of previous conduct of petitioner by alleging that he was engaged in drug peddling – However, no material was placed on record showing involvement of accused in drug trafficking – Recovered contraband was less than commercial quantity – Rigors of Section 37 of Act not attracted – Petitioner was found aged 75 years - Regular bail granted subject to conditions.

Title: Devi Lal Vs. State of Himachal Pradesh Page-305

Code of Criminal Procedure, 1973- Section 439- Regular bail- Allegations against accused/petitioner Abdul Rehman being that his vehicle was used by 'SR', co-accused for taking victim and then murdering her by pushing her down from a cliff – Further, petitioner obstructed investigation by threatening police and forensic experts indicating that he was a party to conspiracy to kill deceased – Held – Only material collected during investigation against accused/petitioner shows that his vehicle was used by principal accused 'SR' for carrying victim – Call details record does not show any call between petitioner and principal accused at material point of time - Whether petitioner had knowledge of purpose of principal accused in taking his vehicle, is something to be seen during trial- Petitioner granted bail with conditions.

Title: Abdul Rehman Vs. State of Himachal Pradesh Page-576

Code of Criminal Procedure, 1973- Section 439- Regular bail- Principles - Held- Grant or denial of bail is entirely the discretion of the judge – Nature and gravity of circumstances in which offence is committed, position and status of accused with reference to victim and witnesses; possibility of tampering with witnesses, likelihood of accused fleeing from justice are relevant considerations - Gurcharan Singh versus State (Delhi Administration), (1978) 1 Supreme Court Cases 118 relied upon.

Title: Abdul Rehman Vs. State of Himachal Pradesh Page-576

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3(1)– Bail – Accused surrendered before High Court and separately filed application for bail – Investigation was found complete – Custody of accused was not required for further investigation by police - Accused was having roots in society and there was no chance of his fleeing away from justice – Conditional bail granted.

Title: Subhash Sharma @ Chand Vs. State of H.P. Page-554

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 323, 376 and 506- **Information Technology Act, 2000**- Section 67A- Petition for quashing of FIR and consequent proceedings on ground of compromise between parties and that FIR was registered on account of misunderstanding - State contesting petition on ground of seriousness of offences - On facts, it was found that complainant and accused were having love affairs for the last 3-4 years- Parties had compromised all disputes with intervention of local Panchayat – Accused had agreed to marry victim/complainant – Both of them major – Chances of conviction bleak if trial is allowed to continue - Held – Inherent powers to quash FIR and criminal proceedings may be exercised to secure ends of justice and prevent abuse of process of Court – In given circumstances, petition allowed and FIR quashed.

Title: Sahil Chaudhary Vs. State of H.P and another Page-473

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 379 and 447- Quashing of FIR –Accused seeking quashing of FIR registered against him on allegations that he removed logs of wood cut and stacked by complainant on his land – Accused relying on fact that cancellation report was filed by police on ground that land from which trees were cut by complainant belonged to accused's brother – High Court found that complainant was in legal possession of land from where trees were cut by him – Held – Theft is constituted when goods are taken away from legal possession of complainant – Legal possession of logs was with complainant – Prima facie case for offences in question against petitioner/accused is made out- Petition dismissed.

Title: Hem Chand Vs. State of H.P. and another Page-451

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 406 and 420- Quashing of FIR and consequent proceedings – Petitioner seeking quashing of FIR and consequent criminal proceedings - On facts, petitioner was found to have purchased khair trees of complainant and others – He cut and converted them into logs and sold to an industrialist – However, he did not pay amount of trees to owners at all – Held –Dishonest intention to deceive owners despite selling logs by petitioner to Industrialist prima facie exists – Charges were rightly framed by trial court- High Court refused to quash FIR and consequent proceedings.

Title: Jagdish Ram Vs. State of Himachal Pradesh Page-478

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 279 and 337- **Motor Vehicles Act, 1988-** Sections 185 and 196- Quashing of FIR – Principles summarized - Petitioner was allegedly driving his motorcycle rashly and negligently and also under influence of liquor – He hit his motorcycle against truck of complainant, resulting into registration of FIR and consequent criminal proceedings against him before CJM – Lateron, petition under Section 482 Cr.P.C filed in High Court by accused for quashing of FIR and proceedings initiated thereon pursuant to compromise with complainant – Held – In appropriate cases, FIR and consequent criminal proceedings can be quashed to meet out the ends of justice even if, offences are non-compoundable provided the settlement is amicable and without pressure- As parties had amicably compromised matter, FIR and criminal proceedings quashed.

Title: Suresh Kumar Vs. State of H.P. and others Page-525

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Quashing of FIR and consequential proceedings - Prosecutrix filing FIR against petitioner-accused for offences under Sections 376 and 452 of I.P.C. – Police filing cancellation report before CJM and stating that commission of aforesaid offences not established during investigation – CJM issuing notice to prosecutrix and also recording her statement to the effect that she was satisfied with police investigation and had no objection in case cancellation report was accepted – However, CJM declining cancellation report and directing SHO to file regular charge sheet for said offences – CJM taking cognizance and issuing notices to accused – Accused filing petition in High Court and seeking cancellation of FIR etc. – Prosecutrix arguing that her 'no objection' before CJM was obtained by police under pressure – High Court found that on date of alleged offence prosecutrix had consumed poison and she was admitted in a hospital – Incident of alleged rape was revealed by her only after eight days - No reason was given for delayed filing of FIR – Her version that no objection before CJM was taken by police under pressure, was found unbelievable – Accused and prosecutrix were well known to each other - In factual matrix, High Court set aside order of CJM as well as FIR and consequent proceedings – Petition allowed.

Title: Sher Singh Vs. State of H.P. and Anr. Page-256

Code of Criminal Procedure, 1973- Section 482- Inherent powers – **Indian Penal Code, 1860-** Sections 279, 337 and 304-A – Quashing of FIR – Held – In appropriate cases, High Court may quash FIR and consequent proceedings even in offences categorized as 'non-compoundable' provided compromise inter se parties is bonafide and without pressure, to meet ends of justice and to prevent misuse of process of court – As compromise between parties was found bonafide, High Court quashed FIR and consequent proceedings.

Title: Sanjay Hallon Vs. State of Himachal Pradesh & others Page- 67

Code of Criminal Procedure, 1973- Sections 156(3), 190(a) and 200- Cancellation report- Protest Petition by complainant - Whether after accepting objections to cancellation report, Magistrate can direct recording of preliminary evidence? – Held- Yes – On complaint of 'R' filed against 'C' and 'T', Magistrate directing investigation under Section 156(3) of Code – Police filing cancellation report by observing that offences alleged were not constituted – Complainant filing objections to cancellation report – Magistrate allowing objections and simultaneously directing recording of preliminary evidence qua complaint initially filed under Section 156(3) of Code – Petition against by 'T' – Petition allowed but order upheld as against accused 'C' - Principles enunciated in ***M/s India Carat Pvt. Ltd. V. State of Karnataka and another,*** AIR 1989 Supreme Court 885 relied upon.

Title: Thakur Singh Vs. State of H.P. & Others Page-10

Code of Criminal Procedure, 1973- Sections 320 and 482- Inherent powers – Quashing of FIR and criminal proceedings- Principles enunciated – Held – Power to quash FIR and criminal proceedings under Section 482 are different from power under Section 320 of Code – Power should be exercised to meet ends of justice or to prevent abuse of process of court – However, power should be sparingly used and with caution – High Court can assess the material on record, like nature of injuries, weapon used, part(s) of body where injuries were inflicted, its social impact etc. for forming opinion - As parties had amicably settled matter with intervention of elders, FIR registered for offences under Sections 307, 323, 325, 452, 504 and 506/34 I.P.C. quashed and consequent proceedings set aside.

Title: Sonu Kumar & Ors. Vs. State of Himachal Pradesh Page- 33

Code of Criminal Procedure, 1973- Sections 362 and 482- Bar against reviewing or altering judgment – Petitioner was convicted and sentenced by trial court for offence under Section 138 of Negotiable Instruments Act - His appeal against judgment of conviction and order of sentence dismissed by Appellate Court and revision by High Court – Petitioner/accused thereafter filing

petition under Section 482 before High Court seeking leave to compound offence – Held – Composition of offence can be made when case is actually pending in Court and not after court has rendered a verdict - Contrary interpretation would amount to reviewing or altering of judgment which is impermissible in view of Section 362 of Code – Petition dismissed - K. Subaramanian vs. R. Rajathi represented by P.O.A.P Kaliappan, (2010)15 SCC 352 distinguished.
Title: Ajay Kaundal Vs. Santosh Kumar Page-591

Code of Criminal Procedure, 1973- Sections 397 and 401 - **Negotiable Instrument Act, 1881 (Act)-** Section 138- Accused convicted and sentenced by trial Court for offence under Section 138 of Act - His appeal also dismissed by Appellate Court- Revision against- Accused contending before High Court that complainant's suit for recovery of amount covered by cheque stood decreed and amount also realized by him by way of execution of decree - And recovery of money through civil proceedings amounts to implied composition of offence - Accused praying for discharge and relying upon ratio laid by Apex Court in ***M/s Meters and Instruments Private Limited vs. Kanchan Mehta, Cr. Appeal No. 1732 of 2017*** - Held – Power to discharge accused and close proceedings for offence under Section 138 of Act on proof of complainant having been duly compensated, lies with trial Magistrate only - Courts superior to trial court cannot close proceedings or order discharge of accused – However, in appropriate cases, where the complainant is proved to have been duly compensated, these courts may substitute sentence of imprisonment by directing accused to pay additional compensation to complainant - Conviction of accused upheld by High Court but sentence of imprisonment as imposed by trial court is substituted by directing payment of Rs.30,000/- as additional compensation to complainant- Principles laid down in **Priyanka Nagpal vs. State (NCT of Delhi) and another, (2018) 3 SCC 249** relied upon.
Title: Gurpreet Singh Vs. Kapil Expo Trade Pvt. Ltd. Page-530

Code of Criminal Procedure, 1973- Sections 397 and 401- Revisional jurisdiction – Scope of – Held, Revisional powers may be used when court notices failure of justice or misuse of judicial mechanism or when procedure, sentence or order is not correct.
Title: Sunil Kumar Vs. State of Himachal Pradesh Page-115

Code of Criminal Procedure, 1973- Sections 421 and 431– Recovery of compensation- Held, compensation granted by Court can be recovered by complainant as if it were fine imposed upon accused.
Title: Mahender Singh Vs. Hem Raj Sharma Page-29

Constitution of India, 1950- Articles 14 & 226- **Shashastra Seema Bal (SSB) Rules, 2009**- Rule 26- Termination of services of petitioner – Validity – Petitioner joined SSB as CT/GD in 1999 – Taking into consideration his previous misconduct which included consumption of liquor during office hours and misbehavior with senior officers, competent authority deciding to terminate his services and issued show cause notice to him – In reply to show cause notice, petitioner specifically admitting his previous misconduct – Competent authority terminating his services – Challenge thereto – In alternative, petitioner also pleading that penalty is not commensurate with misconduct – On facts, petitioner was found to have absconded from duty twice even after submitting his reply to show cause notice despite giving under taking not to repeat such acts in future – He absented from duty without leave on dozen of occasions – Order of competent authority terminating of his services valid - Petition dismissed.
Title: Sanjeev Kumar Vs. Union of India & Others (D.B.) Page-413

Constitution of India, 1950- Article 14- Admission(s) to Medical and Dental Colleges situated in State against 'state quota seats' – Earlier, children and wards of bonafide Himachalis working

outside the State in private jobs, were exempted from requirement of having qualified atleast two of stipulated examinations from schools/colleges located within territory of State of H.P. – Govt. withdrawing this exemption for year 2018-2019 while continuing with similar exemption in favour of children/wards of bonafide Himachali employees/retired employees of State Government, Central Government, Public Sector Bodies etc. working outside State of H.P. – Petition against – Validity - State justifying such deletion on ground that there is no provision in prospectus for 2018-2019, which provides exemption for children and wards of bonafide Himachalis working outside the State in 'private concerns' – Held – Socio-economic conditions of persons residing outside the State are entirely different vis-à-vis Himachalis actually residing in State – Children of Himachalis residing in other States have better facilities for education– And if they are allowed to compete against 'State quota seats', that will prejudice the children/wards having studied in schools located in State - Classification sought to be made by Govt. by deletion of exemption clause, has reasonable nexus with objective sought to be achieved- Further held- Since, children and wards of retired/serving Hmachali employees working outside State are enjoying such exemption, High Court permitted petitioners purely as temporary measure to participate in counseling against State quota seats from their category, if eligible and in merit without claiming any right to admission- Petition disposed of with further directions.

Title: Shivam Sharma Vs. State of H.P. & ors. (D.B.) Page-662

Constitution of India, 1950- Article 226- Administrative action- Validity of – An action required to be taken in a particular manner by a statute, must be done or performed in that manner or not at all.

Title: Prem Lal Sharma Vs. Hira Lal & ors. Page- 268

Constitution of India, 1950- Article 226- Conferment of work charge status - Entitlement - Petitioner was engaged Beldar as a daily wager – He completed more than 8 years engagement with the department as a daily wager – Petitioner seeking conferment of work charge status – Administrative Tribunal by holding that existence of work charge establishment is not a condition precedent, directed department to confer work charge status after completion of 8 years of service with all consequential benefits – Petition against by State – State submitting before High Court that respondent worked as Class-III work inspector and in Class-III category, work charge status was abolished in Public Works Department, therefore, he could not be conferred work charge status - Held, Regularization has no concern with conferment of work charge status - There is an obligation upon the department to consider the case of daily wage workman for conferment of work charge status on completion of required number of years in terms of policy – Petition dismissed – Judgment of Administrative Tribunal upheld.

Title: State of HP and Ors. Vs. Ashwani Kumar (D.B.) Page-285

Constitution of India, 1950- Article 226- Regularization – Entitlement, when workman is not having requisite educational qualification – Since, engagement on 21.3.1989, Workman was working and discharging duties of Work Mistry/Supervisor - Hon'ble Single Bench directing that he be considered for regularization against post of Supervisor and not against post of Beldar – Letter Patent Appeal – State arguing that minimum educational qualification for the post of Supervisor was matric and workman was not possessing requisite qualification – Held, minimum educational qualification prescribed for post is relevant but it is for initial entry into service – Once appointment is made and person is permitted to work for many years, then it would be harsh to deny him confirmation on ground of lack of requisite educational qualification – Workman was found working as Supervisor/work mistry since his engagement, Order of Hon'ble Since Bench upheld – LPA dismissed.

Title: H.P. State Electricity Board Limited & anr. Vs. Amir Singh Negi (D.B.)

Page-321

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order XXI Rules 89 and 92- Setting aside of auction sale – Held – A judgment debtor can avoid sale validly made by way of public auction (but before its confirmation) by depositing five percent of purchase money plus amount specified in proclamation minus amount got realized by decree holder subsequent to proclamation, with Court – No formal application is required to be filed by judgment debtor – If these two conditions are satisfied, executing court has to set aside auction sale after giving notice to all affected persons.

Title: Dasmi Ram Vs. Tilu Devi and Ors. Page-196

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Section 24- Petitioner/wife seeking transfer of divorce petition filed against her from Court of District Judge, Kinnaur at Rampur to court of Additional District Judge, Shimla camp at Rohru as it would be convenient for her to pursue case at Rohru- Held – In matrimonial proceedings normally convenience of wife should be looked into – Petition allowed – Divorce petition ordered to be transferred to court of Additional District Judge, Shimla camp at Rohru for disposal in accordance with law.

Title: Manjeeta Vs. Harish Kumar Page-407

Constitution of India, 1950- Article 227- Contents of FIR not clearly legible because of font size – High Court issued time bound directions to Union of India through Assistant Solicitor General to take up matter with National Crime Records Bureau so that font size of FIR proforma is reasonably modified to make contents legible to a naked eye.

Title: Ganesh Kumar Vs. The State of Himachal Pradesh Page-661

Constitution of India, 1950- Article 227- **Himachal Pradesh Tenancy and Land Reforms Act, 1972–** Section 118- Petitioner-Company constructed a water channel for its power project after purchasing land from one 'N' – During inquiry conducted on complaint of 'N' addressed to Collector Chamba, water channel was actually found to be over other land of 'N', which was never purchased by company – Collector imposing fine of Rs. 4 lacs on company for encroaching land of 'N' and also directing that land 'actually purchased' by it as having been vested in State of H.P., since it was not used within statutory period for purpose, sanction of Government was obtained – Challenge thereto – Held – Collector had no jurisdiction whatsoever to impose fine on a company, even if, it was found to have encroached upon land of 'N' – Petition allowed – Order of Collector set aside more in view of fact that a compromise had already been effected between 'N' and petitioner - And 'N' stood duly compensated by Company.

Title: Greenko Him Kailash Power Project Ltd. Vs. Collector, Sub-Division Chamba and Anr. CMPMO No.489 of 2017 Page- 159

Constitution of India, 1950- Articles 226 and 227- Direction by Sub Divisional Magistrate (SDM) to company to employ person in lieu of acquisition of his land – Legality- Terms of Memorandum of Undertaking between Company and Government provided giving preference to those persons in employment after completion of project, who were displaced on account of acquisition of their land – SDM directed company to employ respondent No.2 in lieu of acquisition of his land – However, construction of project was found complete – Respondent No.2 was not 'displaced' on account of acquisition of his land as only part of his holding was acquired – Held, respondent No.2 was not entitled for any preferential treatment after completion of project – Order of SDM set aside – Petition disposed of.

Title: Greenko Him Kailash Power Project Limited Vs. Sub Divisional Magistrate, Chamba & Anr. CMPMO No. 427 of 2017 Page- 162

'E'

Employees Compensation Act, 1923- Section 4**- Income Tax Act, 1961**- Section 194A(3)(ix)- Execution of award – Insurance company depositing compensation amount with Commissioner after deducting part towards income tax as TDS- However, Commissioner directing insurer to pay amount deducted as TDS – Petition against by insurer – Held – Compensation payable for bodily injuries or death suffered in a motor accident is in nature of damages and not an income – No amount could have been deducted by insurer towards TDS – Directions issued to Income Tax Officer to refund TDS to insurer so that same could be paid to claimants.

Title: National Insurance Company Limited Vs. Dil Kumari and others Page-512

Employees Compensation Act, 1923- Section 4**- Income Tax Act, 1961**- Section 194A(3)(ix)- Execution of award – Insurance company depositing compensation amount with Commissioner after deducting part towards income tax as TDS- However, Commissioner directing insurer to pay amount deducted as TDS – Petition against by insurer – Held – Compensation payable for bodily injuries or death suffered in a motor accident is in nature of damages and not an income – No amount could have been deducted by insurer towards TDS – Directions issued to Income Tax Officer to refund TDS to insurer so that same could be paid to claimants.

Title: National Insurance Company Limited Vs. Neem Kumari and others Page-513

'G'

Grant-in-Aid (PTA) Rules, 2006- Release of grant- Petitioner was engaged as teacher by PTA and he served as such in a school since 22.3.2007 against sanctioned post - He was not paid anything by respondent State- Pursuant to directions of High Court issued in earlier writ petition of petitioner, Director Elementary Education considered petitioner's case but rejected his claim on ground that petitioner was engaged on basis of resolution of PTA Committee – Moreover, petitioner was not eligible as per GIA Rules to be appointed as a language teacher – Petition against – Respondent State challenging petitioner's engagement on ground that procedure stipulated in office instructions dated 13.7.2007, requiring issuance of advertisement, holding of interview and of candidate must be having requisite qualification, was not followed in petitioner's case – On facts, it was found that petitioner was engaged on 22.3.2007 before issuance of instructions dated 13.7.2007 by State, therefore, procedure stipulated therein could not have been followed in his case- Petitioner otherwise found eligible for post of language teacher- Respondents were further found to have released grant in aid in favour of many other persons similarly situated vis-à-vis petitioner after issuance of instructions dated 13.7.2007 – Held – In such circumstances, State cannot discriminate against petitioner- Petition allowed- Respondents directed to release grant in aid from date of his engagement as a language teacher.

Title: Balbir Singh Vs. State of H.P & others Page-421

Grant-in-Aid (PTA) Rules, 2006- Release of grant- Petitioner was engaged as a Science Teacher by PTA on 29.8.2007 – She rendered services for 11 years yet not paid anything – Petition filed for release of grant in aid – State contesting petition on ground that remuneration, if any, is to be paid by PTA or School Management Committee (SMC) - Held – Though petitioner was engaged after instructions dated 3.1.2008 but State permitted her to continue teaching for 10 years – Consent of State in allowing her to continue is apparent on record –State found to have released grant in aid in favour of other teachers appointed by PTA after instructions dated 3.1.2008 – In these circumstances, State cannot discriminate against petitioner- Petition allowed – State directed to release grant in aid to petitioner from date of appointment.

Title: Renuka Devi Vs. State of H.P. & others Page-469

Grant-in-Aid (PTA) Rules, 2006- Release of grant- Petitioner, who was continuously working as a PTA Lecturer since 19.5.2008 but was not paid a single penny, sought release of grant in aid for

her services – State contesting her claim on ground that petitioner was appointed purely as a temporary measure and also after instructions dated 3.1.2008 directing School authorities to stop making appointment by PTA and not to accept joining of PTA appointed teacher - Held – Though petitioner was appointed after instructions dated 3.1.2008 but State permitted her to continue teaching for 10 years – Consent of State in allowing her to continue is apparent on record – State found to have released grant in aid in favour of other teachers appointed by PTA after instructions dated 3.1.2008 – In these circumstances, State cannot discriminate against petitioner - Petition allowed – State directed to release grant in aid to petitioner from date of appointment. (Paras- 6, 10 & 15) Title: Ranjana Devi Vs. State of H.P. & others Page-466

'H'

Himachal Pradesh Cooperative Societies Rules, 1971- Appendix A, Rule 4(2)- Identification of zones for purpose of election- Basis of – Held, as per Rule 4(2), members from contiguous areas are to be included in a particular ward/zone – Statutory authority is not to carve out wards in such a fashion that voters residing under same roof are made to vote at different wards – Respondents No.1 to 9 who were residents of village Neuri were made voters of Kashlog ward, whereas all other residents of same village like father, brother and mother etc. of respondents No.1 to 9 were shown voters of Barsnu ward – Petition allowed – Order of Assistant Registrar approving revised voter list set aside.

Title: Prem Lal Sharma Vs. Hira Lal & ors. Page- 268

Himachal Pradesh Land Revenue Act, 1954- Section 38(b)- Alteration of revenue entries - Decree of Civil Court –Pursuant to decree of civil court dated 12.12.1969, estate of 'C' devolved upon 'B' – 'B' gifted that property to petitioners – Settlement collector attesting mutation pursuant to gift deed in favour of petitioners – Order of Settlement Collector set aside by Commissioner Mandi and case remanded by him- Petition against – Held, decree dated 12.12.1969 determining question of succession to estate of 'C' by 'B' had attained finality – Gift of suit land by 'B' in favour of petitioners also not challenged by any one – Therefore, revenue entries were required to be altered in consonance with decree dated 12.12.1969 and gift deed of 'B' executed by her in favour of petitioners – Petition allowed – Order of Divisional Commissioner set aside.

Title: Paras Ram and others Vs. State of H.P. & others Page-297

Himachal Pradesh Land Revenue Act, 1954- Sections 17(1) and 126- Revisional jurisdiction of Financial Commissioner – Availability thereof – Petitioner, a purchaser of land from a co-sharer, filed application for his impleadment in partition proceedings pending before A.C. 1st Grade – Application dismissed by A.C. 1st Grade and appeal against that order by Collector – Instead of filing revision, petitioner filing petition under Article 227 of Constitution of India and challenging order of Collector – Held – Act provides remedy of revision against order of Collector before Financial Commissioner – Remedy of filing revision not inefficacious – Petition not maintainable in High Court – Petition disposed of with liberty to petitioner to approach Financial Commissioner first within stipulated period and in meanwhile, partition proceedings stayed.

Title: Ram Saran Vs. Rameshwari Devi and others Page-396

Himachal Pradesh Land Revenue Act, 1954- Sections 46 and 171- An aggrieved person can file suit and challenge wrong entries made in record of rights – Jurisdiction of civil courts is not ousted simply because Revenue Officer has passed an order for correction of revenue entries.

Title: Kewal Singh & others Vs. Savitri & others Page-534

Himachal Pradesh Land Revenue Act, 1954- Sections 107 and 171 (xix) – Held – Section 171 (xix) excludes jurisdiction of Civil Court in matters relating to any question connected with or arising out of demarcation of boundaries of estates carried out under Sections 108 to 111 of Act –

Demarcation of estate/holdings carried out under Section 107 of Act, is specifically excluded from Section 171 (xix) of Act - Therefore, in appropriate cases Civil Court can appoint a local commissioner for determination of boundaries of estate, even if there was a previous demarcation of same land by a Revenue Officer - High Court upheld order of First Appellate Court in appointing commissioner for demarcation of lands of parties and relying upon his report notwithstanding that there was already a demarcation report of revenue officer in respect of suit land -Ram Lal vs. Krishan Dutt, Latest HLJ 2012 (HP) 633 held per incuriam – Appeal of plaintiff dismissed.

Title: Geeta Devi Since deceased) through her legal representatives Vs. Devi Ram & Ors.
Page-491

Himachal Pradesh Municipal Corporation Act, 1994- Section 253(3) & (4) – Bar of jurisdiction of civil court – Trial Court granting temporary injunction to plaintiff and restraining Municipal Corporation, Shimla from continuing with proceedings with respect to plaintiff's alleged unauthorized construction – First Appellate Court upholding trial court's order – Petition against – Municipal Corporation raising plea before High Court of bar of jurisdiction of Civil Court in entertaining suit – However, High Court found that there was no material on record showing that aforesaid proceedings were initiated under Section 253 of Act – Matter remanded to trial court to allow Municipal Corporation to place relevant record on file and then decide matter afresh including issue of bar of jurisdiction - Till then status quo order with respect to alleged unauthorized construction granted.

Title: Municipal Corporation Shimla Vs. Balwant Singh Kukreja Page-31

Himachal Pradesh Old Parents Maintenance Act- Held - Son having good salary is bound to maintain his mother.

Title: Sukhdev Vs. Satya Devi & Ors. Page-301

Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974– Section 10– Bar of jurisdiction – Whether order of vestment can be challenged by way of civil suit? – Held – Yes – Orders regarding vestment of suit land in Panchyat and then State of H.P., which was statutorily excluded from vestment being Shamlat Deh Hasab Rasad Malgujari in cultivatory possession of proprietors, were void- Plaintiffs have remedy to file suit and challenge such orders – Section 10 of the Act has no applicability.

Title: Vakil Singh and others Vs. State of H.P. and others Page-611

Hindu Adoption and Maintenance Act, 1956- Section 18- Maintenance- Entitlement of wife - Wife living separately from husband since decades - Filing suit for maintenance against him – Husband admitting marriage but denying its consummation on ground that after first night wife left matrimonial house – Suit dismissed by trial court but in appeal, it was decreed by Additional District Judge – RSA by husband – Held, wife living separately is entitled for maintenance only on proof of her desertion or her having been meted with cruelty by husband – Plaintiff was found (i) living separately from defendant-husband since 1960 till filing of suit (ii) it was she who deserted defendant-husband (iii) defendant had no income from land recorded joint between him and his brother and (iv) being aged 70 years, defendant was not able to personally cultivate it – High Court allowed appeal and set aside decree of Additional District Judge – Suit dismissed.

Title: Sukhdev Vs. Satya Devi & Ors. Page-301

Hindu Adoption and Maintenance Act, 1956- Sections 11 and 12- Adoption – Essential requirements – Effect of non-compliance - Plaintiffs filing suit for declaration to the effect that 'A' was given in adoption by their common ancestor 'J' to one 'R' in 1938 – Therefore, 'A' was not entitled to succeed to estate of 'J', who died in 1956 – Also pleading that mutation of inheritance

of 'J' in favour of 'A' attested in 1956 as well as subsequent revenue record showing contesting defendants (D1 to D3), successors-in-interest of 'A' as co-owners in land of 'J', are wrong – Plaintiffs further claiming succession alongwith proforma defendants to this land, being estate of 'J' – Suit dismissed by trial court but in appeal, the First Appellate Court, allowed appeal and decreed suit of plaintiffs – RSA by defendants No.1 to 3- High Court found that (i) there was no evidence of performance of ceremonies of Datta Homum regarding adoption of 'A' by 'R' (ii) 'A' was found residing separately from 'R' during his life time – Held – Adoption of 'A' by 'R' does not stand proved on record – Being so, A was entitled to succeed to estate of 'J'- Appeal allowed – Judgment and decree of First Appellate Court set aside and of trial court restored.

Title: Narinder & Ors. Vs. Ramesh Chand & Ors. Page-135

Hindu Marriage Act, 1955- Sections 13(1)(ia) and 13B- Cruelty – Divorce by way of mutual consent – Trial Court dismissing petition of husband seeking decree of divorce on ground of cruelty of wife – Husband in appeal before High Court – During pendency of appeal, parties filing application for conversion of appeal into petition for divorce by way of mutual consent – On finding that (i) marriage of parties had broken beyond repairs and re-conciliation was not possible (ii) and they had settled all disputes relating to alimony and custody of child, High Court converted appeal into petition under Section 13B of the Act for divorce by way of mutual consent – Petition allowed – Decree of divorce by way of mutual consent granted after waiving cooling off period.

Title: Susheel Vs. Anju Page-264

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Indian Evidence Act, 1872- Section 3- Circumstantial Evidence – Held – In a case based on circumstantial evidence, prosecution must prove all necessary circumstances and same should constitute a complete chain without a snap.

Title: Prakash Chand Vs. State of H.P. (D.B.) Page-515

Indian Evidence Act, 1872- Section 3- Held, duty of Trial Court is to appreciate and analyze evidence adduced before it and not to just reproduce same in entirety in the judgment.

Title: Prem Singh Vs. State of Himachal Pradesh Page-272

Indian Evidence Act, 1872- Section 9 – Test Identification Parade – Non-holding of - Effect – Held – Accused were already known to witness since before incident – In such circumstances, non-holding of test identification parade during investigation is insignificant – Identification of accused during trial is sufficient.

Title: State of H.P. Vs. Shambu Mahto & Ors. (D.B.) Page-501

Indian Evidence Act, 1872- Section 65(c)- 'Lost' - Meaning of - Petitioner/defendant filing application before trial court seeking its leave to prove photocopy of GPA executed by him in favour of 'K' on ground that original was 'untraceable' - Trial court declining request on ground that no FIR/report with police was lodged and thus 'loss' of original GPA not proved – Petition against – Held – Word 'Lost' as embodded in Section 65(c) of Act does not necessarily imply factum of document being provenly stolen and it includes within its ambit cases of 'sudden disappearance' and misplacing of documents caused by sheer inadvertence of litigant – Insistence on proof of filing FIR/Report with respect to document in question before granting leave is totally misplaced – Order of trial Court set aside - Petition allowed – Petitioner granted permission to prove photocopy of GPA executed by him in favour of 'K' particularly when he (defendant) was being sued in suit through 'K'.

Title: M/s ALPAR Appliances Vs. Leela Dutt Page-496

Indian Evidence Act, 1872- Section 65(c)- Leave to adduce secondary evidence - Trial Court permitting plaintiffs to place on record copies of Will and other documents – Plaintiffs then moving another application under Section 65(c) of Act seeking leave of Court to lead secondary evidence to prove aforesaid Will by averring that they were students when Will was produced before Revenue Officers for attestation of mutation and could not get it back from them – Trial Court summarily rejecting this application by observing that existence of original Will as well as its loss is not proved – Petition against – Held, without recording evidence, Trial Court had no occasion to conclude non-existence of Will or its loss – Order of Trial Court set aside – Matter remanded with direction to provide opportunity to parties to lead evidence and then decide application afresh.

Title: Virender Singh & Another Vs. Shreshtha Devi & Others Page-329

Indian Evidence Act, 1872- Section 101- Burden of proof - Held, it is settled principle of criminal jurisprudence that more serious the offence, stricter the degree of proof – Since, a higher degree of assurance is required to convict accused.

Title: Prem Singh Vs. State of Himachal Pradesh Page-272

Indian Evidence Act, 1872- Section 106- Facts within specific knowledge of accused - Proof of - Held- Accused must prove such facts, which are within his exclusive knowledge – On failure to prove such facts, adverse inference can be drawn against him.

Title: Prakash Chand Vs. State of H.P. (D.B.) Page-515

Indian Evidence Act, 1872- Section 145- Previous statement - Use of - Held- Statement recorded under Section 164 Cr.P.C. is not a substantive evidence - It can be used by defence for contradiction or by prosecution for corroboration as per Section 145 of Evidence Act - Statement given on oath during trial is a substantive evidence - Unless witness is contradicted with his previous statement with respect to alleged improvements, statement given on oath cannot be ignored.

Title: Chandermani Vs. State of H.P. Page-484

Indian Partnership Act, 1932- Section 69(1)- Suit by or against partners of Unregistered Firm – Effect of non-registration – Maintainability of suit – Plaintiffs including 'B' and contesting defendants entered into a partnership for transaction of business of liquor – Partnership however was unregistered – On arising of dispute, 'B' issuing notice to partners and then filing suit for rendition of accounts – Held- Suit was by a partner against other partners of an unregistered firm – It was not maintainable in view of mandate of Section 69(1) of Act.

Title: Bhanu Sood Vs. Jeetendera Malhotra and others Page-148

Indian Partnership Act, 1932- Sections 43 and 69 (3)- Unregistered firm- Dissolution thereof - When to take place ? - Held – Section 69(3) is an exception to Section 69(1) and (2) of Act – A partner of an unregistered firm can file suit for its dissolution or rendition of accounts of a dissolved firm or realization of any property of dissolved unregistered firm- Plaintiffs submitting that they had dis-associated themselves with business of firm on and w.e.f. 31.3.1991 and this amounted to 'dissolution' – Contesting defendants refuting this fact – High Court found that Clause 12 of the partnership deed required of giving one month advance notice in writing by a partner to others, if he intended to resign – No such notice was ever given by plaintiffs- Further held, Partnership was not dissolved merely by disassociating with business of firm- Suit was not for rendition of accounts of a 'dissolved firm' under Section 69(3) of Act – Suit itself was not maintainable – Regular Second Appeal dismissed and judgments and decrees of lower courts upheld.

Title: Bhanu Sood Vs. Jeetendera Malhotra and others Page-148

Indian Penal Code, 1860- Section 379 read with Section 34- **Indian Forest Act, 1927-** Sections 33, 41 and 42- Illicit felling of trees and transport of timber – Trial Court convicting accused under Section 379/34 of I.P.C. for committing theft of trees but acquitting them for offences under Sections 33, 41 and 42 of Act – State not filing appeal against acquittal – Conviction of accused for offence under Section 379/34 of I.P.C. set aside by Sessions Judge in appeal – State in appeal before High Court on ground of misreading of evidence by Sessions Judge – Held, only evidence on record was that accused was found loading wooden scants in a truck parked on road about 1 km. away from place of cutting of trees- No evidence as who transported logs from that place to the loading point – Evidence on record thus does not prove offence of theft – Acquittal upheld- Appeal dismissed.

Title: State of H.P. Vs. Baldev Sharma Page-6

Indian Penal Code, 1860- Sections 170 and 420- Cheating by impersonating as a public servant- Accused allegedly impersonated himself to complainant as Inspector of Food and Civil supplies while visiting his shop and induced him to give money to do favour – He also cheated one another shopkeeper on same pretext to deliver a bag of sugar to him – Accused acquitted for offence under Section 420 but convicted for offence under Section 170 I.P.C. by trial Court- State not filing any appeal against acquittal under Section 420 I.P.C. - In appeal at the instance of accused Sessions Judge acquitting him for offence under Section 170 I.P.C. also – Appeal against by State – Held, offence (s) under Section 170 and 420 I.P.C. are closely interconnected – unchallenged acquittal for offence under Section 420 I.P.C. on same facts would make statement of complainant equally doubtful vis-à-vis offence under Section 170 I.P.C. – Statement of another victim of having delivered a bag of sugar to accused found missing in his statement recorded under Section 161 Cr.P.C. – Acquittal recorded by Sessions Judge for offence under Section 170 of I.P.C. upheld – Appeal of state dismissed.

Title: State of H.P. Vs. Balam Singh Page- 250

Indian Penal Code, 1860- Sections 201, 302 and 120-B – Prakash Chand (A-1) convicted by Additional Sessions Judge for offence under Section 302 for murdering his wife 'N' by giving stick blows and also by strangulation – Trial Court also convicted and sentenced him alongwith Bhim Singh (A-2) for offences under Section 201 and Section 120-B for causing disappearance of evidence of commission of offence - Appeals against conviction and sentence – A-1 contending before High Court that evidence was not correctly appreciated by trial court – Plea being that on return to home, he saw his wife in an objectionable condition with stranger and during scuffle with that man, his wife fell on a corner of trunk, sustained injuries and died – On facts, it was found that accused hired taxi of complainant in order to take dead body bundled in a clothe but on complainant's questioning as what was inside the bundle, A-1 went to his shop and closed its shutters from inside whereas, A-2 fled away - A-1 was found in exclusive possession of dead body of his wife when police came and got opened shutters of a shop - All injuries on body of deceased were not possible by strike against corner of trunk – A-1 did not take any step for medical help of his wife, which he would have otherwise done had she sustained injuries by accidental fall – A-1 also didn't lead any evidence to probablize his plea of scuffle with stranger – He also not suggesting name of stranger with whom his wife was found in objectionable condition and with whom he had a scuffle – Held – Chain of circumstances proved on record clearly established guilt of accused beyond reasonable doubts – Judgment of conviction and order of sentence of trial court upheld – Appeals dismissed.

Title: Prakash Chand Vs. State of H.P. (D.B.) Page-515

Indian Penal Code, 1860- Sections 279 and 304-A- Rash and negligent driving on public highway – Proof of - Driver (A1) and conductor (A2) of a bus were acquitted by trial court of offences under Sections 279 and 304-A – Appeal against – State arguing that deceased 'D' was allowed by accused to travel on roof top of bus from where he had fallen and died – Their duty

was to preclude him from occupying roof top of bus – However, High Court found the evidence regarding deceased travelling on roof top of bus and his falling from there, totally lacking – Appeal dismissed – Acquittal upheld.

Title: State of H.P. Vs. Ram Narayan and another Page- 182

Indian Penal Code, 1860- Sections 279 and 337- Trial Court convicting and sentencing accused for offences punishable under Sections 279 and 337– Additional Sessions Judge maintaining conviction and order of sentence of trial Court- Revision against – Accused submitting before High Court that manner of accident not proved and evidence is contradictory, warranting his acquittal – High Court found that offending car had gone to wrong side of the road and then hit the cyclist, there were skid marks upto 30 feet on the road indicating that despite applying brakes, offending vehicle could not be stopped owing to high speed – Oral evidence stands corroborated from documentary evidence – Accused not denying that he was driving said car at the relevant time – Conviction upheld – Petition dismissed.

Title: Balbinder Singh Vs. State of Himachal Pradesh Page-106

Indian Penal Code, 1860- Sections 279 and 338- Negligent driving – Proof of – Allegations against accused driver of bus being that he all of sudden started moving bus ahead without waiting for whistle of conductor, when injured was still alighting from it - As a result victim fell down and received crush injuries on foot – Accused acquitted by trial court - Appeal against on ground of mis-appreciation of evidence by trial court – On facts, it was doubtful whether or not conductor had actually whistled/signalled accused to move ahead – Conductor also did not support prosecution case- Other passengers were not associated in investigation – Acquittal upheld – Appeal dismissed.

Title: State of Himachal Pradesh Vs. Madan Singh Page-429

Indian Penal Code, 1860- Sections 279, 337 and 304-A- Rash and negligent driving on public highway – Proof of - Accused 'R' was tried on allegations that he by his rash and negligent driving struck his truck against goods carrier coming from opposite side and caused death of one 'ID' by such driving – Trial Court acquitting accused for such offence- Appeal against by State – State arguing that acquittal is based on misappreciation of evidence – High Court found that offending vehicle could have drifted towards wrong side of the road on account of sudden breaking of its brake pipe and not because of rash driving – Accident was attributable to mechanical defect which developed suddenly – Allegations of rash driving not proved- Acquittal upheld – Appeal dismissed.

Title: State of H.P. Vs. Rajinder Kumar (Cr. Appeal No. 410 of 2010) Page-199

Indian Penal Code, 1860- Sections 279, 337 and 338- Rash and/or negligent driving- Meaning and proof- Accused, a driver of bus squeezed 'H' between front portion of bus and railings installed by side of road – 'H' received grievous injuries in accident – Trial court acquitted accused of offences under Sections 279, 337 and 338 – State in appeal – In High Court, accused arguing that he was ascending on road, therefore could not have been rash – High Court found that accused was driving his bus on left extremity of road leaving enough space towards his right – Held, a person may be negligent in his driving without being rash – A pedestrian has a first right to use road – Driver of a vehicle is supposed to stop it, if he finds that vehicle cannot move ahead without hitting a pedestrian – Brakes are installed in vehicle for this purpose – Statement of 'H' that she was squeezed in between bus and railings finds corroboration from spot map and photograph as well as medical evidence – Appeal of State allowed - Accused convicted of these offences.

Title: State of Himachal Pradesh Vs. Rohtash Singh Page-370

Indian Penal Code, 1860- Sections 302 and 304(ii)- Offence whether murder or culpable homicide not amounting to murder? – Held – Nature of injuries, part of body of deceased - where injuries were caused and weapons used are relevant for inferring intention of accused – Trial Court convicted only accused 'S' for offence under Section 304(ii) of Code and acquitting him for offence under Section 302 of Code - Other accused were acquitted of all offences – State filing appeal against conviction of 'S' for offence under Section 304(ii) of Code and against acquittal of other accused - On facts, High court found that deceased was assaulted by accused with iron rods and pipes on head – There were multiple fractures of frontal and parietal bones – Further held, intention of accused was to commit murder of deceased- Reasoning of trial court that deceased did not die on spot and possibility of his surviving after treatment, for convicting one of accused 'S' for offence under Section 304(ii) of Code is perverse – Participation of other accused along with 'S' in commission of offences also established on record – All accused convicted of offences under Sections 147, 148 and 302 read with Section 149 of Code – Appeal of State allowed.

Title: State of H.P. Vs. Shambu Mahto & Ors. (D.B.) Page-501

Indian Penal Code, 1860- Sections 323, 325 and 341- **Code of Criminal Procedure, 1973-** Section 378- Appeal against acquittal - After trial, trial court acquitting accused on allegations that on 7.4.2016 he stopped complainant 'G', his wife 'K' and one 'Y' from working on a road and gave beatings to complainant's wife 'K' and 'Y' – Appeal by State on ground that acquittal is based on wrong appreciation of evidence – On facts, it was found that (i) there was enmity between parties on account of land dispute (ii) 'K' had given in writing before Panchayat earlier that she would not fight with accused in future (iii) all victims had attended work on very next day also suggesting absence of any serious injury to them (iv) FIR was belatedly filed for no reasons (v) medical evidence not clearly proving fracture of rib of victim – Held, prosecution case is doubtful – Acquittal upheld – Appeal of state dismissed.

Title: State of Himachal Pradesh Vs. Yashpal Page-191

Indian Penal Code, 1860- Sections 354 and 451- **Code of Criminal Procedure, 1973-** Section 378- Accused was tried and convicted by trial court on allegations that he trespassed in room of prosecutrix at night when her husband was out to irrigate fields, and then outraged her modesty by touching her private parts – Accused fled away as soon as husband of prosecutrix returned back and entered into room – In appeal, Additional Sessions Judge, disbelieving her and her husband setting aside conviction and sentence- Appeal by State – High Court found that accused was known to prosecutrix and he was on visiting terms to her house – No explanation from side of prosecutrix as to why room was left unbolted from inside when accused had come to her room on that night itself in absence of her husband – Statements of prosecutrix and her husband found contradictory- Lodging of FIR was delayed and explanation for delay that prosecutrix had no money for bus fare in order to go to police station found false – 'D', an eye-witness was given up by prosecution- Held, Additional Sessions Judge was right in setting aside judgment of conviction recorded by trial Court and acquitting accused – Appeal dismissed.

Title: State of Himachal Pradesh Vs. Surinder Singh alias Vicki Page-24

Indian Penal Code, 1860- Sections 380 and 457- Theft of thirteen cell phones from shop of complainant during night – Trial Court convicting accused for lurking house trespass and theft- Appeal of accused dismissed by Additional Sessions Judge and his conviction and sentence for said offences upheld- Revision against – High Court found (i) Sim of three sets were kept active by complainant through one of which 'S' was contacted by accused (ii) 'P', 'S', 'K' and 'Su' identified accused as person from whom they had purchased stolen cell phones (iii) Seven stolen cell phones were recovered from underneath bed of accused pursuant to his disclosure statement – Held – Accused was rightly convicted of offences under Sections 380 and 457 of Code by trial court, however, order of sentence modified in view of peculiar circumstances of case.

Title: Sunil Kumar Vs. State of Himachal Pradesh Page- 115

Indian Penal Code, 1860- Sections 420 and 480- Accused 'G', 'P' and 'H' were tried by trial court on allegations of illicit transport of country liquor in a truck of 'H' without permit after tampering its chassis and engine numbers - Trial Court acquitting accused of cheating and using false property marks as genuine – Appeal against – Held – On facts, it is not proved by prosecution that chassis and engine numbers of truck impounded by police were different from the chassis and engine number of vehicle as recorded in record of Motor Registering and Licencing Authority- Acquittal upheld.

Title: State of Himachal Pradesh Vs. Gurmail Singh & others Page-417

Indian Succession Act, 1963- Section 63- Attestation of Will – Proof of – Held, examination of at least one attesting witness to will who is alive and subject to process of court, is necessary – Defendant No.1 relying upon Will executed by 'T' and attested by 'J' and 'R' – Defendant not examining 'J' or 'R' to prove execution and attestation of Will – One 'D' examined by defendant No.1, had actually signed the Will as 'identifier' and not as attesting witness – Execution of Will otherwise was surrounded by suspicious circumstances like (i) it was registered after three weeks of execution (ii) there was no explanation for delayed registration (iii) recitals of Will were incorrect regarding natural heirs of testator (iv) beneficiary took active part in execution of Will (v) No reason was given for excluding some of legal heirs from bequeath - Held, due execution of Will not proved – RSA of defendant No.1 dismissed – Decrees of lower courts upheld.

Title: Tol Dassi Vs. Nathi and others Page-358

Industrial Disputes Act, 1947- Section 2A- Reference to Labour Court- 'Appropriate Government'- Which is ? - State Government making a reference of industrial dispute concerning workmen of National Hydroelectric Power Corporation Ltd. (NHPC) to Labour Court – NHPC contending before Labour Court that State Government was not Appropriate Authority for making reference – And reference, if any, ought to have been made by Central Government –NHPC also relying upon notification dated 30.5.2007 of Ministry of Labour and Employment, Government of India clarifying that Central Government would be 'Appropriate Authority' under the Act with respect to establishment of NHPC – However, Labour Court relying upon Industrial Disputes (Amendment) Bill, 2002 for holding that State Government would be 'Appropriate Authority' with respect to all industrial disputes arising within its territorial jurisdiction – On that premise, Labour Court entertaining reference and allowing claim of workmen – Petition against – Held, Industrial Disputes (Amendment) Bill, 2002 was never passed by the Legislature and made law of land – Therefore, 'Appropriate Authority' with respect to establishment of NHPC was the Central Government – Reference of Industrial Dispute, if any, was to be made by Central Government and not by State Government – Reference of dispute by State Government itself was illegal – Petition allowed – Award of Labour Court set aside.

Title: M/s National Hydroelectric Power Corporation Ltd. and others Vs. R.C. Rana and others Page-351

Industrial Disputes Act, 1947- Section 25F- Termination of services of a workman - Validity – Department terminated services of workman on his refusal to hand over charge of his seat and joining at new place of posting – On reference, Labour Court holding that if employee had disobeyed order of employer, domestic enquiry ought to have been held – Labour Court holding termination as bad and directing reinstatement of employee with seniority but without back wages – Petition against award of Labour Court- High Court found that workman in his claim petition as well as in his cross-examination had admitted of his having not joined at place of posting to which he was transferred – Held, as the transfer order itself had clarified that services of workman would be dispensed with in event of his not joining at place of transfer and he admittedly did not join there, no domestic inquiry was required to be conducted – Employee was

rightly terminated for disobedience of order of employer – Award of Labour Court set aside- Petition allowed.

Title: H.P. State Co-operative Marketing and Consumers Federation Ltd. Vs. Nain Sukh Page-201

Industrial Disputes Act, 1947- Section 25G- Principle of last come first to go – Applicability - In absence of contract to the contrary employer is required to retrench workman who was employed last in that category – Respondent was retrenched though his juniors 'U', 'J' and 'K' all were retained- Plea of petitioner that respondent had abandoned his work not probablized – Held – Retrenchment of respondent was illegal – Award of Labour court holding retrenchment of respondent illegal, is upheld.

Title: The Executive Engineer, HPSEB, Electrical Division, Mandi Vs. Mohinder Singh Page-558

Industrial Disputes Act, 1947- Section 33(2)- Proviso - Approval of dismissal order – Nature of proceedings before Labour Court – After holding domestic enquiry, employer deciding to dismiss petitioner-employee for his misconduct which involved making of false entries in record and misbehavior with seniors – Employer sending matter to labour court for approval of dismissal order since industrial dispute under General Reference involving petitioner and others was already pending before it – Petitioner pleading before Labour Court gross violation of principles of natural justice during domestic inquiry, like non-supply of documents accompanying chargesheet, non-affording assistance of a person desired by him etc. – However, Labour Court approving dismissal order of petitioner - Petition against – Held – Authority which is to give approval to action of employer has to examine (i) whether order of dismissal/discharge is bonafide or it is an unfair labour practice and whether conditions contained in proviso to sub section 2 were complied with – If authority refuses to approve dismissal/discharge of employee, he shall be deemed to have continued in service as if no such order had ever been passed by employer – Only on approval of order of employer relationship of employer-employee comes to an end de jure - Labour Court can call for evidence of parties in proceedings filed by employer for approval of dismissal/discharge order – Parties can also lead evidence in support of their claim – Petitioner did not lead any evidence despite grant of opportunity by Labour Court – He also admitted receipt of documents accompanying chargesheet – Therefore, he cannot argue breach of principles of natural justice – Dismissal of petitioner upheld but petition disposed of with direction to employer to pay his gratuity pension and leave encashment etc. if not paid earlier.

Title: Kali Kant Jha Vs. M/s Birla Textile Mills Page-203

Industrial Disputes Act, 1947- Sections 12(5) and 25H- Refusal on part of Government to refer dispute to Labour Court on ground of its fading away - Validity thereof – Services of petitioner initially discontinued by the department In 1998 - However, pursuant to order of Administrative Tribunal, he was re-engaged in September, 2001 but with periodical breaks – After Dec. 2002, he was never engaged – Petitioner sending demand notice in April, 2008 to department and pleading that preference ought to have been given to him being a retrenched daily wager before engaging another person for said job - Petitioner seeking reference of dispute to Labour Court – However, Labour Commissioner declined reference on ground of unexplained delay in raising dispute – Petition against - Held – Reference for Labour Court generally cannot be questioned on ground of delay alone – Even in case where there is some delay, Labour Court can always mould relief by declining back wages to workman till the date he raised demand - At any rate, delay and laches, if any, is to be considered from date of knowledge of engagement of another person in place of retrenched workman – Further, cause of petitioner was continuing one and cannot be said to have faded away with passage of time – Petition allowed – Labour Commissioner directed to refer dispute to Labour Court.

Title: Asho Ram Vs. State of H.P. & others Page-432

Industrial Disputes Act, 1947- Sections 33(2)(b) and 33(3)- **Industrial Disputes (Central) Rules, 1957-** Rule 61- 'Protected Workmen'- Meaning of – Employer passed order of dismissal against petitioner-employee after holding domestic inquiry and also complied provision of Section 33(2)– Employer referred matter to Labour Court for approval of dismissal as general reference of industrial dispute to which petitioner was also a party was already pending before it – Labour Court approving dismissal order of petitioner – Petition against – Petitioner arguing before High Court that being union leader he was 'protected workman' and employer could not have passed dismissal order during pendency of earlier reference before Labour Court – Held – Every registered trade union is to communicate to employer before 30th April, names and addresses of its officers who should be recognized as 'protected workman' – Name of petitioner was not figuring in that list supplied to employer – Thus, petitioner was not a 'protected workmen' – Section 33(3) of Act has no applicability – Order of Labour Court approving dismissal of petitioner upheld.

Title: Rama Kant Misra Vs. H.P. Labour Court-cum-Industrial Tribunal and another

Page-216

'J'

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 12- Bail – Entitlement- Juvenile Justice Board as well as Sessions Judge declining bail to child-in-conflict with law (CCL) on ground of possibility of his being exposed to physical, moral or psychological danger in event of release on bail and also CCL would face outrage of members of victim's family – Petition against – Held – there is absolutely no material on record to entertain a belief that CCL would meet with some danger physical, psychological or moral if released on bail- Bail to CCL thus cannot be refused – Petition allowed- CCL directed to be released on bail subject to conditions. (Para-4) Title: Sahab Singh Vs. State of H.P. Page-619

'L'

Land Acquisition Act, 1894- Section 53 – vis-à-vis **Code of Civil Procedure, 1908** - Order XXII- Applicability of – Held – Relevant provisions of Code which are not inconsistent with Act can be made applicable to land reference cases - Therefore, legal representatives of deceased/claimant can be brought on record to continue proceedings.

Title: Bhag Singh & other Vs. Collector Land Acquisition HPPWD Mandi Page-442

Land Acquisition Act, 1894- Section 53 – vis-à-vis **Code of Civil Procedure, 1908** - Order XXII- **Limitation Act, 1963**– Held – No period of limitation is prescribed for moving application for bringing legal representatives of a deceased claimant on record – However, application has to be filed within reasonable time – There can be no abatement of reference proceedings inasmuch as Reference Court is bound to answer reference in one way or other- Land owners including 'C' had filed an application before LAC for sending reference to District Judge - During pendency of this application 'C' died – Collector sent reference to District Judge after 5-6 years without verifying status of parties – As a result name of 'C' was also figuring in the reference of collector – On receipt, District Judge issuing notices to claimants including 'C' – Then, LRs of 'C' filing an application under Order XXII Rule 3 of Code for their substitution – However, their application was dismissed by District Judge on ground that 'C' was already dead before commencement of reference proceedings before him – Petition against – Since, 'C' had died before commencement of proceedings before reference Court, High Court treated the application of legal representatives to be one under Order 1 Rule 10 CPC and ordered them to be substituted in place of 'C'- Petition allowed.

Title: Bhag Singh & other Vs. Collector Land Acquisition HPPWD Mandi Page-442

Land Acquisition Act, 1894 (As amended vide H.P. Amendment Act, 1984)– Sections 18 and 25- Jurisdiction of Reference Court- Whether amount awarded as compensation by Collector, can

be reduced by Reference Court?- Held- No - Amount awarded by Reference Court cannot be less than amount awarded by Collector.

Title: General Manager, NHPC and another Vs. Rattan Dass and others Page- 253

Land Acquisition Act, 1894 (As amended vide H.P. Amendment Act, 1984)– Section 23- Determination of compensation – Held, where entire land is to be used and no area is to be left for development activities, claimants are entitled for compensation at uniform rate(s) regardless of classification and nature of land.

Title: General Manager, NHPC and another Vs. Rattan Dass and others Page-253

Land Acquisition Act, 1894- Sections 18 and 23- Market value – Determination of – Exampler sale deed(s)- Held – Date(s) of execution of sale deed(s) must be in closest proximity to date of issuance of notification under Section 4 of Act – Further, there should be similarity in land acquired and land mentioned in sale deed(s) vis-à-vis location, nature etc. – Since, reference court had wrongly ignored exampler sale deeds, market value of land enhanced on their basis.

Title: Roshan Lal (since deceased) through his legal heirs Vs. Land Acquisition Collector & Anr. Page-603

Land Acquisition Act, 1894- Sections 4, 18 and 23- Market value of land – Land was acquired by Government for raising housing colony – On reference, Reference Court assessed market value of land at Rs.1,800/- per Sq. mts. irrespective of classification - Appeal by claimants against award of reference Court for enhancement on ground that potentiality of land was not considered - Cross-objections by beneficiaries/department on ground that deductions towards development charges were not made by District Judge in his award - High Court found that i) acquired land was sloppy (ii) below National Highway and totally undeveloped (iii) drain crossing through acquired land also required channelization before constructing building blocks (iv) Road to be constructed by raising retaining walls right up to National Highway (v) only 30% of acquired land is to be actually used for construction (vi) Huge amount required for development activities etc. – Held – Acquired land is certainly undeveloped and as it has been acquired for construction of buildings, therefore, 1/3rd of assessed value should normally be deducted towards development charges – After taking into consideration annual average value of revenue estate, sale deed executed with respect to adjoining land and making 1/3rd deduction towards development charges, High Court assessed market value of acquired land at Rs. 1,717/- per square metre – Reference court had awarded compensation at Rs. 1,800/- per square metre irrespective of classification – Award of Reference Court upheld – Appeals as well as cross-objections dismissed.

Title: Lalit Kishore Vs. State of H.P. & others Page-635

Limitation Act, 1963- Article 100- Mutation order – Challenge thereto – Period of limitation - Accrual of cause of action – Determination – Defendants contending that mutation of inheritance being challenged by plaintiffs was attested in favour of 'A' in 1956, whereas suit challenging such mutation was filed in 1999 – Since, suit was not filed within three years from date of attestation of mutation, suit is barred by limitation – Held, Mere attestation of mutation does not give cause of action to file suit- Cause of action arises only when plaintiff's rights are threatened by virtue of such revenue entries – Period of limitation will start from that date – As per plaint, plaintiffs were threatened to be dispossessed from land by defendants in 1999- Suit thus not barred by limitation.

Title: Narinder & Ors. Vs. Ramesh Chand & Ors. Page-135

'M'

Motor Vehicles Act, 1988- Section 149(2)- Liability of Insurer – Validity of driving licence – Claims Tribunal burdening insurer with liability to indemnify award – Appeal against – Insurer

submitting before High Court that driver was not authorized to drive motor cycle being so, it has no liability – Driver intending to lead additional evidence showing that he was also authorized to drive motor cycle at the time of accident - Matter remanded to Claims Tribunal for recording additional evidence and deciding claim application afresh in light of finding on validity of driving licence.

Title: United India Ins. Co.Ltd. Vs. Ram Avad Pal and others Page-59

Motor Vehicles Act, 1988- Section 166- Assessment of income- Held- If there is no documentary evidence in proof of income of claimant/deceased, compensation can be awarded by assessing income on basis of minimum wages fixed by Government prevalent at the time of accident.

Title: Reliance General Insurance Company Limited Vs. Ishwar Singh & others

Page-90

Motor Vehicles Act, 1988- Section 166- Claim application – Claims Tribunal granting compensation with interest and fastening liability on insurer – Appeal against – Insurer not disputing its liability but simply arguing that award of Tribunal is not in consonance with ratio laid in ***Pranay Sethi and others'*** case - On finding that age of deceased was 45, High Court granted hike of 25% towards future prospects instead of 30% as was done by Claims Tribunal – High Court also struck down compensation granted towards loss of love and affection and reduced compensation from Rs. 1 lac to Rs.40,000/- towards loss of consortium – Appeal partly allowed – Award modified.

Title: The New India Assurance Company Ltd. Vs. Vimla and others Page-16

Motor Vehicles Act, 1988- Section 166- Claim for compensation- Legal representatives of deceased 'B' claiming compensation on account of his death in a motor accident, who was aged 38 years at the relevant time – Claims Tribunal by assessing monthly income of deceased at Rs.5,400/- and giving addition of 50% towards future prospects awarded compensation after applying multiplier of '15' – Tribunal also granting Rs.1 lac each towards loss of consortium and loss of love and affection – Appeal by insurer – Insurer contending that deceased was travelling as a gratuitous passenger and it has no liability – At any rate, addition towards future prospects and compensation granted under conventional heads, is excessive – High Court found that (i) deceased was travelling with goods in offending vehicle (ii) being engaged in private job, Claims Tribunal went wrong in giving 50% increase towards future prospects – High Court brought down addition towards future income (40%) as well as compensation given under conventional heads in consonance with **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157 – Appeal partly allowed and award modified.

Title: Oriental Insurance Company Ltd. Vs. Salochna and others Page-44

Motor Vehicles Act, 1988- Section 166- Claim for compensation on account of death in a motor accident - Claims Tribunal holding that accident was result of rash driving of driver and then fastening liability on insurer – Claims Tribunal determining monthly income of deceased at Rs. 17,150/- by taking Rs.5,000/- p.m. as his additional income from employment with a tent house - Appeal against by Insurer – Insurer contending wrong assessment of monthly income of deceased and excessive payments under conventional heads – High Court found that no documentary evidence regarding additional income of Rs.5,000/- P.M. of deceased was led before Claims Tribunal – Held – Additional income of deceased not proved notwithstanding that witnesses were not cross-examined by insurer on that point - Monthly income of deceased proved to be Rs.12,150/- only- Compensation under conventional heads also scaled down in consonance with ***Pranay Sethi's*** case – Appeal partly allowed - Award modified.

Title: New India Assurance co. Ltd. Vs. Sarla Devi & others Page-539

Motor Vehicles Act, 1988- Section 166- Compensation for personal injuries – Claimant, then a student of 12th class, suffered bodily injuries when a tipper driven rashly by its driver dashed against his stationary motorcycle – Ankle of claimant was amputated and he sustained permanent disability to the extent of 70% with respect to left leg – Claims Tribunal assessing monthly income of injured at Rs. 6,000/- and granting compensation in sum of Rs.9,90,658/- with interest – Appeal by insurer – Appellant pleading that compensation granted by Claims Tribunal was on higher side – On finding that there was no documentary evidence regarding income of injured by sale of milk, High Court granted compensation for bodily injuries on basis of minimum wages of Government prevalent at the time of accident – Further, in view of age of injured and permanent disability suffered by him, High Court applied multiplier of '18' and also enhanced compensation under heads 'pain & suffering', 'future discomfort' etc. – Appeal partly allowed – Award modified.

Title: Reliance General Insurance Company Limited Vs. Ishwar Singh & others

Page-90

Motor Vehicles Act, 1988- Section 166- Enhancement of compensation- Held- In appropriate cases, High Court can enhance compensation payable to claimant(s) even in an appeal filed by Insurance Company if compensation awarded by Tribunal is not just and fair- Compensation awarded to claimant enhanced by High Court even when there was no appeal against award at his instance – Appeal partly allowed – Award modified.

Title: Reliance General Insurance Company Limited Vs. Ishwar Singh & others

Page- 90

Motor Vehicles Act, 1988- Section 166- Grant of Compensation – Assessment of income of deceased – Claims Tribunal assessing income of deceased, aged 21 years, notionally at Rs. 6,000/- per month and granting compensation on that basis to his legal representatives after applying multiplier of '15' – Appeal against – Legal representatives contending before High Court that Claims Tribunal did not take into consideration income of deceased @ Rs. 1 lac per month from horticultural pursuits- High Court found that there was no documentary proof of income of deceased from horticulture – After taking notional income of deceased at Rs. 6,000/- per month, granting 40% increase towards future prospects (6000 + 2400 = 8400), deducting ½ towards personal living expenses and applying multiplier of '18' instead of 15, High Court reassessed compensation on that basis - Compensation under conventional heads is given as per **National Insurance Company Limited Vs. Pranay Sethi and others, AIR 2017 SC 5157** - Appeal allowed – Award modified.

Title: Hukam Chand & another Vs. Churamani & others Page-132

Motor Vehicles Act, 1988- Section 166- Grant of compensation- Claims Tribunal assessed monthly income of deceased aged 27 years at relevant time at Rs.13,000/- p.m., allowed 50% increase towards future income and after applying multiplier of '17' awarded compensation to his widow and mother – Tribunal further holding that accident was result of rash driving of truck, and there was no negligence of deceased, who was driving motorcycle- Appeal against by insurance company – Insurer pleading before High Court that income was wrongly assessed and compensation under conventional heads was on higher side – High Court found that (i) deceased was self employed and (ii) his income was Rs.13,000/- p.m. at relevant time – In view of **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, High Court allowed 40% increase towards loss of future income and after making 1/3rd deduction towards self expenses, awarded compensation to claimants with interest @ 7.5% P.A. – Payments under conventional heads also modified in tune with ratio laid down in **Pranay Sethi's,** case – Appeal partly allowed – Award modified.

Title: Reliance General Insurance Company Limited Vs. Manju Kumari and others

Page-82

Motor Vehicles Act, 1988- Section 166- Grant of compensation- Quantum of – Deceased was self employed – Claims Tribunal gave 50% increase towards future income and granted Rs. 1 lac each towards loss of estate, loss of consortium (to widow) and loss of love and affection besides Rs.25,000/- towards funeral charges – Also directed payment of compensation with interest @ 9% P.A. – Appeal against by insurer mainly on ground of wrong and excessive quantum of compensation – In appeal, High Court granted 40% increase towards future prospects instead of 50%, and also reduced compensation payable under conventional heads in view of ratio laid down in **Pranay Sethi's** case (AIR 2017 SC 5157) – Also directed payment of interest @ 7.5% P.A.- Appeal partly allowed- Award modified.

Title: The New India Assurance Company Vs. Vimla Devi & others Page-74

Motor Vehicles Act, 1988- Section 174- **Code of Civil Procedure, 1908-** Order 1 Rule 10 and Order XXI Rule 11 - Motor Accidents Claims Tribunal while executing award directing insurer to pay amount deducted by it as TDS with interest from date of its deduction – Petition against by insurer – Held – In these circumstances, Income Tax Department was a necessary party before Executing Court – Matter remanded to Claims Tribunal to implead Income Tax Department as a party and proceed further in accordance with law.

Title: National Insurance Company Ltd. Vs. Satya Devi & others Page-480

Motor Vehicles Act, 1988- Sections 149 and 166- Claim for compensation – Overloading – Effect - Claimants filing applications before Claims Tribunal for compensation on account of deaths/bodily injuries received in a motor accident – Owner of the vehicle pleading that accident had taken place because of sudden mechanical defect – Insurer taking defence that driver had no valid and effective driving licence and vehicle was also being plied in breach of terms and conditions of policy- Claims Tribunal allowing applications and fastening liability on insurer – Appeals and cross-objections against awards – Insurance Company submitting before High Court for the first time that risk of only 10 persons was covered, whereas the vehicle was being occupied by 14 persons at the time accident – Further submitting that this overloading had caused malfunctioning of steering wheel of the vehicle – Held, no evidence regarding mechanical defect in the vehicle was adduced before Claims Tribunal – Plea of overloading was not taken before the Claims Tribunal – Overloading itself doesn't constitute fundamental breach of terms and conditions of the policy – Insurer held liable – However, awards modified in view of ratio laid in **National Insurance Company Vs. Parnay Sethi, 2017 ACJ 2700.**

Title: Oriental Insurance Company Ltd. Vs. Chhama Devi and others Page-373

Motor Vehicles Act, 1988- Sections 149 and 166- Liability of insurer - Driver not authorized to drive offending vehicle – Whether insurer liable ? Held, no – Respondent – Driver was holding driving licence of LMV category – He was not authorized to drive motor cycle – Accident occurred when he was driving motor cycle – High Court held the owner liable but directed insurer to first satisfy award and then recover amount from insured - Kulwant Singh and others versus Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186 relied upon.

Title: IFCO Tokio General Insurance Company Vs. Budhi Singh and others Page-66

Motor Vehicles Act, 1988- Sections 149 and 166- Quantum of Compensation – Petitioner filing claim application before Tribunal on account of death of his son in a motor accident – Petitioner claiming that his son, who was aged 20 years was working in a hotel at Goa – Claims Tribunal assessing monthly income of deceased at Rs.6,000/- per month, granted 50% increase towards future prospects – Tribunal also granting Rs.25,000/- towards funeral expenses and Rs.1 lac towards loss of love and affection – Appeal against – Insurer contending that deceased was actually the driver of offending vehicle and had no valid and effective driving licence besides he was drunk at the time of accident – On facts, High Court found that vehicle was not being driven

by the deceased and it was being driven by one 'R' – Driving Licence of 'R' was found valid and effective – However, in the absence of other evidence as to income of deceased, the daily wages prevalent at the relevant time, were taken for determining income of deceased – Further, increase of only 40% towards future prospects, was allowed by High Court – Payments under conventional heads were also reduced in consonance with principles laid down in **National Insurance Company Vs. Parnay Sethi, 2017 ACJ 2700** – 9% per annum rate of interest as granted by the Tribunal, however, not interfered with in the facts of case.

Title: National Insurance Company Limited Vs. Kanwar Rawat and another

Page-233

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Possession of 'charas' – Accused was convicted of offence under Section 20 of Act for possessing 425 grams of 'charas' – Sentenced to seven years rigorous imprisonment and fine of Rs.50,000/- with default clause by trial court - Appeal against – Accused arguing that 'case property' produced before trial court does not link him with crime – Defence relying upon alleged discrepancies regarding 'seals' embossed on bulk parcel vis-à-vis description given in recovery memo, NCB Form and FSL reports – High Court found that no cross-examination was done on witnesses qua 'seals' embossed on parcel – Evidence on record was found consistent - Bulk parcel, cloth with sample seal as well as recovery memo, were bearing signatures of accused and witnesses – Conviction upheld – However, in view of young age of accused, sentence reduced to 2 years and fine of Rs.25,000/-.

Title: Bal Krishan Vs. State of H.P. Page-61

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of 'Charas'- Special Judge convicting and sentencing accused by holding that he was in conscious and exclusive possession of 2.77 kg. of 'charas' in a bag being carried by him – Appeal against – High Court found (i) resealing certificate issued by Station House Officer showed that parcel initially sealed with seal 'A' was re-sealed by him with seal 'T' – Whereas case of prosecution was that parcel was sealed with seal 'A' and resealed with seal 'D' (ii) alleged recovery was effected from accused at a time when it was dark, but corresponding photographs of proceedings were of day light (iii) false attempt was made to show efforts were made to associate independent persons in investigation (iv) discrepancies were found in entries of log book vis-à-vis statements of members of police party regarding their arrival in police station from spot (v) As per recovery memo, bag containing contraband was 'yellow' but in FSL documents, it was found of blue, white and yellow colours – Held, these vital contradictions make prosecution case doubtful – Appeal allowed – Judgment of conviction and order of sentence of Special Judge set aside.

Title: Prem Singh Vs. State of Himachal Pradesh Page-272

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of 'Charas' from accused - Proof of – Trial Court convicting and sentencing accused for said offence – Appeal against – Accused raising plea that case property produced before trial court does not link him with crime – High Court found that (i) parcel containing contraband and produced before trial court was not bearing 'seals' of FSL as mentioned in its report (ii) Two seals on parcel were broken and (iii) no attempt was made to join independent witnesses in recovery proceedings though easily available - High Court allowed appeal and set aside conviction and sentence imposed by trial court.

Title: Ravinder Kumar Vs. State of H.P. Page-103

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 37- Rigors of - Extent of applicability - Held, Bar is not absolute – If Court is satisfied on basis of material on record that

accused is not guilty of such offence, and he is not likely to commit such offence while on bail, he can be enlarged on bail – Restrictions on power to grant bail should not be pushed too far.

Title: Naveen Bura Vs. State of Himachal Pradesh Page-172

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 57- Directory in nature- Held – Provisions of Section 57 are directory in nature - Therefore, fact that special report sent to Authorized officer does not bear serial number of dispatch register is not of much significance, and no prejudice is shown to have been caused to accused for this reason.

Title: Mohar Singh Vs. State of H.P. (D.B.) Page-644

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 2(vii-a)(xxiii-a), 21 & 37- Grant of bail- Small or commercial quantity – Determination of – Whether only pure contents of contraband concerned or entire recovered stuff is to be looked into? – Recovery of Nitrosun tablets and Onerex syrup bottles from accused – Each tablet of Nitrosun containing 10.0 mg. ntirazepam, whereas 5.0 ml. of syrup carrying 4.0 mg Chlorpheniramine Maleate and 10.0 mg Codeine Phosphate – Pure contents alone of recovered substance(s), however bringing contraband into less than commercial quantity – Held – In each such case applicant/petitioner is to satisfy court: (a) Narcotic Drug or Psychotropic Substance was not exceeding the prescribed per dose unit, and (b) it was being transported only for therapeutic use- Otherwise, entire contents of 'prohibited substance alone' are to be taken for human consumption – While relying upon E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008)5 SCC 161 only the contents of prohibited substance were taken into consideration – Recovered stuff (Codeine Phosphate) being in 'small quantity' category – Petition allowed – Bail granted subject to condition.

Title: Suresh Kumar @ Shivam Sharma Vs. State of H.P. Page-605

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 42- Possession – Proof of - Recovery of 'charas' from a trunk kept in a room adjoining to shop alleged to be in possession of accused – Accused acquitted by Special Judge – Appeal against – On facts, even police witnesses admitted that shop and said room were owned by one 'M' – Also admitting that accused was only a salesman at shop of 'M' - Plea of prosecution that room was in exclusive possession of accused and he was using it as a residence, not substantiated- Evidence regarding accused having handed over keys of room to police, is contradictory – Held – Exclusive possession of accused with respect to contraband in question, not proved beyond doubts – Acquittal upheld- Appeal dismissed.

Title: The State of H.P. Vs. Kundan Lal (D.B.) Page-621

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque - Issuance of summons– Challenge thereto – Accused pleading that cheques were issued by sole proprietor 'R' and she had no role in issuing those cheques – High Court finding clear allegation in complaint that she abetted 'R' to issue dishonoured cheques – Held, summoning order cannot be quashed.

Title: Nisha Chaudhary Vs. Nirmla Devi Page-295

Negotiable Instruments Act, 1881- Section 138- **Himachal Pradesh Registration of Money Lenders Act, 1976-** Section 3- Trial Court acquitting accused on ground that complainant was engaged in money lending without licence/registration as required under Act of 1976 – Findings recorded by trial court, on basis of complainant having filed complaints under Section 138 of Act of 1881 against 'R' and 'B' also – Appeal against – Held – Bar under Section 3 of Act of 1976 is attracted qua filing of money suit or seeking recovery of money by way of execution application only- Complaint under Section 138 of Act of 1881 is not barred by virtue of Section 3 of Act of 1976.

Title: Rajbir Singh Vs. Geeta Devi Page-547

Negotiable Instruments Act, 1881- Sections 138 and 139- Dishonour of cheque – Trial Court convicting and sentencing accused for offence under Section 138 of Act- Her appeal was dismissed by Sessions Judge – Revision against – Accused arguing before High Court that presumption stipulated under Section 139 of Act doesn't absolve complainant from discharging initial onus to prove that cheque was issued for any outstanding amount – On facts, High Court found that accused had given work of construction of her house to the complainant, estimated cost of which was Rs.7,00,000-8,00,000/- - She admitted her outstanding liability towards complainant - Her plea of having discharged that liability is not substantiated on record – Held, cheque was issued by accused for consideration - Judgments of conviction and final order of sentence of Lower Courts upheld – Petition dismissed.

Title: Bimla Sharma Vs. State of H.P and another Page-325

P'

Payment of Gratuity Act, 1972- Section 4- Forfeiture of gratuity – Permissibility – After departmental enquiry holding delinquent guilty of misconduct, Board of Directors ordering withholding of 1/3rd of his gratuity towards loss caused to bank – However, delinquent not terminated from service – Statutory Authority under Act setting aside order on ground that power to withhold gratuity can be exercised only in event of termination of services of employee – Statutory Authority also directing release of money – Said Authority also commenting upon merits of findings of Inquiry Officer as accepted by Disciplinary Authority – Petition against – Held, power conferred upon competent Disciplinary Authority by virtue of Section 4 of Act includes power of forfeiture of gratuity - Statutory Authority under Act has no authority to reverse order of Disciplinary Authority – Petition disposed of with direction to release the permissible gratuity to delinquent, if amount due to Bank stood redeemed.

Title: H.P. State Co-operative Bank Ltd. Vs. Naresh Kumar & others Page-290

Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996- Rule 12- Expl. (3)– 'Seize' and 'Seizure' – Procedure of – Held – It is mandatory for authority seizing incriminatory articles to emboss thereon 'seal' impression – It is necessary to make articles identifiable and relatable to accused during trial – Cartons containing alleged incriminatory equipments were merely taped with no identifying seals on them – Findings of trial court acquitting accused for offences under Act upheld.

Title: Health Department Vs. Dr. Shobha Thakur Page-633

Prevention of Food Adulteration Act, 1954- Sections 10(7) and 16(1)(a)(i)- In appeal, Additional Sessions Judge setting aside judgment of conviction of trial court convicting accused of offence under Section 16(1)(a)(i) of Act by holding that provisions of Section 10(7) were not complied with by Food Inspector before taking sample- Appeal by State- Held- Provisions of Section 10(7) of the Act requiring the Food Inspector to associate independent witnesses at the time of taking of sample are mandatory – However, non-compliance, if reasonably explained is not fatal- On facts, it was doubtful that Food Inspector had even made efforts to comply with provisions of Section 10(7) of the Act- Held – In these circumstances, non-compliance is fatal to prosecution case- Appeal dismissed – Acquittal upheld.

Title: State of Himachal Pradesh Vs. Jagdish Chand Page- 112

Prevention of Food Adulteration Act, 1954- Sections 16(1)(a)(i) and 17(1) & (2)- Offences by companies – Impleadment of Directors as co-accused – Grounds for – Food Inspector taking sample of 'Dal Chini' for public analysis from hotel run by a company – Sample found adulterated by public analyst – Complaint for offence under Section 16(1)(a)(i) of Act filed against 'A', Manager of the hotel – During trial, Food Inspector filing application under Section 17(2) of Act for impleading Directors of Company as co-accused – Application filed after 11 years of filing of complaint – CJM allowing application for impleadment of Directors mentioned in the application,

as co-accused – Petition against summoning order – State justifying order of impleadment on ground that prima facie their involvement in commission of offence is established as no person responsible for the conduct of business of company was nominated by it – Held, if no person has been nominated by Company under Section 17(1) of the Act, then every person only who was incharge and responsible for conduct of business of the company when the offence was committed, can be impleaded as co-accused – There was no averment in complaint-application that persons sought to be arrayed as co-accused being Directors, were responsible for conduct of business at the time alleged offence was committed - Petition allowed – Order of CJM, summoning petitioner as co-accused set aside.

Title: T.K. Sibal and others Vs. Food Inspector and others Page-334

Probation of Offenders Act, 1958 (Act)- Section 3- Admonition – Power of Court – Exercise thereof - In appeal, Additional Sessions Judge though upholding conviction of accused for offence punishable under Section 138 of the Negotiable Instruments Act as recorded by Trial Court, but ordering his release after due admonition subject to payment of compensation to complainant within stipulated period – Complainant in appeal against grant of benefit of Section 3 of Act – Held, grant or refusal of benefit of Section 3 of Act is in the discretion of Court - It has to be exercised by Court prudently after applying its mind on the facts of case – Appellate Court had given reasons for exercise of this discretion in favour of accused – It is not shown that accused had not complied with directions regarding payment of compensation within stipulated period – Order of Appellate Court upheld – Appeal dismissed.

Title: P.N. Khamboj Vs. State of H.P. and another Page-369

Protection of Women from Domestic Violence Act, 2005- Section 12- Interim maintenance- Judicial Magistrate granting interim maintenance @ Rs.2,000/- per month to wife – Appeal of husband against that order, dismissed by Sessions Judge – Petition against before High Court – Petitioner/husband alleging that he belongs to BPL family and had no means to provide maintenance to wife as directed by Lower Courts – High Court found that BPL Certificate relied upon by petitioner/husband was issued on basis of survey conducted in 2002-03 and its validity was only for six months – Whereas, complaint under Section 12 of Act against him was filed in 2016 – Further, husband had stated in his reply that after withdrawal of divorce petition , he was engaged in business of tent house – In these circumstances, orders of Lower Courts not interfered with – Petition dismissed.

Title: Devinder Kumar Vs. Shakuntla Devi Page-328

Protection of Women from Domestic Violence Act, 2005- Section 31- Breach of order – Procedure to be followed – On complaint of wife having been filed under Section 12 of Act, Magistrate directing husband to pay medical expenses incurred by her on son's treatment and also to provide her rented accommodation in village Ustehar or nearby vicinity but subject to her vacating possession in the old house of husband – Appeal of husband dismissed by Additional Sessions Judge – However, wife filing revision petition in High Court against judgment of Additional Sessions Judge and submitting that rooms ought to have been given to her in the shared household – Petition of wife was dismissed by High Court – Wife then filing an application under Section 31 of Act for breach of initial order directing husband to provide her residential accommodation in village Ustehar or nearby vicinity – Magistrate dismissing application of wife by observing that she was to vacate her possession in the old house of husband as a condition precedent before she could be provided rented accommodation- In appeal, Additional Sessions Judge setting aside order of Magistrate by observing that procedure as contemplated under Section 31 of Act was not followed – Petition against – Held, Procedure provided in Section 31 of Act is to be followed only when there is breach of the order – Wife never wanted to vacate her possession in old house of her husband and this fact was never considered by the Additional Sessions Judge - Petition allowed - High Court set aside order of Additional Sessions Judge.

Title: Raj Kumar Vs. Indu Rani Page-140

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- **Code of Criminal Procedure, 1973-** Section 377- Appeal by State against inadequacy of sentence– Accused 'G' and 'P' were sentenced for offence under Section 61(1)(a) of Excise Act by trial court to period already gone by them in custody (three days) - State seeking enhancement of sentence – Further held – (i) only three out of 4420 pouches of liquor were sent for chemical examination and no findings can be given that other pouches contained country liquor, (ii) offence was committed in year 2001 and there is no plausible reason to enhance sentence after 17 years – Appeal of State dismissed.

Title: State of Himachal Pradesh Vs. Gurmail Singh & others Page-417

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- Constructive possession- Held - Person not having control or supervision over driver of vehicle cannot be said to be in the constructive possession of vehicle – Accused 'H', owner of truck was found to be in jail at Chandigarh when his vehicle was intercepted by police carrying country liquor without permit – He had no control or supervision over person plying vehicle at the relevant time – He cannot be held to be in constructive possession of liquor in question – Acquittal upheld.

Title: State of Himachal Pradesh Vs. Gurmail Singh & others Page-417

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- **Indian Penal Code, 1860-** Section 120-B- Illicit transport of country liquor – Huge quantity of country liquor in bottles as well in pouches was recovered from vehicle of accused – Accused not having licence to carry liquor – Trial Court convicting accused for said offence but acquitting one 'B' of offence under Section 120-B of I.P.C., who allegedly conspired with other accused for illicit transport of liquor – Additional Sessions Judge setting aside conviction and acquitting accused – State in Appeal – On facts, independent witnesses to recovery of liquor from vehicle of accused did not support case – These witnesses were salesmen of a liquor contractor and their presence at place of recovery at 11 A.M. was doubtful, there was no explanation from where twelve nips were obtained by I.O. for taking samples – Held, prosecution case was totally unreliable – Acquittal upheld – Appeal dismissed.

Title: State of Himachal Pradesh Vs. Sukhvinder Singh Page-19

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- **Motor Vehicles Act, 1988-** Sections 182-A and 196- Transport of 112 cartons of Indian made Foreign Liquor in a truck without permit – Trial Court convicting and sentencing accused for said offence(s) but in appeal, Sessions Judge setting aside conviction and order of sentence – Appeal against - State arguing before High Court that acquittal of accused was result of mis-appreciation of evidence – On facts, it was found that (i) 'P' and 'B' independent witnesses to search of truck and recovery of liquor from it did not support prosecution case yet they were not got declared hostile and led by public prosecutor suggesting thereby that prosecution admitted their version as correct (ii) entire haul was not sent to chemical analyst for examination – Held – Case of prosecution is suspicious – Acquittal upheld – Appeal of State dismissed.

Title: State of H.P. Vs. Jagtaar Singh Page- 1

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- Recovery of cartons containing Indian made foreign liquor from vehicle occupied by accused – Accused were charged and tried for possessing liquor without permit - Accused however were acquitted by trial Court- Appeal against- Held – Cartons allegedly containing bottles of liquor not produced before trial Court for identification by witnesses – Link evidence is also missing – Charges not proved – Acquittal upheld – Appeal dismissed.

Title: State of H.P. Vs. Kali Prashad & others Page-551

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- Transportation of country liquor without permit – Police intercepting a truck driven by 'T' and recovering huge quantity of country liquor from it – No permit to transport liquor was produced – 'M' was in the cabin, whereas 'V' and 'J' were allegedly on roof of aforesaid truck – Trial court convicting only 'J' and acquitting others of offence under Section 61(1)(a) of Act – Additional Sessions Judge upholding conviction and sentence – Revision by 'J' – 'J' pleading that link evidence was missing and findings of Lower Courts were wrong – On facts, High Court found that no identifying seal was affixed on seized cartons containing liquor – Further, only six bottles were sent to chemical examiner for analysis – Six bottles when distributed amongst four accused/occupants of vehicle, then it was permissible for them to carry six bottles without permit – Appeal allowed – Conviction and sentence set aside – Accused 'J' also acquitted of said offence.

Title: Jai Lal Vs. State of H.P. Page-166

Punjab Village Common Lands (Regulations) Act, 1961 (Punjab Act)- Section 4(3)(ii) - **H.P. Village Common Lands Vesting and Utilization Act, 1974 as amended vide Amendment Act of 2001 (Himachal Act)–** Section 3- Suit for declaration and injunction- Plaintiffs claiming cultivatory possession since before 26.1.1950 over suit land, which was recorded as Shamlat Deh Hasab Rasad Malgujari in revenue record - And disputing its vestment in Panchyat under Punjab Act and subsequently in State of H.P. under Himachal Act– Alternatively, they are also claiming title over land by way of adverse possession - State of H.P. denying plaintiffs' title and justifying vestment of land in it – Also pleading that some villagers illegally encroached government land during settlement in 1983-84 – Trial court dismissed suit of plaintiffs and their appeal was also dismissed by First Appellate Court- Regular Second Appeal – On facts, High Court found suit land consistently recorded as Shamlat Hasab Rasad Malgujari since 1912 and in cultivatory possession of proprietors - Held – Suit land was not liable to be vested first in Panchyat under Punjab Act and then in State of H.P. under Himachal Act – Mutation orders, passed by revenue officer(s) qua vestment of land set aside – Plaintiffs held to be owners in possession of suit land – Appeal of plaintiffs allowed – Judgment of lower Courts set aside and suit decreed.

Title: Vakil Singh and others Vs. State of H.P. and others Page-611

'R'

Right to Information Act, 2005- Section 8(j)- Information personal in nature, when can be given? - Applicant, a litigant sought information from Bar Council of Himachal Pradesh regarding University from which Advocate of opposite party which had instituted multiple cases against him, had passed his law degree – Also sought certified copies of such degree(s) – Request declined by Public Information Officer on ground that information being personal in nature, and no public purpose would be served by supplying such information – Appeal dismissed by Appellate Authority i.e. Chairman Bar Council of Himachal Pradesh – However, State Information Commissioner allowing appeal and directing Bar Counsel to supply the information sought – Petition against – Held, even if information is personal in nature, disclosure thereof is in larger public interest – Public including applicant has a right to know whether petitioner is a qualified lawyer or not – Petition disposed of with direction to PIO to supply information qua enrolment of petitioner as maintained by Bar Council – Certified copies of law degree not to be supplied as no public purpose would be served by supplying copies thereof.

Title: Rajender Singh Vs. State Information Commission & ors.(D.B.) Page- 101

'S'

Specific Relief Act, 1963- Section 5- Suit for possession- Plaintiffs filing suit for vacant possession of land alleged to be encroached by defendants – Defendants claiming land as part of their own land and in alternative, also raising plea of their adverse possession- Suit dismissed by trial court and Appeal of plaintiffs was also dismissed by first appellate court – Regular Second Appeal – It was found that area of plaintiffs land was increased during settlement – These entries

were subsequently corrected on application of defendants by Consolidation Officer – This order attained finality and also not shown to be wrong - Held – Plaintiffs not proved to be owners of land alleged to be encroached by defendants –Hence, plaintiffs not entitled for its possession - RSA dismissed.

Title: Kewal Singh & others Vs. Savitri & others Page-534

Specific Relief Act, 1963- Section 10- Suit for specific performance – Plaintiff company filing suit for specific performance of agreement to sell land – Trial Court partly decreeing suit but for refund of amount with interest and proportionate costs – Appeal by defendant – High Court found that the plaintiff/company stood dissolved in the year 2010 and was struck off from rolls by Registrar of Companies – Held, the juristic personality of company stood extinguished in the year 2010, therefore, decree of trial court had become unexecutable – Appeal allowed – Decree of Trial Court set aside – Suit dismissed.

Title: Dinesh Handa Vs. Inter Communion House Development and Finance Co. Ltd. & others Page-343

Specific Relief Act, 1963- Section 10- Suit for specific performance of agreement to sell and in alternative for recovery – Defendant denying execution of any such agreement and depicting same to be result of fraud – Defendant further alleged of plaintiff having obtained his signatures on pretext of filing documents before settlement authorities – Trial Court dismissing suit but in appeal decree of Trial Court set aside and suit stood decreed for specific performance – RSA – Held, Trial Court laid undue emphasis on spacing occurring in different portions of agreement to sell for its finding that defendant probably had signed it when document was blank – Whereas no such plea was taken in written statement – Signatures of executant 'A' on agreement not denied by any one – Purchase of non-judicial stamp paper by 'A' and execution of agreement to sell duly proved by marginal witnesses to it – RSA dismissed – Decree of first Appellate Court upheld.

Title: Malkiat Kaur & Ors Vs. Kulwant Singh Page-227

Specific Relief Act, 1963- Section 34- **Indian Succession Act, 1925-** Section 63- Will- Mode of Proof- Plaintiff filing suit for declaration and injunction on basis of Will – During trial, plaintiff only examining one 'R', who had signed Will as an 'identifier'- However, 'R' also deposing before trial court about 'attestation' of Will in his presence – His deposition not contested in cross-examination – Trial court relying upon Will and decreeing suit of plaintiff- First Appellate Court setting aside decree of trial Court by holding that Will in question didn't stand proved – RSA by plaintiff – Defendants contended before High Court that as none of marginal witnesses to Will was examined before Trial Court, it was not proved in accordance with law – Held, there is no bar that identifier cannot testify as an 'attesting witness' - If his deposition satisfies due attestation of Will, he can be relied upon – Further held, deposition of 'R' proves due attestation of Will in question in favour of plaintiff – Judgment and decree of First Appellate Court set aside and of trial Court restored – Appeal allowed – Suit decreed.

Title: Dharam Pal Vs. Kailasho Devi & Ors. Page- 123

Specific Relief Act, 1963- Section 38- Suit for injunction – Plaintiff seeking decree of permanent prohibitory injunction against defendants for restraining them from interfering in his possession over suit land- Defendants denying exclusive possession of plaintiff and asserting their own joint possession – Suit decreed by trial Court- Appeal of defendants also dismissed by First Appellate Court- Regular Second Appeal- Exclusive possession of plaintiff over suit land was inferable from revenue record, statements of revenue officers examined before trial court and from sale deed executed in his favour as well as from decree of court passed in previous litigation – Held - Plaintiff's suit for permanent prohibitory injunction was rightly decreed- Regular Second Appeal dismissed.

Title: Gangi Devi & others Vs. Prem Singh & others Page-594

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction- Plaintiff seeking decree of permanent prohibitory injunction against defendants on allegations of their unauthorized interference in his possession over suit land – Defendants contesting suit and pleading that a motorable road actually passes through suit land – Trial court decreeing suit for permanent prohibitory injunction – First Appellate Court dismissing appeal of defendants- RSA- Defendants relying upon a photocopy signed by plaintiff and others for giving consent for construction of road through land – Original document not placed on record - Corresponding record not filed in evidence to show that recital in that document pertains to suit land only- Held, suit was rightly decreed for permanent prohibitory injunction – RSA dismissed - Decrees of lower courts upheld.

Title: Jai Kishan and others Vs. Sita Ram Page-293

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction – Death of sole plaintiff – Whether cause of action survives? Held- Yes - Principle of reliefs in personam is applicable only where cause of action accrues in respect of personal contract of service or the same is closely appertaining to his personal status - Suit for permanent prohibitory injunction is with respect to an estate – Cause of action survives after death of plaintiff and suit can be continued by his legal representatives – Petition dismissed – Order of trial court upheld.

Title: Ramesh Chand Vs. Ichha Devi (since deceased) and another Page-247

'T'

Transfer of Property Act, 1882- Section 41- Bonafide Purchaser- Plaintiff filing suit for specific performance of agreement to sell with respect to suit land executed by defendant No.1 in his favour – Also praying for setting aside of sale deed executed by defendant No. 1 qua suit land in favour of defendant No. 2 being subsequent to agreement to sell in question - Defendant No.1 admitting execution of agreement to sell in favour of plaintiff - Whereas defendant No.2 taking plea of his being a bonafide transferee for consideration without notice – Suit decreed by trial court and appeal filed by defendant No. 2 was dismissed by First Appellate Court- Regular Second Appeal – Held - Transferee is bound to show that he had taken reasonable care to ascertain that transferor had power to make transfer - Where transferee fails to discharge this onus, he cannot be said to be a bonafide purchaser - Suit land was in proximity to transferee's (Defendant No.2) own land – Possession of suit land was with plaintiff and he was cultivating it – Defendant No.2 was aware of plaintiff's possession over suit land - No evidence on record suggesting that transferee/defendant No.2 ever inquired as to how plaintiff was in possession of land purchased by him (transferee) – Therefore, transferee (defendant No.2) was not a bonafide purchaser- Regular Second Appeal dismissed – Judgments of lower Courts upheld.

Title: Munna Ram Vs. Tara Devi & another Page-461

'U'

UCO Bank (Employees') Pension Regulations, 1995- Regulations No. 14, 16 and 18- Qualifying service for pension - Computation of – Regulation requiring employee having rendered minimum ten years service for entitlement of pension – Petitioner had rendered service for nine years, ten months and five days – His pension claim declined by department – Petition against - Held - Regulation 18 clearly provides that broken period of service if more than six months, then it is to be taken as one complete year – Service of period rendered for ten months and five days, is to be rounded off to one year in view of Regulation No.18 – Petitioner thus rendered service for ten years and entitled for pension – Petition allowed.

Title: Chaman Singh Vs. UCO Bank & others Page-651

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

State of H.P. ....Petitioner.
Versus
Jagtaar Singh ....Respondent.

Criminal Appeal No.7 of 2018
Date of Decision: 09.03.2018

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- **Motor Vehicles Act, 1988-** Sections 182-A and 196- Transport of 112 cartons of Indian made Foreign Liquor in a truck without permit – Trial Court convicting and sentencing accused for said offence(s) but in appeal, Sessions Judge setting aside conviction and order of sentence – Appeal against - State arguing before High Court that acquittal of accused was result of mis-appreciation of evidence – On facts, it was found that (i) 'P' and 'B' independent witnesses to search of truck and recovery of liquor from it did not support prosecution case yet they were not got declared hostile and led by public prosecutor suggesting thereby that prosecution admitted their version as correct (ii) entire haul was not sent to chemical analyst for examination – Held – Case of prosecution is suspicious – Acquittal upheld – Appeal of State dismissed. (Paras-11 to 14)

Cases referred:
Surender Singh. V. State of H.P., Latest HLJ 2013 (2) 865
State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919
C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645

For the Appellant: Mr. Dinesh Thakur, Additional Advocate General, with Mr. Vikrant Chandel, Deputy Advocate General.

Nemo for the respondent.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Being aggrieved and dissatisfied with the impugned judgment of acquittal, dated 18.09.2017, passed by learned Sessions Judge, Shimla, Himachal Pradesh, in Criminal Appeal No.31-S/10 of 2017, whereby judgment/ order of conviction and sentence dated 27.12.2016/ 2.01.2017, passed by learned Chief Judicial Magistrate, Shimla in Criminal Case No.188-3 of 2011 came to be set-aside, appellant-State has approached this Court by way of instant appeal, seeking therein conviction of the respondent(***hereinafter referred to as the 'accused')*** for having committed the offences punishable under Section 61(1)(a) of the Punjab Excise Act(as applicable to the State of Himachal Pradesh) **(*for short 'Act')*** and section 182-A and 192 of the Motor Vehicles Act**(*for short 'M.V.Act).***

2. In nutshell, the case of the prosecution as reflected from the record that police party headed by ASI, Subhash Kumar (PW-8), after having received secret information that a truck (Mazda) bearing registration No.HP-51-4355, containing large number of carton boxes of illicit liquor was moving towards Sunni to Shimla, laid a Nakka near Panchayat Ghar, Dhalli. At about 4:15 PM, truck, as mentioned hereinabove, came from Shimla side, which was signalled to be stopped. At the same time, another vehicle (Mahindra) bearing No.HP-51-T-6499, wherein to persons namely Purshotam Lal (PW-11) and Balbir Singh (PW-12) were sitting also came there. Police party headed by ASI Subhash Kumar (PW-8) also associated aforesaid persons in the investigation during the search of the truck bearing registration No.HP-51-4355 and in their presence police carried out the search of the truck and found that one specific secret cabin was constructed in the truck from where 45 carton boxes of Bagpipper, 19 carton boxes of Green

Label, 8 carton boxes of Royal Stag, 8 carton boxes of red knight, 4 carton boxes of Mc Dowel, 5 carton boxes of 8 PM, 15 carton boxes of Officer Choice and 8 carton boxes of Granter Whiskey were recovered. In total 112 carton boxes of English liquor were found in the truck. Allegedly, all the 112 boxes of liquor were meant for sale in Chandigarh UT only. Since, the accused failed to produce any valid licence/permit to transport the liquor allegedly recovered from the vehicle being driven by him, he was taken into custody alongwith liquor. Out of the recovered 112 carton boxes, one carton box of each marka was separated and total eight carton boxes as sample were separated and were tied with separate jute rope and were sealed with one seal impression 'T'. The seal impression 'T' was also taken on the piece of cloth, which is Ex.PW4/B and the seal after its use was handed over to witness Purshotam Lal (PW-11). Remaining carton boxes of English liquor alongwith the Truck bearing registration No.HP-51-4355 and its documents were seized vide seizure memo Ex.PW3/A in the presence of independent witnesses. Police also got clicked photographs Ex.PW8/A-1 to Ex.PW8/A-7. Thereafter, intimation was sent to police Station, CID Bharari, Shimla through constable Dhani Ram(PW-3) vide ruqua Ex.PW8/A, on the basis of which, formal FIR Ex.PW4/J came to be registered against the accused. After completion of the investigation, police presented the challan in the competent court of law i.e. Chief Judicial Magistrate Shimla, Himachal Pradesh.

3. The learned trial Court after satisfying itself that a prima facie case exist against the accused, put notice of accusation under Section 61(1)(a) of the Punjab Excise Act(as applicable to the State of Himachal Pradesh) and Sections 182-A and 192 of the Motor Vehicles Act, against the accused, to which he pleaded not guilty and claimed trial.

4. Prosecution with a view to prove its case examined as many as 12 witnesses, whereas accused in his statement recorded under Section 313 of the Code of Criminal Procedure, denied the case of the prosecution in toto. However, fact remains that learned trial court on the basis of the evidence adduced on record by the prosecution held accused guilty of having committed the offence punishable under Section 61(1)(a) of the Act and Sections 182-A and 192 of the M.V. Act, and accordingly convicted and sentenced him as under:-

1. To undergo simple imprisonment for a period of six months and to pay fine of Rs. 2000/- and in case of default of payment of fine, to further undergo simple imprisonment for one month, under Section 61(1)(a) of the Act.
2. To pay fine of Rs. 2000/- and in case of default of payment of fine, to further undergo simple imprisonment for five days, under 192 of the Motor Vehicles Act.
3. To pay fine of Rs. 1000/- and in case of default of payment of fine, to further undergo simple imprisonment for five days, under 182-A of the Motor Vehicles Act.

5. Being aggrieved and dissatisfied with the aforesaid judgment/order of conviction and sentence recorded by the learned trial court, accused preferred an appeal in the court of learned Sessions Judge, Shimla, which came to be allowed vide judgment dated 18.09.2017, as a consequences of which, judgment of conviction recorded by the learned trial Court, came to be quashed and set-aside and the accused was acquitted. In the aforesaid background, appellant-State has approached this Court by way of instant appeal, seeking therein conviction of accused after setting aside the judgment of acquittal recorded by the learned Sessions Judge, Shimla.

6. Mr. Dinesh Thakur, learned Additional Advocate General, while inviting attention of this Court to the impugned judgment of acquittal passed by the learned Sessions Judge, Shimla, vehemently argued that the same is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence and as such, same deserves to be quashed and set-aside. Mr. Thakur, further contended that close scrutiny of the evidence led on record by the prosecution, clearly suggest that prosecution was able to prove its case beyond reasonable doubt that on the alleged date of incident, truck being driven by the accused was apprehended by the police party and 112 carton boxes of illicit liquor being transported illegally were recovered

and as such, there was no occasion for the learned Sessions Judge to reverse the findings recorded by the learned trial Court, which was based upon the correct appreciation of evidence adduced on record by the prosecution. While specifically referring the statements of independent witnesses PW-11 and PW-12, allegedly associated by the police at the time of the search of the truck, learned Additional Advocate General, contended that it has come in the statements of both the independent witnesses that on search of truck, being driven by the accused, 112 carton boxes of English liquor were found and as such, findings returned by the learned Sessions Judge to the effect that independent witnesses have not supported the case of the prosecution is totally contrary to the record and as such, judgment of acquittal needs to be set-aside.

7. Lastly, Mr. Thakur, contended that bare perusal of FSL Reports Ex.PW4/G-1 to 16, suggest that in total 96 bottles, one bottle each from eight carton boxes were sent to chemical analysis, but learned Sessions Judge has wrongly recorded the fact that only eight bottles one each from eight carton boxes were sent and as such, judgment of acquittal being contrary to the evidence be it ocular or documentary on record deserves to be set-aside. With the aforesaid submission, learned Additional Advocate General, while praying for accepting the appeal, prayed that accused may be convicted for having committed the offence punishable under Section 61(1(a) of the Act and Sections 182-A and 192 of the Motor Vehicles Act, after setting aside the judgment of acquittal recorded by the learned Sessions Judge.

8. I have heard learned Additional Advocate General and perused the record of the learned court below, which was made available during hearing of the case. This Court finds no substantial force in the arguments having been made by learned Additional Advocate General.

9. Having perused the statements made by the material prosecution witnesses, this Court is unable to persuade itself to agree with the contention having been made by learned Additional Advocate General that so called independent witnesses supported the story put forth by the prosecution, rather this Court, after having carefully gone through the statements made by these independent witnesses, has no hesitation to conclude that their statements have totally demolished the case of the prosecution.

10. PW-8, ASI Subhash Kumar (Investigating Officer) in his statement has stated that when he was present at a place near Panchayat Ghar, Dhalli then he received secret information at about 4/4:15 PM that a truck bearing registration No.HP-51-4355 carrying large quantity of liquor is going towards Sunni side. As per statement of this witness, he had laid nakka at about 4:15 PM, whereafter truck was found coming from Shimla side, which was subsequently stopped on signal given by the police party. It has specifically come in the statement of this witness that during that time independent witnesses PW-11 and PW-12 came there in a vehicle bearing registration No.HP-51-T-6499 and they were associated in the investigation. As per this witness, inquiry with regard to the name of the accused and search of the vehicle was conducted in presence of aforesaid independent witnesses. However, if the statements having been given by PW-11 and PW-12 are read in its entirety juxtaposing each other, it reveals that altogether different story.

11. PW-11, Purshottam Lal in his statement has categorically stated that at about 4:00 PM when they reached near, Dhalli they found a truck parked and 4 to 5 persons in civil dress were there, who had stopped their vehicle and showed liquor boxes in the truck to them. This witness has not stated that search of truck was conducted in his presence, rather he candidly stated that when he reached the spot, truck was already parked and 4-5 persons in civil dress showed liquor boxes to them in the Mazda truck. Apart from above, this witness failed to identify the accused in the Court.

12. In his cross-examination, he stated that incident took place at around 4:00 PM, whereas as per statement of the investigating Officer (PW-8) he had received secret information at 4/4:15 PM, whereafter a nakka was laid and PW-11 and PW-12 were associated in the search of the truck, being driven by the accused. This witness has not stated that boxes of liquor were

recovered in his presence. In his cross-examination, he has further stated that boxes of liquor were not opened in his presence and he is unable to disclose about the brand marka of the liquor.

13. Another, independent witness PW-12, Balbir Singh gave altogether different version. He stated that when their vehicle was stopped, CID police apprised them that they have got a vehicle in which there were 110 carton boxes of liquor. This witness further stated that police men were tying the boxes and liquor was taken into possession. True it is that it has come in the statement of this witness that the accused was the same person from whom liquor was recovered, but interestingly, this witness has not stated that the search of the vehicle was conducted in his presence. Like PW-11, he also deposed that they were informed by the police party that they have recovered 110 boxes of liquor in the truck being driven by the accused. Interestingly, these aforesaid witnesses PW-11 and PW-12, who nowhere supported the case of the prosecution were not declared hostile by the prosecution, meaning thereby version put forth by them was accepted by the prosecution and as such, entire story put forth by the prosecution appears to be surrounded by suspicion and the same could not be accepted merely on the basis of statements of official witnesses. Moreover, this witness nowhere supported the version of the prosecution that there was secret cabin in the truck being driven by the accused as stated by PW-8.

14. Interestingly, in the case at hand, 8 carton boxes containing 12 bottles each were sent for chemical analysis at the time of drawing sample, bottles were sealed with seal impression 'T', and seal impression was handed over to PW-11, who in his statement categorically stated that he has lost that seal. Seal was never produced in the Court. Though, this Court after having carefully perused the entire evidence led on record, sees no reason to defer with the findings returned by learned Sessions Judge that prosecution was not able to prove its case beyond reasonable doubt, but even if it is presumed and accepted that eight carton boxes containing 96 bottles were sent for chemical analysis, which was admittedly found to be alcohol as per FSL Reports Ex.PW4/G-1 to Ex.PW4/G-16, recovery, if any, of 96 bottles can be said to have been effected from the conscious possession of the respondent/accused. Omission on the part of the investigating Agency to send 1344 bottles of liquor allegedly recovered from the possession of the accused for chemical analysis has rendered the story of prosecution wholly doubtful and unreliable.

15. In this regard reliance is placed upon the judgment passed by our own High Court in "***Surender Singh. V. State of H.P***.", Latest HLJ 2013 (2) 865, which reads as under:-

> ***"26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.***
>
> ***27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.***

> ***28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law."***

16. Reliance is also placed on the judgment passed by this Court ***State of HP v. Jagjit Singh, Latest HLJ 2008 (HP) 919,*** wherein this Court has observed in paras 6 and 7 as under:-

> ***"6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.***
>
> ***7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."***

17. Though this Court, after having examined the depositions made by so called independent witnesses i.e. PW-11 and PW-12, sees no reason to refer the statements made by other official witnesses, but since during proceedings of the case, this Court had an occasion to go through the entire evidence, it has no hesitation to conclude that there are material inconsistencies in the statements of the official witnesses specifically with regard to receipt of secret information and laying of nakka and as such, no much reliance can be placed on the same.

18. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled***

Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:- (SCC p.704, para 14)

> ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.***

19. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment passed by the learned Sessions Judge, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the present appeal is dismissed, alongwith pending application(s), if any.

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

Criminal Appeal No.270 & 269 of 2006
Date of Decision: 12.03.2018

1. Cr. Appeal No.270 of 2006

State of H.P. ....Appellant.
Versus
Baldev Sharma .....Respondent.

2. Cr. Appeal No.269 of 2006

State of H.P. ......Appellant.
Versus
Kamardeen ......Respondent.

Indian Penal Code, 1860- Section 379 read with Section 34- **Indian Forest Act, 1927-** Sections 33, 41 and 42- Illicit felling of trees and transport of timber – Trial Court convicting accused under Section 379/34 of I.P.C. for committing theft of trees but acquitting them for offences under Sections 33, 41 and 42 of Act – State not filing appeal against acquittal – Conviction of accused for offence under Section 379/34 of I.P.C. set aside by Sessions Judge in appeal – State in appeal before High Court on ground of misreading of evidence by Sessions Judge – Held, only evidence on record was that accused was found loading wooden scants in a truck parked on road about 1 km. away from place of cutting of trees- No evidence as who transported logs from that place to the loading point – Evidence on record thus does not prove offence of theft – Acquittal upheld- Appeal dismissed. (Paras-13 and 16)

Case referred:

C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645

For the Appellant(s) Mr. Dinesh Thakur, Additional Advocate General, with Mr. Amit Kumar, Deputy Advocate General.
For the Respondent(s) Mr. V.S.Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

These appeals are directed against the judgment of acquittal dated 15.12.2005, passed by learned Sessions Judge, Kinnaur at Rampur Bushahr, Himachal Pradesh in Criminal Appeals No.6 & 7 of 2005, reversing the judgment of conviction and order of sentence dated 30.3.2005/11.4.2005, passed by learned Sub Divisional Magistrate, Rampur Bushahr, District Shimla, Himachal Pradesh, whereby respondents***(hereinafter referred to as the 'accused')*** were convicted for having committed the offence punishable under Section 379 read with Section 34 of the Indian Penal Code ***(hereinafter referred to as the 'IPC'***).

2. Facts as emerge from the record are that on 6.10.1999, Madan Lal, Forest Guard of Addu Beat, while doing patrolling duty in forest i.e. C-91, Tangri Dhar, found two Deodar trees of IInd-A, illicitly felled. Above named Forest Guard also found 20 sleepers allegedly processed therefrom near the site of illicit felling. Madan Lal, Forest Guard after having noticed illicit felling, associated the villagers of village, Addu and kept constant watch on the sleepers with a view to apprehend the culprits. On 11.10.1999, Forest Guard, Madan Lal accompanied by Devi Singh, Surat Sigh, Padam Dass, Goverdhan Dass, Roop Singh, Jawahar Singh and Sher Singh, laid a nakka in the Jungle and at about 12:00 midnight they heard some noise caused by felling of the sleepers in Addu Nallah. Above named persons also noticed that one truck came from Narkanda side, which allegedly halted near the sleepers. 4-5 occupants of the truck started loading the sleepers, but thereafter Madan Lal, Forest Guard accompanied by other villagers, named hereinabove, rushed towards the truck, but persons loading sleepers in truck after having seen them coming towards their side, unloaded the sleepers from the truck and made an attempt to flee therefrom alongwith the truck. Forest Guard alongwith other persons nabbed two Kashmiries, who subsequently disclosed their identity as Kamardeen and Mohmad Sadique. Villagers also succeeded in halting the truck by throwing boulders on the road. Accused Sunil Kumar, who has since expired and respondent-accused Baldev Sharma were also caught by the villagers. Thereafter, matter was reported to police Station, Nankhari. Subsequently, on the basis of the report submitted by the Forest Guard, a formal FIR came to be registered against the accused persons under Section 379 read with Section 34 of IPC and Sections 33, 41 and 42 of the Indian Forest Act. After completion of the investigation, police presented the challan in the competent Court of law.

3. The learned trial Court after satisfying itself that a prima facie case exist against the accused persons, framed charge against them under Sections 33,41 & 42 of the Indian Forest Act and Section 379 read with Section 34 of IPC, to which they pleaded not guilty and claimed trial.

4. Subsequently, learned trial Court on the basis of the evidence collected on record by the prosecution held all the accused persons guilty of having committed the offence punishable under Section 379 read with Section 34 of IPC, whereas they were acquitted of the charges framed against them under Sections 33, 41 and 42 of the Indian Forest Act.

5. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the learned trial Court, respondent/accused Baldev Sharma alongwith other co-accused preferred an appeal, which came to be registered as Criminal Appeals No. 6 & 7 of 2005, however fact remains that appeals having been preferred by the respondents/accused were allowed, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be set-aside.

6. In the aforesaid background, appellant-State has approached this Court by way of instant appeals, seeking therein conviction of respondents/accused under Section 379 read with Section 34 of IPC, after setting aside the judgment of acquittal recorded by the learned Sessions Judge, Kinnaur. At this stage, it may be noticed that the appellant-State did not lay any challenge to the acquittal of the respondents/accused under Sections 33, 41 and 42 of the Indian Forest Act and as such, findings qua the same returned by the learned trial Court attained finality.

7. Mr. Dinesh Thakur, learned Additional Advocate General, while referring to the impugned judgment of acquittal passed by the learned Sessions Judge, Kinnaur, strenuously argued that same is not sustainable in the eye of law as the same is contrary to the evidence available on record and as such, same deserve to be quashed and set-aside. Learned Additional Advocate General, further contended that bare perusal of the same suggest that court below has miserably failed to appreciate the evidence in its right perspective, as a result of which, erroneous findings have come on record.

8. With a view to substantiate his aforesaid arguments, learned Additional Advocate General, made this court to travel through the entire evidence collected on record by the prosecution to suggest that prosecution successfully proved on record that on the alleged date of incident, respondents/accused indulged in illegal felling of trees and thereafter they made an attempt to steal the sleepers of Deodar trees in the truck. While referring to the disclosure statement made by the accused Kamardeen, learned Additional Advocate General, contended that accused himself disclosed to the police that in presence of forest officials they had cut deodar trees from the spot and thereafter they had converted the same into sleepers and as such, there was no scope left to the learned Sessions Judge to reverse the findings of learned trial Court, which was based upon the proper appreciation of the evidence.

9. Mr. V.S. Chauhan, learned counsel representing the respondent/accused namely Baldev Sharma, while refuting the aforesaid submission having been made by learned Additional Advocate General, contended that there is no illegality and infirmity in the findings recorded by the learned Sessions Judge, rather same is based upon the proper appreciation of the evidence and as such, same deserve to be upheld. While inviting the attention of this Court to the statements of the prosecution witnesses, Mr. Chauhan, strenuously contended that none of prosecution witnesses stated something specific with regard to their having witnessed felling of trees by the respondents/accused. Mr. Chauhan, further contended that it has nowhere come in the statements of the prosecution witnesses that they saw respondents/accused cutting trees and as such, learned Sessions Judge, rightly came to the conclusion that there is no direct evidence available on record suggestive of the fact that Deodar trees were cut by the respondents/accused. While referring to the spot map Ex. PW7/A, Mr. Chauhan, contended that truck allegedly used by the respondents/accused for carrying sleepers has shown to be standing at the distance of 1 Km. away from the actual spot of felling of trees and there is no evidence led on record by the prosecution that how timber was carried from actual spot to the truck standing 1 Km away from the spot. Mr. Chauhan, further contended that bare perusal of the statements of material prosecution witnesses clearly suggest that no conviction, if any, could be recorded on the basis of their statements because of material contradictions and inconsistencies in their statements. Lastly, Mr. Chauhan, contended that none of the prosecution witnesses were able to identify the respondents/accused in the Court and as such, judgment of conviction recorded by the learned trial Court came to be rightly reversed by the learned Sessions Judge.

10. I have heard learned counsel representing the parties and have carefully gone through the record made available.

11. During the proceedings of the case, this Court had an occasion to peruse the entire record, perusal whereof, certainly not compels this Court to agree with the contention of learned Additional Advocate General that there is total misreading, misappreciation and misconstruction of the evidence by learned Sessions Judge while acquitting the respondents/accused of charges framed against them. At this stage, it may be noticed that one of

co-accused namely Sunil Kumar, driver of the truck had expired during the pendency of the trial, whereas another accused Mohmad Sadiq was declared proclaimed offender.

12. Bare perusal of the judgment of conviction recorded by the learned trial court, clearly suggest that respondents/accused were held not guilty of having committed the offence punishable under Sections 33, 41 and 42 of the Indian Forest Act and findings returned qua the same was not laid challenge by the appellant-State and as such, same have attained finality. Since, there is categorical findings available on record with regard to non- commission of offence, if any, by respondents/accused under sections 33, 41 and 42 of the Indian Forest Act, which has already attained finality, appellant-State cannot be allowed to raise/made contention, if any, at this stage with regard to illicit felling by respondent/accused. Question which remains to be decided by this Court is whether findings returned by the learned Sessions Judge qua guilt, if any, committed by the respondents/accused under Section 379 read with Section 34 of IPC is based upon the proper appreciation of evidence or not?.

13. After having carefully perused the depositions made by the prosecution witnesses, this Court sees considerable force in the arguments of learned counsel representing the respondents/ accused that none of prosecution witnesses have stated that they saw the respondents/accused carrying timber allegedly converted by them from Deodar trees from the spot to the truck, which was admittedly standing at the distance of 1 Km from the alleged site of the occurrence. In nutshell, the case of the prosecution is/was that Forest Guard, Madan Lal after having noticed illegal felling in the jungle, laid a nakka with the help of the villagers to nab the culprits, but interestingly, no attempt has been made by the prosecution to prove on record that Forest Guard, Madan Lal and other villagers nabbed/apprehended the respondents/accused at the spot of alleged felling, rather all the prosecution witnesses have stated that they after having heard noise of converting trees into sleepers, nabbed four persons including the respondents/accused. But question remains that as per spot map truck was standing at the distance of 1.KM away from the alleged site of felling and none of prosecution witnesses has stated that they saw respondents/accused carrying timber from the alleged site of felling to the truck. If the statements of all the prosecution witnesses are read in conjunction, it only suggest that they saw accused loading timber on the truck which is/was admittedly parked 1 Km away from the place of occurrence. It is not understood that when as per story of the prosecution nakka was laid near the site of alleged illegal felling of trees, how the respondents/accused could carry the timber to a truck which is/was 1 Km away. Otherwise also, there is no direct evidence available on record to connect the respondents/accused with the recovery of timber from the truck because none of the prosecution witnesses was able to identify the respondents/accused. Similarly, there appears to be no attempt on the part of the prosecution to identify the timber allegedly cut from the Addu Beat and then connect the same with the alleged illegal transportation of the same by the respondents/accused.

14. Needless to say, it is always incumbent upon the prosecution to prove its case beyond reasonable doubt and in this regard it is expected to lead cogent and convincing evidence on record, but in the case at hand, this Court after having gone through the statements made by the prosecution witnesses, has no hesitation to conclude that there are material contradictions and insistencies in the statements of the prosecution witnesses and as such, no much reliance could be placed on the same by the learned trial Court while ascertaining the guilt of respondents/accused.

15. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said

that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:- (SCC p.704, para 14)***
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> > ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.***

16. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment passed by the learned Sessions Judge, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the appeals are dismissed, alongwith pending application(s), if any.

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

Cr.MMO No.1 of 2018 a/w
Cr.MMO No.411 of 2017
Date of Decision: 20.03.2018

1. Cr.MMO No.1 of 2018
Thakur Singh ...Petitioner.
Versus
State of H.P. & Others ...Respondents.

2. Cr.MMO No.411 of 2017
Rockey Singh ...Petitioner.
Versus
State of H.P.& Others ...Respondents.

Code of Criminal Procedure, 1973- Sections 156(3), 190(a) and 200- Cancellation report- Protest Petition by complainant - Whether after accepting objections to cancellation report, Magistrate can direct recording of preliminary evidence – Held- Yes – On complaint of 'R' filed against 'C' and 'T', Magistrate directing investigation under Section 156(3) – Police filing cancellation report by observing that offences alleged were not constituted – Complainant filing

objections to cancellation report – Magistrate allowing objections and simultaneously directing recording of preliminary evidence qua complaint initially filed under Section 156(3) – Petition against by 'T' – Petition allowed but order upheld as against accused 'C' - Principles enunciated in ***M/s India Carat Pvt. Ltd. V. State of Karnataka and another,*** AIR 1989 Supreme Court 885 relied upon. (Paras- 2, 3, 9 and 12)

Case referred:
M/s India Carat Pvt. Lted V. State of Karnataka and another, AIR 1989 Supreme Court 885

For the Petitioner(s):	Mr. Maan Singh Advocate, for the petitioner in Cr.MMO No.1 of 2018 and for respondents No.2 and 3 in Cr.MMO No.411 of 2017. Mr. Naveen K. Bhardwaj, Advocate, for the petitioner in Cr.MMO No.411 of 2017 and for respondent No.2 in Cr.MMO No.1 of 2018
For the Respondent(s):	Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General, for the respondent/State.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Since, by way of above captioned petitions, challenge has been laid by both the parties to the impugned order dated 2.2.2017, passed by learned Judicial Magistrate 1st Class, Manali, District Kullu, Himachal Pradesh, same are being taken up together for adjudication of the case with the consent of the parties. Moreso, the facts and parties to the lis are the same in both the cases.

2. Necessary facts, as emerge from the record are that respondent No.2, Rockey Singh(petitioner in Cr. MMO No.411 of 2017) filed a complaint under Section 156(3) of Code of Criminal Procedure (**Annexure P-1)** in the Court of learned Judicial Magistrate 1st Class, Manali, District Kullu, Himachal Pradesh, praying therein for registration of FIR against the petitioner namely Thakur Singh(petitioner in Cr.MMO No.1 of 2018)under Section 379 of Indian Penal Code and under Sections, 218, 323 and 506 of Indian Penal Code against respondent No.3, alleging therein that the petitioner Thakur Singh and respondent No.3 had stolen his scooter bearing registration No. HP-58-0892 from bus stand, Manali on 13.4.2015. Complainant further alleged that he had purchased the aforesaid scooter from the petitioner on 31.10.2014 and in this regard he had made full and final sale consideration, but despite that petitioner was reluctant in transferring the scooter in the name of the complainant. Allegedly, respondent No.2/ complaint lodged a complaint with the police, but no action was taken. Subsequently, on 6.5.2015 he was called by the police official to withdraw the complaint against the petitioner. On 1.6.2015, at about 9:30 PM, petitioner and respondent No.3 allegedly gave beating to respondent No.2/complainant. Taking cognizance of the averments contained in the aforesaid complaint filed by respondent No.2/complainant namely Rockey Singh, learned trial Court ordered for investigation, however fact remains that police after having conducted investigation filed cancellation report (available at page 46 of the paper book).

3. Being aggrieved and dissatisfied with the cancellation report submitted by the Investigating Agency, complainant Rockey Singh filed objections to the cancellation report, which subsequently came to be upheld by the learned trial Court vide impugned order dated 2.2.2017. Learned trial Court while accepting the objections against the cancellation report, also ordered to treat the application filed by the complainant under Section 156(3) of Code of Criminal Procedure, as a private complaint. In the aforesaid background, petitioner namely Rockey Singh approached this Court by way of Cr.MMO No.411 of 2017 on the ground that once learned Magistrate had rejected the cancellation report, it had no option but to issue process against the accused and as such, learned court below had erred in directing the complainant Rockey Singh to adduce

preliminary evidence in support of averments contained in his application. On the other hand, petitioner Thakur Singh against whom complainant Rockey Singh filed complaint, laid challenge to the impugned order by way of Cr. MMO No. 1 of 2018 on the ground that since police had deleted section 379 of IPC from the FIR, allegedly lodged against him, learned Magistrate had no authority to grant opportunity to complainant Roceky Singh to lead preliminary evidence, if any, against Thakur Singh.

4. Mr. Maan Singh, learned counsel representing the petitioner, while making this Court to travel through impugned order, strenuously argued that sole reason, which weighed heavily with the learned trial Court below while accepting the objections filed by respondent/complainant is/was non production of the record of challan, if any, of vehicle in question. While inviting attention of this Court to receipt ***(Annexure P-5***), issued by Chief Judicial Magistrate, Kullu, learned counsel contended that on 28th August, 2014, petitioner had deposited fine to the tune of Rs. 100/- on account of the challan of scooter bearing registration No.HP-58-0892 and as such, impugned order being contrary to the material available on record deserves to be quashed and set-aside. He further contended that it stands duly proved on record that scooter is owned by the petitioner, who had admittedly agreed to sell the scooter to the respondent/complainant, but since he failed to get the registration done in his name, scooter remained in the name of the petitioner. Mr. Maan Singh, also invited attention of this Court to FIR, lodged at the behest of the complainant, to demonstrate that case, if any, against the petitioner was registered under Section 379 of IPC, which was subsequently deleted by the police.

5. Mr. Naveen K. Bhardwaj, learned counsel representing the respondent No.2/complainant, while opposing the aforesaid submissions having been made by learned counsel representing the petitioner, contended that respondent No.2/complainant had made full and final payment towards scooter agreed to be sold by the petitioner, but despite repeated requests, petitioner failed to get the registration done in his name. He further contended that it is not in dispute that the petitioner after having received full and final payment had handed over the scooter in question to the respondent/complainant and as such, there was no occasion for the petitioner to take the scooter without the consent of respondent/complainant. Mr. Bhardwaj, further contended that once learned Magistrate below had allowed the objection filed by the respondent/complainant to the cancellation report, he ought not have ordered to treat the application having been filed by him under Section 156(3) of Code of Criminal Procedure as a private complaint, rather he should have issued process against the petitioner Thakur Singh as well as respondent No.3.

6. I have heard learned counsel representing the parties and carefully gone through the record made available.

7. Close scrutiny of the material available on record, clearly suggest that scooter bearing registration No.HP-58-0892 belongs to petitioner namely Thakur Singh, who had agreed to sell the same to respondent/complainant. Since, the parties failed to get the registration done/changed in the name of the respondent complainant, who claims that he had paid entire amount towards consideration, scooter remained in the name of original owner Sh. Thakur Singh. It is a matter of record, as is evident from the material adduced on record that on 13.4.2015 when scooter was allegedly stolen, scooter was in the name of Thakur Singh. Similarly, there is no document produced on record by the respondent/complainant, suggestive of the fact that some purchase agreement was executed *inter se* the parties with regard to sale of aforesaid scooter and as such, by no stretch of imagination, it can be said that on 13th April, 2015 respondent/complainant had any authority to claim ownership of the scooter bearing registration No.HP-58-0892, which is still in the name of the petitioner Thakur Singh.

8. Respondent/State in its reply in the present proceedings has categorically stated that as per registration certificate of stolen scooter, Sh. Thakur Singh (petitioner) son of Sh. Bhagat Ram, R/o village Pangan Phatti Pangan, Tehsil Manali, District Kullu, Himachal Pradesh, is the actual owner and accordingly Section 379 of IPC was deleted by the police. Since, the case

against the petitioner was only registered under Section 379 of IPC, which was subsequently came to be deleted, as is evident from the reply filed by the Deputy Superintendent of Police, Kullu, District Kullu, Himachal Pradesh, there was no occasion for the learned court below to reject the cancellation report in as much it relates to case registered against the petitioner Thakur Singh under Section 379 of IPC is concerned.

9. As far as another contention put forth by Sh. Naveen K. Bhardwaj, learned counsel representing the respondent/ complainant (petitioner in Cr.MMO No.411 of 2017) that learned trial Court while accepting the objections having been filed by the respondent/complainant to the cancellation report, had no option but to issue process to the accused, also deserves to be rejected out rightly. Under Section 156(3) Code of Criminal Procedure, Magistrate while entertaining application, if any, filed by individual has an option to order investigation of the case by police, but definitely he is not bound to accept the report of the investigating agency, be it for cancellation of FIR or registration of the case, rather Magistrate while passing the order, if any, under section 156(3), has to apply his/her mind and in case he/she is satisfied that no case is made out he/she shall order closure of the case. But similarly in case the Magistrate is not satisfied with the investigation carried out by the investigating agency, he/she can order applicant, who had filed application under Section 156(3) Code of Criminal Procedure to lead preliminary evidence in support of his allegations levelled against the petitioner-accused. In this regard reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***M/s India Carat Pvt. Lted V. State of Karnataka and another,*** AIR 1989 Supreme Court 885, wherein it has been held as under:-

> "13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The Magistrate may take cognizance of the offence at once and proceed to record statements of the complainant and the witnesses present under Section 200. After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint under Section 203. On the other hand if in his opinion there is sufficient ground for proceeding he may issue process under Section 204. If, however, the Magistrate thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter and submit a report under Section 173(2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and

proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

14. Since in the present case the Second Additional Chief Metropolitan Magistrate has taken cognizance of offences alleged to have been committed by the second respondent and ordered issue of process without first examining the appellant and his witnesses, the question for consideration would be whether the Magistrate is entitled. under the Code to have acted in that manner. The question need not detain us for long because the power of a Magistrate to take cognizance of an offence under Section 190(1(b) of the Code even when the police report was to the effect that the investigation has not made out any offence against an accused has already been examined and set out by this Court in Abhinandan Jha v. Dinesh Mishra (1967) 3 SCR 668: (AIR 1968 SC 117) and H. S. Bains v. State (1981) 1 SCR 935 : (AIR 1980 SC 1883). In Abhinandan Jha v. Dinesh Mishra (supra) the question arose whether a Magistrate to whom a report under Section 173(2) had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge-sheet, on his disagreeing with the report submitted by the Police. This Court held that the Magistrate had no jurisdiction to direct the police to submit a charge-sheet but it was open to the Magistrate to agree or disagree with the police report. If he agreed with the report that there was no case made out for issuing process to the accused, he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under Section 156(3) and if ultimately the Magistrate was of the opinion that the facts set out in the police report constituted an offence he could take cognizance of the offence, notwithstanding the contrary opinion of the police expressed in the report. While expressing the opinion that the Magistrate could take cognizance of the offence notwithstanding the contrary opinion of the police, the Court observed that the Magistrate could take cognizance under Section '190(1)(c)'. The reference to Section 190(1)(c) was a mistake for Section 190(1)(b) and this has been pointed out in H. S. Bains (supra).

16. The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

17. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the

> appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under Section 158(3), the police would have had to submit a report under Section 173(2). It has been held in Tula Ram v. Kishore Singh (1978) 1 SCR 61 : (AIR 1977 SC 2401) that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with."

10. Aforesaid exposition of law laid down by the Hon'ble Apex Court, clearly suggest that on receipt of a complaint, Magistrate has several courses open to him. The Magistrate either may take cognizance of the offence at once and proceed to record statements of the complainant and the witnesses present under Section 200. After recording of those statements, if in the opinion of the Magistrate, there is no sufficient ground for proceeding, he/she may dismiss the complaint under Section 203. To the contrary, if in his/her opinion there is sufficient ground for proceeding he/she may issue process under Section 204. Another course open to the Magistrate is that instead of taking cognizance of offence and following the procedure laid down under Section 200 or Section 202, he/she may order an investigation to be made by the police under Section 156(3). Pursuant to aforesaid order, police shall have to investigate and submit a report under Section 173(2). On receiving of such report from the police, Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused.

11. Needless to say, Magistrate may exercise his powers in this regard irrespective of the view expressed by the police in their report whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceedings proceed under Section 200 by taking cognizance of the Offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

12. In the case at hand, learned Magistrate while disagreeing with the report submitted by the police under Section 173(2), has called upon the complainant Rockey Singh to lead preliminary evidence in support of his allegations levelled against the accused person. As has been taken above, learned Magistrate is well empowered under Section 200 of Code of Criminal Procedure to call upon the complainant to lead preliminary evidence in support of the allegation, whereafter he/she may proceed to issue process or dismiss the complaint. In view of above, this Court finds no force much less substantial in the arguments, as has been taken note above, advanced by Mr. Naveen K. Bhardwaj, learned counsel representing the respondent/complainant.

13. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, Cr.MMO No.1 of 2018 filed by the petitioner namely Thakur Singh is allowed, as a consequences of which, cancellation report submitted by the Investigating Agency against the petitioner is accepted. As far as, another petition bearing Cr.MMO No.411/2017 filed by the complainant Rockey Singh (Respondent No.2 in Cr.MMO No.1 of 2018) is concerned, the same is dismissed. However, it is made clear that impugned order dated 2.2.2017, passed by the learned trial Court shall remain in force qua other accused namely Chaman Singh.

Accordingly, the petitions are disposed of, alongwith pending application(s), if any.

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

The New India Assurance Company Ltd. .....Appellant.
Versus
Smt. Vimla and others .....Respondents

FAO No. 350 of 2017
Decided on : 22.3.2018

Motor Vehicles Act, 1988- Section 166- Claim application – Claims Tribunal granting compensation with interest and fastening liability on insurer – Appeal against – Insurer not disputing its liability but simply arguing that award of Tribunal is not in consonance with ratio laid in ***Pranay Sethi and others'*** case - On finding that age of deceased was 45, High Court granted hike of 25% towards future prospects instead of 30% as was done by Claims Tribunal – High Court also struck down compensation granted towards loss of love and affection and reduced compensation from Rs. 1 lac to Rs.40,000/- towards loss of consortium – Appeal partly allowed – Award modified. (Paras- 2, 4 and 5)

Cases referred:
National Insurance Co. Ltd vs Pranay Sethi and others, 217 ACJ 2700
Sarla Verma vs. DTC, (2009)6 SCC 121

For the Appellant: Mr. Praneet Gupta, Advocate.
For Respondents: Mr. Divya Raj Singh, Advocate, for respondents No. 1 to 3.
Mr. Vijay Arora, Advocate, for respondents No. 5 and 6.
Ms. Ritika Kashav, Advocate, for respondents No. 7 and 8.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge (oral).

The instant appeal stands directed against the award pronounced by the Learned Motor Accident Claims Tribunal, Una, District Una upon MAC petition bearing No. 18 of 2015, whereby, the learned Tribunal adjudged compensation vis-a-vis, the LRs of deceased Ravinder Mohammad, who met his end, in an accident caused, by the rash negligent driving of the offending vehicle, by one Chaman Lal (respondent No.5 herein). The quantum, of, compensation amount adjudged thereunder vis-a-vis the legal heirs, of deceased Ravinder Mohammad, is, constituted in a sum of Rs. 15,32,800 /-, and, interest at the rate of 9% per annum, is, levied thereon, accrual thereof is ordered to commence, from, the date of petition, uptill, its deposit. The compensation amount has been apportioned, amongst, the claimants in the hereafter extracted manner:-

> "Petitioner No.1, being entitled to 40% amount along with proportionate interest and petitioners No.2 to 4 being entitled to 20% each with proportionate interest."

Obviously indemnificatory liability thereof, has been fastened, upon the insurer/appellant herein.

2. The learned counsel appearing, for the appellant/insurer, (i) does not contest, the tenability of affirmative findings recorded by the learned Tribunal, upon the issue appertaining, to the demise of one Ravinder Mohammad, being a sequel of rash and negligent driving, of, the offending vehicle by respondent No.5 herein, (ii) nor he contests the fastening of the apposite indemnificatory liability(ies), upon the insurer. Moreover, he also does not make any challenge vis-à-vis the learned Tribunal computing, in a sum of Rs. 6000/-, the per mensem salary of the deceased, borne His solitary contention for casting a challenge vis-à-vis the impugned award, is constituted in the factum of the learned Tribunal, rather irrevering the verdict pronounced by the

Hon'ble Apex Court, in case titled as **National Insurance Co. Ltd vs Pranay Sethi and others,** reported in **217 ACJ 2700,** the relevant paragraph No. 59 extracted hereinafter:

> "59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable." (p.2721-2722)

wherein it is expostulated (i) that where the deceased concerned, is rendering employment, in non government organization(s), as is the employer of the deceased, (ii) thereupon, hikes or accretions, on anvil of future incremental prospects vis-a-vis the last drawn salary, by the deceased, especially at the time contemporaneous to the ill fated mishap, from his employer, being also meteable thereto. Mandate whereof, is canvassed to be rather infringed, by the learned Tribunal, infringement whereof, he contends to arise from the factum, of, despite the deceased, being reflected in the postmortem report borne in Ext. P-3, to be aged 45 years, at the relevant time, (ii)

thereupon with the mandated percentum, of, accretions, or hikes towards future prospects, in the income of the deceased, being pegged @ 25%, (iii) whereas, the learned Tribunal meteing accretions or hikes in the future prospects, towards, the income derived by the deceased, from, his relevant employment, at 30%, hence rather thereupon entailing reversal thereof. The aforesaid submission is meritworthy, especially, bearing in mind the evident age of the deceased, at the relevant time, as reflected in his post mortem, whereon rather as mandated by paragraph (supra), the apposite percentum to be meted vis-à-vis hikes towards future earnings, reared by the deceased, from his employment, is pegged at 25% vis-à-vis the apposite last drawn per mensem salary. Consequently, after meteing 25% increase(s) vis-à-vis, the apposite last drawn salary, of the deceased, thereupon, the relevant last drawn salary of the deceased, is determined @ Rs. 7500/-, [Rs.6000 (last drawn salary of the deceased)+Rs.1500/-(25% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, four, hence, 1/4th deduction is to be visited, upon a sum of Rs.7500/-, deducted, amount whereof, is calculated at Rs**. 1875/**- per mensem.

Consequently, the annual dependency, including the hikes towards future prospects, is, worked out, now at Rs.7500**–Rs.1875 = Rs.5,625** /-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.**5,625x12= Rs. 67,500/-.** After applying thereon the apposite multiplier of 14, the total compensation amount, is assessed in a sum of Rs.67,500 x14=Rs.9,45,000/-.

3. Be that as it may, the learned Tribunal, in consonance, with the verdict, pronounced by the Hon'ble Apex Court, in case tilted as **Sarla Verma vs. DTC**, reported in ***(2009)6 SCC 121***, has aptly recorded a mandate, (i) of with the number of dependents of the deceased, being more than three, hence, 1/4th deduction from the proven salary of the deceased being meteable, (ii) thereupon, in the learned tribunal meteing ¼ deduction(s) vis-a-vis the per mensem, salary of Rs. 6000 /-, is both appropriate and apt.

4. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii) and quantification, of compensation vis-a-vis the claimants No. 2, 3 and 4, under the head, loss of estate, loss of expectation of life and Funeral and litigation expenses is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of expectation of life, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to the mother, and, to the offspring(s) of the deceased, especially under the head, loss of love and affection, hence reliefs in respect thereto being impermissibly granted. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the off springs, and, mother of the deceased. Accordingly, in addition to the aforesaid amount of Rs.9,45,000 /-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of expectation of life, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs. 9,45,000 + 15,000/- + 40,000/- + 15,000/-= Rs. 10, 15,000 -(Rs. Ten lakhs, fifteen thousand, only).

6. For the foregoing reasons, the appeal filed by the insurer is allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.10,15,000/- along with pending and future interest @7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in the hereinafter extracted manner:-

"Petitioner No.1, being entitled to 40% amount along with proportionate interest and consortium as also funeral expenses, and, the remaining amount with proportionate interest shall fall in equal shares of the petitioners No.2 to 4."

7. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit of the minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of Himachal Pradesh. ....Appellant
Versus
Shri Sukhvinder Singh. ....Respondent

Cr. Appeal No. 401 of 2008
Date of decision: 28.3.2018

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- **Indian Penal Code, 1860-** Section 120-B- Illicit transport of country liquor – Huge quantity of country liquor in bottles as well in pouches was recovered from vehicle of accused – Accused not having licence to carry liquor – Trial Court convicting accused for said offence but acquitting one 'B' of offence under Section 120-B of I.P.C., who allegedly conspired with other accused for illicit transport of liquor – Additional Sessions Judge setting aside conviction and acquitting accused – State in Appeal – On facts, independent witnesses to recovery of liquor from vehicle of accused did not support case – These witnesses were salesmen of a liquor contractor and their presence at place of recovery at 11 A.M. was doubtful, there was no explanation from where twelve nips were obtained by I.O. for taking samples – Held, prosecution case was totally unreliable – Acquittal upheld – Appeal dismissed. (Paras-11 to 17)

For the Appellant: Mr.Raju Ram Rahi and Mr.Amit Dhumal, Deputy Advocate Generals.
For the Respondent: Mr.Dalip K. Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

Instant appeal has been preferred by State of Himachal Pradesh against acquittal of respondent in case FIR No. 183 of 2000, dated 28.9.2000 registered in Police Station, Solan under Section 61 (1) (a) of Punjab Excise Act, as applicable to the State of Himachal Pradesh vide judgment dated 20.2.2008 passed by learned Additional Sessions Judge, reversing his conviction and sentence announced vide judgment/order dated 25.9.2007 passed by learned Chief Judicial Magistrate in Criminal Case No. 79/3 of 2001.

2. Prosecution case is that on 28.9.2000 at about 11:30 A.M., respondent was found in exclusive and conscious possession of three gunny bags containing 102 bottles of country made foreign liquor, 299 pouches, each containing 180 ML of country liquor and also 80 pouches, each containing 180 ML of country liquor without any permit, transporting the same in Car CH-01Q-9003, being driven by respondent himself from Solan side towards Jatoli, near village Seri, on interception of his vehicle by the police party headed by PW-4, ASI Narayan Singh,

consisting of PW-1 Inder Singh, PW-7 H.C. Jeet Ram and Constable Chabil Kumar, Constable Narinder, Constable Fiaz Khan and Constable Dalel Singh.

3. It is the case of prosecution that during patrolling, police party had signaled the vehicle being driven by respondent, whereupon respondent had stopped his car at a distance of 50 feet ahead of police party and after opening the glass of car, he had stated that vehicle is empty and tried to move the vehicle, resulting into suspicion to the police party, whereupon the respondent, who was trying to flee along with car was overpowered, who on inquiry disclosed his identity as respondent. However, he could not produce any documents of vehicle, but on getting opportunity, he jumped below the road and was again overpowered by the police officials. On checking the dickey of the vehicle, three gunny bags of Tata tea were found, wherein in first gunny bag 102 bottles of liquor, in second bag 299 pouches of country liquor with marka Saki each containing 180 ML and 80 pouches of Orange No. 1, each containing 180 ML country liquor, were found in the third gunny bag. Respondent could not produce any permit for the said liquor, recovered from the vehicle being driven by him, whereupon samples of 250 ML each from 12 bottles out of 102 bottles and 20 pouches out of 299 pouches of Saki marka liquor and 8 pouches out of 80 pouches of Orange No. 1 country liquor, were separated and seized in separate parcel by sealing the same with seal "A". Remaining recovered liquor was again put in the same fashion in the gunny bags and these bags were also sealed with seal "A". Site map was prepared and rucka Ex. PW-4/A was sent to Police Station for registration of FIR through H.C. Jeet Ram. Samples of recovered liquor were sent to CTL Kandaghat on 11th October, 2000 and after receiving analysis reports Ex. PW-7/B, 7/C, 7/D, 7/E and 7/F from CTL Kandaghat, challan was prepared and filed in the Court.

4. Prosecution has examined as many as seven witnesses to prove its case and after recording statement under Section 313 Cr.P.C., respondent had chosen not to lead any evidence in his defence. On conclusion of trial, respondent was convicted under Section 61 (1) (a) of the Punjab Excise Act, as applicable to the State of Himachal Pradesh and sentenced to undergo one year rigorous imprisonment with fine of Rs. 2000/-, in case of default in making the payment of fine, to further undergo simple imprisonment for one month.

5. Before scrutinizing evidence, it would be necessary to refer that initially challan was filed against two persons i.e. respondent and one another Bimal Kumar. From the perusal of record, the said Bimal Kumar appears to be arrayed as respondent for commission of offence under Section 120B IPC i.e. conspiracy with respondent Sukhvinder to transport the liquor recovered from his vehicle. However, after considering the entire material on record, said Sh.Bimal Kumar was acquitted by the trial Court, against which no appeal has been preferred by the respondent-State.

6. During the process of search and seizure, police party had also associated two independent witnesses PW-3 Kali Dass and PW-Sukhdev Singh. PW-Sukhdev Singh has not been examined, whereas PW-3 Kali Dass in his deposition in the Court has not lent support to the prosecution case and despite his lengthy cross-examination, nothing discriminatory against the respondent can be elucidated.

7. PW-1 Constable Inder Singh, PW-4 ASI Narayan Singh and PW-7 H.C. Jeet Ram are three other spot witnesses, who are official witnesses. It is settled law that conviction can be based upon only on the statements of official witnesses, in case their evidence is found to be cogent, reliable and trustworthy ultimately establishing the case of prosecution, beyond all reasonable doubt.

8. It is true that no enmity between the police party and the respondent has been established on record and no reason for falsely implicating him by the police has been satisfactorily explained on record, but at the same time, it is also well established that prosecution has to stand on its own legs and the case of prosecution must be proved beyond all reasonable doubt.

9. In present case, in rucka Ex. PW-4/A and in FIR Ex. PW-4/C, recorded on the basis of rucka, it is stated that after stopping vehicle, respondent had tried to flee alongwith his vehicle but he was overpowered along with car and thereafter, when he could not produce the documents, he slipped and jumped below the road, but he was again overpowered by the police officials, whereas facts of trying to flee alongwith car after stopping it on signal of police and jumping below the road, are missing in the statements of PW-1, PW-4 and PW-7 deposed in Court.

10. Allegedly, PW-1 was present on the spot. However, he, in his cross-examination, has stated that in his presence, car was not taken anywhere and he did not know as to whether they had counted the bottles before arrival of witnesses or not. Whereas, PW-7 Investigating Officer has stated that they had brought the respondent to Police Station in the car. It is also stated by PW-7 that case property was also brought to the Police Station along with respondent in the same vehicle, whereas PW-1 has stated that he did not know as to whether car was locked on the spot or taken to somewhere else. But he categorically stated that they themselves had carried out the gunny bags of liquor to Police Station from the spot.

11. As per prosecution, two independent witnesses PW-3 Kali Dass and PW Sukh Dev were associated in the search and seizure process of the recovered vehicle. PW-4 ASI Narayan Singh in his cross-examination has denied that sales men of Chopra were cited as witnesses, however, it is apparent from the addresses of PW-Sukh Dev and Kali Dass mentioned in list of witnesses filed with the challan, that they are residents of Tehsil Ghumarwin, District Bilaspur, and at that time, they were sales men of Chopra and Company, Solan dealing with liquor business having license for selling liquor in District Solan. There is nothing on record indicating circumstances in which they were present on the spot, which was at a distance of 5 kilometers from Solan and more than 120 kilometers from Ghumarwin.

12. It is case of prosecution that place of occurrence is near village Seri. Investigating Officer PW-4 has stated that there is no house or habitation near the place of occurrence, whereas PW-1 has categorically admitted that there were residential houses near the road and he also admitted that there were number of houses on the side of road in village Seri, but no witness was called from those houses. Liquor was allegedly recovered during day time and no reason has been assigned for not associating independent witnesses, who were naturally available on the spot. However, PW-3 Kali Dass, resident of distant place working at Solan, has been cited as independent witness, associated in search and seizure process, but he also has not supported the prosecution case. He also admitted that he was a cook in Chopra and Company. According to his deposition, he was sent to Police Station by Chopra on the call of police to sign papers and accordingly he signed the papers in Police Station.

13. In present case, one out of two independent witnesses had not supported the prosecution case and was declared hostile. Therefore, it was incumbent upon the prosecution to produce another so called independent witness, but the said witness i.e. PW Sukh Dev was given up stating to have won over by the accused. The said witness had never stepped into the witness box and was not put even a single question in the Court. Therefore, on what basis and under which circumstances, he was declared to be won over by the accused, is not on record. For all fairness in any case, particularly when one of the independent witness had not supported the prosecution case, another independent witness must have been examined in the Court, who, at the most, could have not supported the prosecution case, but in that situation, no adverse inference could have been drawn against the prosecution, but withholding of material witness from examining in the Court is certainly fatal to the prosecution case as for not supporting the prosecution case by another witness, he cannot be treated even repetitive witness.

14. As per prosecution case, as evident from Ex. PW-5/A, police party had left police station at 11:00 A.M. on foot for routine patrolling. According to PW-7, they had reached on the place of occurrence after covering a distance of 5 Kilometers. The time of recovery has been claimed as 11:30 A.M. and according to PW-7, they were patrolling, they kept on moving, but with

making observations on the way. It is not humanly possible to cover a distance of 5 kilometers within 30 minutes.

15. Even if it is presumed that police party had covered the distance of 5 Kilometers within 30 minutes, then there is another unexplained fact which creates doubt about the veracity of prosecution story. Samples of 250 ML each were taken out of 12 bottles, but where from these 250 ML bottles were obtained, is not clear. PW-1 in his cross-examination has stated that he did not remember from where these 250 ML bottles (Pawas) were brought. Whereas PW-7 has stated that 250 ML bottles were with them. In departure DDR Ex. PW-5/A, there is no reference that the police party had left the Police Station with 12 empty bottles of 250 ML. According to prosecution, the patrolling was a routine and there is no reference in Ex. PW-5/A that police team was also carrying investigating kit with them. It is also unnatural to presume that police party was patrolling with 12 empty bottles. 12 sample bottles (Pawas) and 28 pouches of samples have claimed to have been sealed in parcel. But where from the cloth for parcel was arranged, is also not clear from the evidence on record.

16. All these infirmities, detailed hereinabove, in prosecution evidence creates a doubt on the fairness of prosecution case and it appears that things had not happened in the manner, as have been claimed in the prosecution case, rendering the evidence of spot witnesses unreliable and untrustworthy. As the evidence of spot witnesses has not been found to be cogent, convincing and reliable, there is no necessity to discuss the statements of other witnesses, who have been examined to prove the other process and procedure undertaken by the Investigating Officer, during investigation. The prosecution has failed to point out any cogent, reliable, trustworthy and convincing evidence, so as to upheld the conviction of respondent, for which he was charged.

17. It is cardinal principle of criminal jurisprudence that in case of possibility of two views, benefit of doubt is to be extended to accused. Therefore, in my opinion learned Additional Sessions Judge has not committed any error, irregularity or illegality in acquitting the respondent after reversing the judgment passed by the trial Court. Accordingly, present appeal is dismissed. Bail bonds furnished by and on behalf of respondent are discharged. Record be sent back.

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

Paras Ram ...Petitioner/Decree Holder/Plaintiff

Versus

Om Parkash and another ...Respondents

CMPMO No. 367 of 2017
Reserved on : 17.3.2018
Decided on : 29.3.2018

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner – Decree holder seeking appointment of local commissioner for spot inspection/demarcation to prove infringement of decree of permanent prohibitory injunction by judgment debtor – Executing Court dismissing application on ground that provisions of Order XXI Rule 32 are penal in nature and decree holder should prove disobedience of decree – And evidence for him cannot be collected by Executing Court – Petition against- Held, when best evidence to prove a fact can only be obtained by way of local investigation than oral deposition of parties, Court should not throttle that process by recourse to flimsy grounds – Petition allowed – Order of executing court set aside – Case remanded with direction to executing court to appoint local commissioner, call his report and then proceed further. (Paras-2 and 3)

For the petitioner : Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. Aman Deep Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

A conclusive binding executable decree vis-à-vis suit Khasra No. 5, was rendered under Ext. A-1, whereupon the defendants, were, permanently restrained from changing the nature of the suit land, and, from raising any construction thereon, till, dismemberment of the undivided estate, occurs by metes and bounds. The afore-referred decree for permanent prohibitory injunction, was, put to execution by the plaintiff-Decree Holder. However, during pendency of the apposite execution petition bearing No. 3 of 2009, the plaintiff instituted, therebefore, an application, cast under the provisions of Order 26 Rule 9 CPC, (a) wherein he sought appointment of a Local Commissioner, for holding the suit land to demarcation, for ascertaining whether willful disobedience, vis-à-vis the mandate, of a conclusive binding decree of permanent prohibitory injunction, hence emanated. The learned Executing Court, proceeded to, under the impugned order, decline, relief to the plaintiff/Decree Holder, hence the latter is aggrieved therefrom, hence, has through the instant appeal, made a concert to beget its reversal.

2. The short reason, which is assigned by the learned Executing Court, for declining relief to the plaintiff/Decree Holder, is comprised in the factum, of, a petition, cast under Order 21 Rule 32 CPC, (a) holding penal consequence, and, hence the assistance of the Court, as concerted, by the Decree Holder, for proving infringements, if any by the JD, vis-à-vis the mandate of a conclusive binding decree, of permanent prohibitory injunction, rather being unavailable to him b) especially it being not the duty of the Court, to collect evidence on behalf of any party to the lis, rather, it being incumbent upon the petitioner, to prove purported violations, by the Judgment Debtor, vis-à-vis the conclusive binding decree, rendered by the Civil Court. The aforesaid reasons' assigned by the learned Executing Court are perse flimsy a) given the learned Executing Court remaining unmindful, to factum of the provisions of Order 26 Rule 9 CPC, being available to the Court concerned, for theirs being recoursed, conspicuously for hence making the relevant ascertainments, b) also whereupon alone the Courts would be sufficiently satisfied qua the Judgment Debtor, hence infringing or not infringing the mandate, of the apposite decree. Consequently, if the mandate of order 26 Rule 9 CPC, is assuredly meant, for Courts concerned, for theirs taking recourse thereto, (c) thereupon the apposite recourse(s) as aspired by the Decree Holder, could not be throttled, merely, on the perse flimsy reason, of it, being rather incumbent upon the petitioners/Decree Holders, to prove the apposite violation(s), (C) especially when the best evidence for validating or invalidating the espousal(s) of the decree holder, would, emanate, only, upon the Local Commissioner concerned purveying its report, (d) rather than from the oral testification(s) rendered by the Decree Holder or by his witness(es).

3. Be that as it may, the learned Executing Court, has by assigning the aforesaid reasons, meted irreverence vis-à-vis the mandate of Order 29 Rule 6 CPC, also has proceeded to relegate, into the realm of redundancy, the innate nuance, of the provisions borne in Order 26 Rule 9 CPC, hence, has abandoned its duty, to ensure efficacious execution, of the conclusive decree for permanent prohibitory injunction, pronounced vis-à-vis the suit land, (a) significantly also when the joint estate, in respect whereof, the apposite decree is pronounced, yet remains unpartitioned by metes and bounds, nor when hence the part thereof, qua wherewith the alleged infringement has purportedly occurred, is also hence not demonstrated, upon its partition, to hence stand allotted to the Judgment Debtor, (f) thereupon dehors the penal consequence(s) ensuing, from, proven infringements, being made by the Judgment Debtor, vis-à-vis the mandate of the decree, it was not befitting, for the learned Executing Court, to decline relief upon, the application preferred before it, under the provisions of Order 26 Rule 9 CPC. It is not only the duty of the parties concerned, but also the duty of the Court, to ensure efficacious execution of the apposite decree, moreso, when adduction of best documentary evidence would secure a

conclusive binding verdict qua occurrence(s), of apposite infringement(s). Consequently, the reasons aforesaid assigned, by the learned Executing Court, are thoroughly flimsy, specious and, are sequelled by gross non-application of mind. The learned trial Court has not exercised the jurisdiction vested in it under law, also the impugned order is permeated with a vice of material irregularity and illegality. Hence, there is merit in the petition and the same is allowed. The impugned order, rendered by the learned Civil Judge (Senior Division) Nadaun, District Hamirpur in CMA No. 24 of 2017 in Civil Execution No. 3 of 2009, upon application under Order 26 Rule 9 CPC, is quashed and set aside. The learned trial Court is directed to appoint a Local Commissioner, to visit the relevant site, for his making the apposite ascertainment(s), qua whether, willful disobedience(s), vis-à-vis the mandate, of conclusive binding decree of permanent prohibitory injunction, has or not emanated. The records be sent back forthwith. The parties are directed to appear before the learned Court below on 16.4.2018.

All pending application(s), if any, are disposed of. No costs.

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

State of Himachal Pradesh .....Appellant.

Versus

Surinder Singh alias Vicki .....Respondent.

Criminal Appeal No.56 of 2018
Date of Decision : 02.04.2018

Indian Penal Code, 1860- Sections 354 and 451- **Code of Criminal Procedure, 1973-** Section 378- Accused was tried and convicted by trial court on allegations that he trespassed in room of prosecutrix at night when her husband was out to irrigate fields, and then outraged her modesty by touching her private parts – Accused fled away as soon as husband of prosecutrix returned back and entered into room – In appeal, Additional Sessions Judge, disbelieving her and her husband setting aside conviction and sentence- Appeal by State – High Court found that accused was known to prosecutrix and he was on visiting terms to her house – No explanation from side of prosecutrix as to why room was left unbolted from inside when accused had come to her room on that night itself in absence of her husband – Statements of prosecutrix and her husband found contradictory- Lodging of FIR was delayed and explanation for delay that prosecutrix had no money for bus fare in order to go to police station found false – 'D', an eye-witness was given up by prosecution- Held, Additional Sessions Judge was right in setting aside judgment of conviction recorded by trial Court and acquitting accused – Appeal dismissed. (Paras-11 to 14)

Cases referred:

C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645
State of UP versus Ghambhir Singh & others, AIR 2005 (92) Supreme Court 2439

For the Appellant	Mr. Dinesh Thakur, Additional Advocate General, with Mr. Vikrant Chandel, Deputy Advocate General.
For the Respondent	Mr. Ashok Kumar Tyagi, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Instant Criminal Appeal is directed against the judgment of acquittal dated 5.9.2017, passed by learned Additional Sessions Judge, Sirmaur, District Nahan, H.P., in

Criminal Appeal No. 8-N/10 of 2013, whereby the judgment of conviction and sentence dated 31.1.2013/6.2.2013, passed by the learned Judicial Magistrate 1st Class, Court No.1, Paonta Sahib, District Sirmaur, H.P., in Criminal case No.82/2 of 2009, has been set-aside.

2. In nutshell, the case of the prosecution as emerge from the record are that on 28.1.2009, prosecutrix lodged a complaint at police Station, Paonta Sahib, alleging therein that in the night of 26.1.2009, at around 10:00 PM, her husband went to irrigate the fields, after 15-20 minutes, accused came to her house and after sometime, he also went towards the field to irrigate the same. She fell asleep while watching television. But, at around 11:00 PM, one person entered her room and she thought that her husband has returned back. Allegedly, the said person started touching private parts of her body, upon which, she woke up and saw that it was the accused, who was touching her. Accused also tried to open the string of her salwar. Though, prosecutrix tried to escape from the clutches of the accused, but accused had shut her mouth with his hand. In the meanwhile, husband of the prosecutrix returned back, and on noticing her husband, accused fled away from the scene. Prosecutrix further alleged that since she was short of money to pay bus fare, matter could not be reported immediately to the police after the alleged incident. On the basis of aforesaid complaint, a formal FIR Ex.PW1/A, came to be registered against the accused. After completion of the investigation, police presented the challan in the competent Court of law.

3. The learned trial Court after satisfying itself that a prima-facie case exists against the accused put notice of accusation under Sections 451 and 354 of IPC, to which he pleaded not guilty and claimed trial.

4. Learned trial Court vide judgment dated 31.1.2013, held the respondent/accused guilty of having committed the offences punishable under Sections 451 and 354 of IPC and accordingly convicted and sentenced him to undergo one year rigorous imprisonment and to pay a fine of Rs. 1000/- under Section 454 of IPC and in default of payment of fine, to further undergo simple imprisonment for three months and to further undergo one year rigorous imprisonment and to pay fine of Rs. 1000/- under Section 354 of IPC and in default of payment of fine, to further undergo simple imprisonment for three months.

5. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the learned trial Court, respondent/accused preferred an appeal in the Court of learned Additional Sessions Judge, Sirmaur, which came to be registered as Criminal Appeal No.8-N/10 of 2013, however fact remains that appeal having been preferred by the respondent/accused was allowed, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be set-aside. In the aforesaid background, appellant-State, has approached this Court by way of instant proceedings, praying therein for restoration of the judgment passed by the learned trial Court, after setting aside the judgment of acquittal recorded by the learned First Appellate Court.

6. Mr. Vikrant Chandel, learned Deputy Advocate General, vehemently argued that the impugned judgment of acquittal recorded by learned First Appellate Court is not sustainable in the eye of law because same is not based upon the proper appreciation of the evidence and as such, same needs to be rectified, in accordance with law. Mr. Chandel, while making this Court to travel through the impugned judgment of acquittal recorded by learned First Appellate Court, strenuously argued that learned First Appellate Court has miserably failed to appreciate the evidence in its right perspective, as a consequence of which, erroneous findings have come on record and the accused has been let of on very flimsy grounds. Learned Deputy Advocate General, further contended that if the statements of PW-1 and PW-2 are read in conjunction, it clearly suggest that on the date of alleged incident accused entered into the room of the prosecutrix and thereafter made an endeavour to outrage her modesty and as such, there was no scope left for the court below to set-aside the well reasoned judgment passed by the learned trial Court and as such, impugned judgment of acquittal being contrary to the record available on record, deserves to be quashed and set-aside.

7. Mr. Chandel, learned Deputy Advocate General, further contended that bare reading of the impugned judgment of acquittal, passed by the learned First Appellate Court, clearly suggest that learned court below has drawn its own inferences while ascertaining the guilt of the accused and has arrived at wrong conclusion that prosecution was not able to prove its case beyond reasonable doubt.

8. Mr. Ashok Kumar Tyagi, learned counsel representing the respondent/accused, while supporting the impugned judgment of acquittal, contended that same is based upon the correct appreciation of the evidence and as such, same needs to be upheld. While referring to the statements of PW-1 and PW-2, Mr. Tyagi, contended that there are material contradictions and inconsistencies in their statements with regard to the alleged incident and as such, learned First Appellate Court has rightly placed no reliance upon the same. Mr. Tyagi, further contended that there is no explanation, worth the name, available on record with regard to the delay in lodging of the FIR, which admittedly came to be lodged after two days of the alleged occurrence. Mr. Tyagi, further contended that there is no independent witness associated on record by the prosecution to lend support, if any, to the story/version put forth by the prosecution witnesses and as such, no conviction, if any, could be recorded by the learned court below merely on the basis of the statements of husband and wife, who otherwise categorically admitted in their cross-examination that they have prior litigation pending in the competent Court of law against the accused.

9. I have heard learned counsel representing the parties and have carefully gone through the record made available.

10. During the proceedings of the case, this Court had an occasion to go through the entire evidence adduced on record by the prosecution vis-à-vis impugned judgment of acquittal recorded by the learned First Appellate Court and as such, this Court finds it difficult to accept the submissions of learned Deputy Advocate General that learned First Appellate Court has misread, misinterpreted and misconstrued the evidence adduced on record by the prosecution while examining the correctness of the judgment of conviction recorded by the learned trial Court. Rather, this Court after having perused the entire record, has no hesitation to conclude that no much reliance could be placed on the versions put forth by PW-1 and PW-2 because of material contradictions and inconsistencies in their statements and as such, learned First Appellate Court rightly ignored them while ascertaining the guilt, if any, of the respondent/accused. Similarly, this Court finds no error in the findings returned by the learned First Appellate Court that the prosecution has not been able to prove its case beyond reasonable doubt.

11. Interestingly, in the case at hand, there is no attempt on the part of the prosecution to prove the contents of the challan filed under Section 173 of Code of Criminal Procedure, because the statements having been made by PW-1 (prosecutrix) and her husband PW-2, nowhere support the story put forth by the other prosecution witnesses, rather both the aforesaid witnesses have given altogether different story. If the statements of prosecution witnesses are examined/ analyzed, it certainly suggest that an endeavour has been made to prove on record that accused was stranger to the family of the complainant and he was not related to the prosecutrix, in any manner. Prosecutrix (PW-1) in her statement stated that accused resides at a little distance from her house. If the charge sheet filed by the SHO, is read juxtaposing statement of PW-1(prosecutrix), it suggest that something else. In charge sheet, it has been specifically mentioned that sister of the accused is married to the brother-in -law (Jaith) of the prosecutrix and due to this relationship accused had been visiting the house of the prosecutrix frequently. It also emerge from the record of challan that on 26.o1.2009 accused was present in the house of the prosecutrix and accused taking undue advantage of the absence of husband of the prosecutrix, made an attempt to outrage the modesty of the prosecutrix. Version as contained in the challan filed under section 173 of Code of Criminal Procedure is totally contrary to the statement of the prosecutrix, who stated that accused resides at a little distance from her house. As per prosecutrix, she was watching television at her house on 26.1.2009 and at around 10:00 PM, her husband went out to irrigate the fields. She further stated that she alongwith her seven months old son were in the room, when accused Vicki @ Surinder came there and asked her the

whereabouts of her husband. She further stated that thereafter the accused left her house and she fell asleep while watching television. As per prosecutrix, she after some time felt that somebody was touching her private parts and she woke up and saw that it was the accused, who had made an attempt to sexually assault her. In the meanwhile, her husband returned back, and accused fled away from the scene. She further stated that her brother-in-law, Shri Data Ram also reached the spot, but interestingly this fact is nowhere stated in the complaint initially lodged by the prosecutrix to the police. Moreover, above named person Sh. Data Ram was given up by the prosecution. She, in her cross-examination, admitted that her mother-in-law resides with her as well as her brother in law. Though, she denied that there is any dispute between her husband and the accused, but admitted that she had filed complaint against Sh. Data Ram for outraging her modesty.

12. Sh. Tara Chand (PW-2), husband of the prosecutrix, deposed that he cultivates his land with his brother Sh. Data Ram. On 26.1.2009, at around 10:00, he left his house to irrigate the fields. He further stated that he returned back at around 11:00 PM and when he switched on the light of his room, he found accused lying over his wife. He further stated that accused had shut the mouth of his wife and was trying to open the string of her salwar. He further stated that television was in running mode. He tried to nab the accused, but he fled away. He further stated that lateron Sh. Data Ram also reached the spot. He and his wife reported the matter to the police on 28th. He further stated that his mother was sleeping in the other room of his house when the alleged incident occurred. If the statement of this witness is read juxtaposing statement of the prosecutrix, it certainly compels this Court to agree with the contention of learned counsel representing the respondent/accused that there are material contradictions and inconsistencies in their statements with regard to presence of the accused at the time of alleged incident. Moreover, it is not understood that if the accused was not known to the complainant and her family, how he could enter in her room at 10:00 PM when allegedly husband of the prosecutrix left for the fields to irrigate the same. There is no evidence available on record that at 10:00 PM, prosecutrix raised hue and cry, if any, meaning thereby, version put forth by these witnesses that accused was stranger is not correct, rather, as has been noticed above, it clearly emerge from the evidence that accused had prior acquaintance with the prosecutrix and her husband and for the whole day i.e. on 26.1.2009, he was present in the house of the prosecutrix. Similarly, there are material contradictions in the statements of PW-1 and PW-2 with regard to the presence of mother-in-law in the house at time of alleged incident. PW-1, categorically stated that though mother-in-law resides with her, but on that day she was in the house of her brother-in-law, but as per PW-2 on the date of alleged incident mother-in-law was sleeping in other room of the house. Though, prosecutrix stated that she made an attempt to rescue herself from the clutches of the accused, but he had gagged her mouth, but story/version put forth by the prosecutrix does not appear to be trustworthy because there is nothing in the statement of PW-2 that when he entered the room of the prosecutrix there were some noise being caused due to scuffle, if any, between the accused and her wife, rather he stated that when he entered the room the accused was lying over the body of the prosecutrix.

13. Leaving everything aside, it is not understood that once Data Ram was a direct eye witness to the incident, why he was given up by the prosecution. Though, explanation has been rendered on record that he was won over, but that could not be a ground for prosecution to give up that witness, especially when there was no other independent witness associated by the prosecution to lend support to the story of the prosecution. Apart from above, it clearly emerge from the cross-examination conducted on these witnesses PW-1 and PW-2, who otherwise are related to each other being husband and wife, that there were other houses adjoining to the house of accused, but there appears to be no effort on the part of the prosecution to associate independent witness.

14. True, it is that the version put forth by the interested witnesses cannot be brushed aside solely on the ground that they are closely related to each other, but law is well settled that version put forth by such witnesses are to be examined carefully and cautiously. In the case at hand, as has been noticed above, it clearly emerge from the record that there was

prior dispute between accused and husband of the prosecutrix with regard to land and as such, learned trial court ought to have exercised due care and caution while ascertaining the correctness of the version put forth by these witnesses while ascertaining the guilt of the respondent/ accused.

15. There is another aspect of the matter at hand that though alleged incident occurred on 26.1.2009, whereas FIR came to be lodged on 28.1.2009 i.e. that after two days and there is no plausible explanation rendered on record by the prosecutrix with regard to delay in lodging the FIR. PW-1 in her statement has stated that since she had no money to pay the fare of the bus, report could not be lodged well within time. It stands duly proved on record that husband of the prosecutrix is a carpenter and earns Rs. 200-300/- per day and as such, explanation rendered on record does not appear to be plausible and was rightly rejected by the learned First Appellate Court. It has also come in the statement of PW-2 that police station is/was 4-5 Km away from his house, this much distance could be covered by the complainant alongwith her husband on foot.

16. Similarly, this Court finds no explanation rendered on record by the prosecutrix that why she left her room unbolted, especially when after departure of her husband at 10:00 PM, accused had entered her room. If version put forth by PW-1 and PW-2 to the effect that accused was stranger is presumed to be correct, prosecutrix should have bolted the door from inside, especially when the accused had entered her room for the first time at 10:00 PM after the departure of her husband. It is also not understood that why prosecution failed to cite mother- in -law of the prosecutrix as a prosecution witness, who could certainly lend some support to the story of prosecution. It stands duly proved on record that accused was closely related to the prosecutrix and her husband and he throughout the day remained present in the house of the prosecutrix, as stands mentioned in the challan.

17. As has been noticed hereinabove, both the prosecution witnesses PW-1 and PW-2 have admitted in one way or other with regard to their enmity with the accused and as such, statement made by the accused under Section 313 Code of Criminal Procedure, wherein he categorically stated that since he had changed the channel of water for irrigating his field, husband of the complainant got furious and lodged false complaint against him, ought to have been examined/considered in that pretext by the court below while ascertaining the guilt of the accused.

18. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> *"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)*
>
> > *" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."*

> *46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.*

19. After perusing the statements of the prosecution witnesses as well exhibits placed on record, two views are possible in the present case and as such, the petitioner-accused is entitled to the benefit of doubt. The learned counsel for the petitioner-accused has placed reliance on the judgment passed by Hon'ble Apex Court reported in ***State of UP*** *versus* ***Ghambhir Singh & others****, AIR 2005 (92) Supreme Court 2439*, wherein the Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> *"6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, his evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred."*

20. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment passed by the learned First Appellate Court, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the appeal is dismissed, alongwith pending application(s), if any.

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

Mahender Singh ...Petitioner

Versus

Hem Raj Sharma ...Respondent

Cr. Revision No. 95 of 2017
Decided on : 3.4.2018

Code of Criminal Procedure, 1973- Sections 421 and 431– Recovery of compensation- Held, compensation granted by Court can be recovered by complainant as if it were fine imposed upon accused. (Paras- 1 and 2)

For the petitioner : Mr. D.N. Sharma, Advocate.
For the respondent : Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The learned counsel for the petitioner submits before this Court that the latter has undergone the substantive terms of imprisonment, imposed upon him. He further submits that he may be permitted to withdraw the instant criminal revision petition. However, the permission , as prayed for, is accorded, subject to a right being reserved, vis-à-vis the complainant, to, by resorting to the mandate of Section 421 of the Cr. P.C., ensure recovery of compensation amount, assessed vis-à-vis him, by the learned trial Magistrate. The reason for granting the aforesaid liberty to the complainant, arises, from a conjoint reading of Section 431 Cr.P.C., with, the mandate of Section 421 Cr.P.C., provisions whereof are extracted hereinafter:

> **421. Warrant for levy of fine-**(1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-
>
> **(a)** issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender;
>
> **(b)** issue a warrant to the Collector of the district, authorizing him to realize the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter;
>
> Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.
>
> (2) The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the summay determination of any claims made by any peson other than the offender in respect of any property attached in execution of such warrant.
>
> (3) Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realize the amount in accordance with the law, relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law;
>
> Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.
>
> **431. Money ordered to be paid recoverable as a fine-** Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine;
>
> Provided that Section 421 shall, in its application to an order under Section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of Section 421, after the words and figures "under section 357", the words and figures" or an order for payment of costs under Section 359' had been inserted.

2. A close reading, of the mandate of Section 431 of Cr. P.C. makes a clear display

of even compensation amount, in respect, of, recovery whereof, no specific mandate exists, rather being also recoverable, in the manner, akin to the ordained manner of recovery of fine. Consequently, with Section 421, of the Cr.P.C., contemplating the mechanism, for recovery of fine, thereupon it is open to the complainant to, resort to mandate thereof, and, hence ensure the recovery of compensation amount, from the petitioner.

3. Consequently, in view of the aforesaid observation(s), the instant petition is dismissed, as withdrawn. All pending application(s), if any, are also disposed of. No costs.

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

Municipal Corporation Shimla ...Petitioner

Versus

Balwant Singh Kukreja ...Respondent

CMPMO No. 347 of 2017
Decided on :3.4.2018

Himachal Pradesh Municipal Corporation Act, 1994- Section 253(3) & (4) – Bar of jurisdiction of civil court – Trial Court granting temporary injunction to plaintiff and restraining Municipal Corporation, Shimla from continuing with proceedings with respect to plaintiff's alleged unauthorized construction – First Appellate Court upholding trial court's order – Petition against – Municipal Corporation raising plea before High Court of bar of jurisdiction of Civil Court in entertaining suit – However, High Court found that there was no material on record showing that aforesaid proceedings were initiated under Section 253 of Act – Matter remanded to trial court to allow Municipal Corporation to place relevant record on file and then decide matter afresh including issue of bar of jurisdiction - Till then status quo order with respect to alleged unauthorized construction granted. (Paras-4 and 5)

For the petitioners : Mr. Hamender Chandel, Advocate.

For the respondents: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate, for the respondent.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The defendant/petitioner initiated proceedings under Section 253 of the Municipal Corporation Act, against the respondent/plaintiff, given the latter allegedly unauthorizedly raising construction, as detailed in the plaint. During the pendency of the suit, the plaintiff instituted an application before the learned trial Court, for, ad-interim restraining the defendant/petitioner, herein, from holding further statutory proceedings, against, the plaintiff/respondent. The learned trial Court granted relief to the respondent/plaintiff. The defendant/petitioner, being aggrieved therefrom, preferred an appeal before the learned appellate Court. The latter Court dismissed the defendant's appeal, whereas, it affirmed the verdict, pronounced by the learned trial Court. The defendant, being aggrieved by the concurrent orders pronounced upon the plaintiff's application, cast under the provisions of Order 39 Rule 1 & 2 CPC, has hence approached this Court.

2. The learned counsel appearing for the petitioner has contended with vigor, that, with Sub-Section (4), of Section 253 of the Municipal Corporation Act, provisions whereof are extracted hereinafter:

"Save as provided in this section no Court shall entertain any suit, application or

other proceedings for injunction or other relief against the Commissioner or restrain him from taking any action or making any order in pursuance of the provisions of this Section."

rather contemplating a complete statutory fetter, and, bar against entertainment, of suits' or initiation of proceedings, for injunction or other relief, against the Commissioner or for restraining him, from, taking any action or making any order, within the ambit, of, the apposite statutory jurisdiction, bestowed upon him (i) hence the entertainment of the plaintiff's suit by the learned trial Court, and also concurrent orders of injunction pronounced, on an application cast, by the plaintiff/respondent, before the Courts below, being hence devoid of jurisdiction. He contends, that, on the aforesaid solitary score, the instant petition be allowed by this Court, and, the apposite concurrent pronouncement(s), be reversed and set aside, given theirs falling beyond the jurisdictional competence, of both the learned Courts below.

3. The aforesaid submission, as addressed before this Court, has not been anvilled, upon, the petitioner herein, tendering before the learned Courts below, the apposite notice, in pursuance whereof, the learned Commissioner, initiated statutory proceedings, against, the petitioner herein. Further more, both the learned Courts below hence, had no opportunity, to therefrom, gauge (i) whether the work/construction, carried by the plaintiff, falling within or falling outside the domain, of Section 253 of the Municipal Corporation Act, (ii) nor both the learned Courts below, had any opportunity to gather, whether, the purported unauthorized works, carried by the plaintiff, falling within the definition of "building", borne in sub-Section (3) of Section 253, of the Act. The aforesaid relevant omission(s), of, by the counsel for Commissioner, obviously constrained, both, the learned Courts below to proceed to hold that prima-facie, the relevant work/construction, falling within or falling outside the statutory domain, of the learned Commissioner, (i) and in absence thereof, thereupon both the learned Courts below, hence assuming jurisdiction upon the lis, obviously they cannot be construed to either exceed jurisdiction vested in them or to exercise jurisdiction beyond the mandate, of law.

4. Be that as it may, also, there occurs no discussion, in the concurrent orders, recorded by both the Courts below, qua the aforesaid submission(s) addressed only before this Court, that, the purported unauthorized construction, raised by the respondent/plaintiff, squarely falling within the domain, of, the statutory definition of "building", hence launching of proceedings, against the plaintiff/respondent, also falling within the purview of, the Municipal Corporation Act, and, besides, hence the statutory bar, constituted, in sub-Section (3) of Section 253 of the Act, being squarely attractable, against, the institution of the suit, by the plaintiff. Since the aforesaid argument neither came to be addressed nor adjudicated upon by the learned Courts below, and, no material in consonance therewith exists, before the Courts below, (i) thereupon, it is deemed fit, to, only for the aforesaid reasons, allow the instant petition, and remand CMA No. 56-6 of 2016, to the learned trial Court, to, enable it to, upon an appropriate application being instituted before it, by the counsel for the Commissioner, accompanied by the relevant documents, in respect whereof the apposite leave, for, their adduction, hence is asked for, and, to be granted, in accordance with law, by the learned trial Court, thereafter, its upon applying its mind, vis-à-vis the material placed before it, hence make a fresh adjudication, in accordance with law, upon CMA No. 56-6 of 2016.

5. Consequently, the instant petition is disposed of. Till a fresh adjudication is most expeditiously made, by the learned Court(s) below upon CMA No. 56-6 of 2016, the parties are directed to maintain status quo, with respect to the purported unauthorized construction. All pending application(s), if any are also disposed of. No costs.

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

Sonu Kumar & Ors. .....Petitioners.

Versus

State of Himachal Pradesh .....Respondent.

Cr.MMO No.22 of 2018
Date of Decision: 3.4.2018

Code of Criminal Procedure, 1973- Sections 320 and 482- Inherent powers – Quashing of FIR and criminal proceedings- Principles enunciated – Held – Power to quash FIR and criminal proceedings under Section 482 are different from power under Section 320 of Code – Power should be exercised to meet ends of justice or to prevent abuse of process of court – However, power should be sparingly used and with caution – High Court can assess the material on record, like nature of injuries, weapon used, part(s) of body where injuries were inflicted, its social impact etc. for forming opinion - As parties had amicably settled matter with intervention of elders, FIR registered for offences under Sections 307, 323, 325, 452, 504 and 506/34 I.P.C. quashed and consequent proceedings set aside. (Paras-10, 11, 13 & 15)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

For the petitioners : Mr. Kul Bhushan Khajuria, Advocate.

For the respondent : Mr. Dinesh Thakur, Additional Advocate General, with Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, a prayer has been made on behalf of the petitioners-accused ***(hereinafter referred to as the accused)*** for quashing of the FIR No. 65 of 2016, dated 17.6.2016, under Sections 452, 307, 323, 325, 504, 506 read with Section 34 of Indian Penal Code (**hereinafter referred to as 'IPC')** registered at Police Station Kihar, District Chamba, H.P., and consequent proceedings pending adjudication before the learned Additional Sessions Judge, Chamba District Chamba, Himachal Pradesh.

2. Mr. Kul Bhushan Khajuria, learned counsel representing the petitioners-accused, while inviting attention of this Court to compromise, contended that both the parties have compromised the matter between themselves and they want to live peacefully in future and maintain cordial relation with each other. Mr. Khajuria, further contended that since parties have arrived into an amicable settlement, without there being any pressure or influence on the complainant, the instant matter may be ordered to be compounded.

3. This Court with a view to ascertain the correctness and genuineness of the submissions having been made by the learned counsel for petitioners-accused as well as compromise placed on record also recorded statement of complainant Smt. Champa Devi, who is present in Court. Complainant Champa Devi stated on oath that she has settled the matter with the petitioners-accused and now she does not want to pursue her complaint further and she has no objection in case the FIR No.65 of 2016 as well as consequent proceedings pending

adjudication before the learned Additional Sessions Judge, Chamba, District Chamba, H.P. against the petitioners-accused are quashed and set-aside. Her statement is taken on record.

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

5. This Court, after having carefully perused the compromise, which has been duly effected between the parties, sees substantial force in the prayer having been made by the learned counsel for the petitioners-accused that offences in the instant case can be ordered to be compounded.

6. Since the application has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the present application in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014)6 Supreme Court Cases 466,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> **"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:**
>
> **29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.**
>
> **29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:**
>
> **(i) ends of justice, or**
>
> **(ii) to prevent abuse of the process of any Court.**
>
> **While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.**
>
> **29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.**
>
> **29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial**

transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and,

therefore, there is no question of sparing a convict found guilty of such a crime".

7. The Hon'ble Apex Court in case ***Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303*** has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497** has also held as under:-

> ***"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.***
>
> ***The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)***
>
> > ***61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the***

compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

8. At this stage, Mr. Dinesh Thakur, learned Additional Advocate General, while inviting attention of this Court to para No. 29.6 of the judgment passed by the Hon'ble Apex Court in ***Narinder Singh's*** case, contended that offences under Section 307 IPC would fall in the category of heinous and serious offences and as such, same is required to be treated as crime against the society and not against the individual alone.

9. True, it is that Hon'ble Apex Court in ***Narinder Singh's*** case has held that offences under Section 307 IPC would fall in the category of heinous and serious offences and is to be treated as crime against the society and not against the individual alone, but perusal of the subsequent observations made by the Hon'ble Apex Court in para-29.6 of the judgment, itself suggest that mere mentioning of section 307 IPC in the FIR or the charge, if any, framed under this provision would not bar the High Court to exercise his power under Section 482 Cr.P.C while examining whether incorporation of section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. Most importantly, in the aforesaid judgment, as referred above, Hon'ble Apex Court has observed that it would be open to the High Court to go by the nature of injuries sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. and in this regard medical report in respect of injuries suffered by the victim can generally be the guiding factor. The Hon'ble Apex Court has further held that at this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

10. At this stage, it would be profitable to take note of the judgment passed by the Hon'ble Apex Court in ***Narinder Singh's case supra,*** wherein it has been held as under:-

"32. We find from the impugned order that the sole reason which weighed with the High Court in refusing to accept the settlement between the parties was the nature of injuries. If we go by that factor alone, normally we would tend to agree with the High Court's approach. However, as pointed

out hereinafter, some other attendant and inseparable circumstances also need to be kept in mind which compels us to take a different view.

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

11. Though, perusal of FIR suggest that husband of the complainant was attacked allegedly by the accused persons, but with the intervention of the respectable persons, complainant as well as other family members resolved to settle the matter amicably. Compromise placed on record which bears the signature of the complainant, clearly suggest that elders of the village intervened in the matter and the parties have not only buried their hatchet, but have decided to live peacefully in future and as such, this becomes an important consideration. The evidence is yet to be led in the Court. In view of the compromise arrived *inter se* parties, there appears to be a minimal chance of the witnesses coming forward in support of the prosecution case, as such, chances of conviction appears to be remote. In view of aforesaid development, it would be unnecessary to drag proceedings and it is in the interest of both the parties, if compromise placed on record is accepted.

12. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in **Central Bureau of Investigation v. Maninder Singh** (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

> "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in **State of Tamil Nadu v R Vasanthi Stanley** (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> "… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"
>
> "…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

13. Accordingly, in view of the averments contained in the application as well as the submission having been made by the learned counsel for the petitioners that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the compromise being genuine, this Court has no inhibition in accepting the compromise and quashing the FIR as well as proceedings pending in the trial Court.

14. Consequently, in view of the peculiar facts and circumstances of the case, wherein parties have compromised the matter at hand, this Court while exercising power vested in it under Section 482 Cr.P.C., deems it fit to accept the prayer having been made by the learned counsel representing the petitioners.

15. Accordingly, in view of the discussion made hereinabove, the FIR No. 65 of 2016, dated 17.6.2016, under Sections 452, 307, 323, 325, 504, 506 read with Section 34 of Indian Penal Code, registered at Police Station Kihar, District Chamba, H.P., and consequent proceedings pending adjudication before the learned Additional Sessions Judge, Chamba District Chamba, Himachal Pradesh, are ordered to be quashed and set-aside.

The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Mahindra & Mahindra Financial Services Ltd and others ...Petitioners

Versus

Smt. Halli Devi ...Respondent

CMPMO No. 416 of 2017
Decided on :3.4.2018

Arbitration and Conciliation Act, 1996- Section 8- **Code of Civil Procedure, 1908-** Order VIII Rule 1- Computation of period of 90 days for filing written statement – In a recovery suit, defendants' application for directing parties to go for arbitration as per terms of agreement was dismissed by trial court on 16.3.2017 – Thereafter, trial court struck of defence of defendants for not filing written statement within 90 days from date of service – For computing period of 90 days Trial Court also including period during which application under Section 8 of Act remained pending before it– Petition against – Held, trial court went wrong in including period during which application under Section 8 remained pending for adjudication before it – Petition allowed – Trial Court directed to take written statement of defendants on record if filed within three weeks. (Paras-2 and 4)

For the petitioners : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

For the respondents: Mr. Vinod Chauhan, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The plaintiff instituted a civil suit for recovery of money. However during the pendency of the civil suit, an application cast under the provisions of Section 8 read with Section 5 of Arbitration and Conciliation Act, 1956 (hereinafter referred to as "the Act"), was preferred by the defendants, before the learned trial Court, wherein they claimed, that since the dispute constituted in the plaint, was, arbitrable, hence the statutory redressal mechanism constituted, under the Act, being rather available for espousal, vis-à-vis the plaintiff. However, under a pronouncement recorded on 16.3.2017, the learned trial Court dismissed the defendants' application, cast under Section 8 read with Section 5 of the Act. The civil suit was listed on 29.4.2017, for the filing of written statement(s), by the defendants, to the plaint, and, it was again listed on 27.6.2017, for filing of written statement(s), by the defendants. However, on 27.6.2017, for omission of the defendants, to institute written statement(s), to the plaint, the learned trial Court concluded, that since the mandatory period of 90 days, has elapsed, since the institution of the suit, upto 27.6.2017, hence it refused indulgence, to the defendants, to institute written statement(s). Also, it ordered for recording of exparte evidence of the plaintiff. The defendants are aggrieved by the aforesaid order, hence institute a petition before this Court.

2. The learned trial Court has apparently committed, a gross error, also has not exercised jurisdiction in accordance with law, in making a conclusion, in the impugned order, of the period of 90 days, rather elapsing since the institution of the suit, upto 27.6.2017, (i)

whereupon it was constrained, to strike off the defendants' right to file written statement, to the plaint. The reason for making the aforesaid conclusion, arises from the factum that with the period, wherewithin the defendants' application, cast under the Act, was pending for adjudication, being neither computable, besides being not reckonable by the learned trial Judge, for his computing the ordained period of 90 days, rather the period of 90 days being computable, from, 29.4.2017 upto 27.6.2017, in interregnum whereof the ordained period of 90 days, has apparently not elapsed.

3. For the reasons which have been recorded hereinabove, this Court holds that the analysis of the material on record by the learned Courts below, suffers, from a perversity or absurdity of mis-appreciation, and, non-appreciation of material on record , besides obviously of apt statutory provisions.

4. Accordingly, there is merit in the petition, and, the same is allowed. The parties are directed to appear before the learned trial Court on 27.4.2018. The learned trial Court is directed to permit the defendants, to, within three weeks from 27.4.2018, institute written statement to the plaint. The records be sent back forthwith. All the pending application(s), if any, are disposed of. No costs.

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

Paras Ram and others ...Petitioners

Versus

Manoj Sharma ...Respondent

CR No.224 of 2017
Decided on : 11.4.2018

Code of Civil Procedure, 1908- Order XXII Rules 4 and 9- Abatement of suit – Death of one of defendants – Application for bringing his legal representatives on record not filed in time – However, another co-defendant is also legal representative of deceased defendant – Held, co-defendant already on record duly represents estate of deceased defendant – Suit in these circumstances, does not abate even if application is not filed within time. (Paras-3 and 4)

For the petitioners : Mr. Sunil Mohan Goel, Advocate.

For the respondents : Mr. Karan Singh Kanwar, Advocate

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

During pendency of civil Suit No. 235 of 2014, titled as "Manoj Sharma versus Bhedi Devi", co-defendant No. 1, expired on 18.10.2014, (a) however, no steps, within 90 days therefrom, were endeavored to be taken by the plaintiff, for begetting her substitution by her LRs, (b) rather an apposite application was moved, on 23.9.2015. Upon CMA No. 206/VI/2015, the learned trial Court, ordered for substitution of deceased co-defendant, by her LRs, as disclosed in the application, also, pronounced an order (c) that given the estate of deceased co defendant No. 1, being represented by co defendant No. 2, latter whereof being one of the LRs of deceased co-defendant No. 1, hence rejected the argument addressed before it, by the learned counsel for the defendant, that rather the aforesaid lapses, hence rendering, the suit, to, on demise of defendant No. 1, hence abate in its entirety, even qua co-defendant No. 2. The defendants, are aggrieved by the impugned order, hence motion this Court.

2. For testing the validity of espousal(s) made before this Court, by the learned counsel for the petitioner, it is imperative, to make illusion(s) to the zimini orders, copies whereof are appended with the instant petition, (i) perusal(s) thereof disclose, that, apparently the apposite permission was granted, on 16.5.2015, by the learned trial Judge, to the plaintiff, whereat the counsel for defendant No. 2 was also present, (ii) however, thereat, and, besides subsequently upto a pronouncement being made upon the apposite application, no scribed motion, was made by the plaintiff, before, the learned trial Court qua the apposite application being disallowed, given for want of apposite steps being taken within time, thereupon the suit abating, in its entirety, (iii) ill fate whereof, repeatedly arising from the factum, of, no apposite application being preferred, before the learned trial Judge, within the mandated period of time. Absence of apposite scribed motions, by the plaintiff, before the learned trial Judge, is also an evident display of the plaintiff being estopped, to raise the aforesaid contention, before this Court.

3. Be that as it may, even otherwise the defendants, had, resisted the apposite application, moved by the plaintiff, on the ground, that, despite his awareness, and, knowledge about demise of co-defendant No. 1, his omitting to take appropriate steps, within time, hence perse visiting upon the apposite application, the ill consequence(s), of its entailing dismissal, especially when no apposite explication, was purveyed, for condoning the delay in the belated institution, of the apposite application, before the learned trial Judge. The aforesaid contention appears to be untenable, given no material existing on record, hence for sustaining the aforesaid espousal. The absence of aforesaid material, does, constrain this Court to infer that there was, no, willful dereliction/omission, on the part of the plaintiff, and, his counsel, in not promptly instituting the apposite CMA, before the learned trial Judge, hence dehors any explication, being purveyed, for the belated institution of the aforesaid CMA, yet not affecting, the pronouncement, on merits, made upon the apposite application.

4. Furthermore, it is apparent, on a reading, of, the memo of parties, of the apposite civil suit, of, all the proposed LRs of Paras Ram, being fathered by one Ses Ram, and, the apposite application contains recital(s), of, the LRs of deceased co-defendant No. 1, alike co-defendant No. 2, being fathered by one Ses Ram, thereupon it appears, as submitted by the learned counsel, for the defendant, that deceased co-defendant No. 1, was, the grand-mother of co defendant No. 2, besides also is the grand mother of other LRs, disclosed in the apposite CMA. Moreover, when it remains uncontrovered, that, dehors the other LRs, proposed to be substituted in place of deceased co-defendant No. 1, yet, impleaded co-defendant No. 2 alone held, the apposite capacity, to, on her demise, hence represent her estate, thereupon even, if, assumingly no orders stood rendered, for deceased co-defendant No. 1 being substituted by her LRs, other than Paras Ram, rather, with the latter being already arrayed as co-defendant No.2, in the apposite civil suit. In aftermath, with co-defendant No. 1, solitarily holding the capacity, to represent the estate of deceased co-defendant No. 1, hence, it cannot be said, that, even if no explicit order was made by the learned trial Judge, vis-à-vis, abatement of the suit, thereupon, immediately on demise of co-defendant No. 1, especially with no apposite motion being made within time, the ill fate(s), of, the suit automatically abating, in its entirety, hence befalling thereupon.

5. Accordingly, there is no merit in the instant revision petition, and, the same is dismissed. The impugned order of 14.9.2017, is maintained and affirmed. All pending application(s), if any, are also disposed of. No costs.

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

Oriental Insurance Company Ltd. ..Appellant
Versus
Smt. Salochna and others ..Respondents

FAO(MVA) No. 531 of 2017
Decided on: April 17, 2018

Motor Vehicles Act, 1988- Section 166- Claim for compensation- Legal representatives of deceased 'B' claiming compensation on account of his death in a motor accident, who was aged 38 years at the relevant time – Claims Tribunal by assessing monthly income of deceased at Rs.5,400/- and giving addition of 50% towards future prospects awarded compensation after applying multiplier of '15' – Tribunal also granting Rs.1 lac each towards loss of consortium and loss of love and affection – Appeal by insurer – Insurer contending that deceased was travelling as a gratuitous passenger and it has no liability – At any rate, addition towards future prospects and compensation granted under conventional heads, is excessive – High Court found that (i) deceased was travelling with goods in offending vehicle (ii) being engaged in private job, Claims Tribunal went wrong in giving 50% increase towards future prospects – High Court brought down addition towards future income (40%) as well as compensation given under conventional heads in consonance with **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157 – Appeal partly allowed and award modified. (Paras- 12 and 13)

Cases referred:
National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157
Sarla Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SC 3104

For the Appellant : Dr. Lalit K. Sharma, Advocate.
For the Respondents : Mr. H.C. Sharma, Advocate, for respondents No. 1 to 7.
Mr. Vivek Darhel, Advocate vice Mr. V.S. Chauhan, Advocate, for respondent No. 8

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Respondents No. 1 to 7 being wife, children and father of Beli Ram (deceased), filed a claim petition under Section 166 of the Motor Vehicles Act before the learned Motor Accident Claims Motor Accident Claims Tribunal(IV) Shimla, District Shimla, Himachal Pradesh, claiming therein compensation to the tune of Rs.15,00,000/- on account of death of deceased Beli Ram in a motor vehicle accident occurred on 29.9.2002.

2. As per claimants, on 29.9.2002 deceased Beli Ram was traveling in the vehicle bearing registration No. HP-37A-1093 (Eicher Canter) owned by respondent No. 8, Smt. Asha Himalvi, from his Village Aloti to Subzi Mandi Dhalli, being driven by its driver in a rash and negligent manner and when vehicle reached at Bajasra at about 7.15 am, it rolled down the road into a deep gorge resulting into death of Beli Ram and driver of the vehicle. Though Beli Ram was taken to Civil Hospital Theog, but he was declared brought dead. It is alleged that the accident took place due to rash and negligent driving of driver of the vehicle. Deceased was stated to an agriculturist growing vegetables etc. He was engaged as a cleaner by respondent No. 8, who is owner of the vehicle and had been working as such for the last six months. Deceased was carrying his cabbage in the said vehicle for sale in the market at Shimla. A petition came to be filed under Workmen's Compensation Act, which was later withdrawn. Yet another petition came to be filed under Motor Vehicles Act, which was also withdrawn with liberty to file afresh.

Claimants prayed for award of Rs.15,00,000/- as compensation on account of death of Beli Ram. Interest at the rate of 12% p.a. was also claimed on the award amount.

3. Respondent No. 8 (owner), while filing reply to the claim petition took objection of maintainability, vehicle being insured with appellant-Insurance Company and liability if any, was that of the insurer. On merits, factum of accident and vegetables being loaded in the vehicle at the time of accident is admitted. However, it was denied that the driver was rash and negligent in driving the vehicle.

4. Appellant-Insurance Company resisted the claim of the claimants by raising preliminary objections of maintainability and ill-fated vehicle being plied in violation of terms and conditions of insurance policy without any registration-cum-fitness certificate. On merits, factum of accident is not denied. It was averred by the appellant-Insurance Company that the deceased was an unauthorized passenger in the vehicle and as such, appellant-Insurance Company was not liable to indemnify the claimants.

5. Learned Tribunal below vide impugned award allowed the claim petition thereby holding claimants entitled to a sum of Rs.13,91.400/- with interest at the rate of 9% from the date of filing of the petition till realization, to be paid by the appellant-Insurance Company.

6. In the aforesaid background, appellant-Insurance Company being aggrieved and dissatisfied with the aforesaid award passed by learned Tribunal below, approached this Court in the instant proceedings, praying therein for setting aside the impugned award.

7. Dr. Lalit K. Sharma, learned counsel representing the appellant-Insurance Company argued that the impugned award is against law and facts as such, same is liable to be set aside. He further contended that bare perusal of impugned award clearly suggests that the learned Tribunal below has not appreciated the evidence in its right perspective, as a consequence of which, erroneous findings have come on record to the detriment of the appellant-Insurance Company. Dr. Lalit K. Sharma, further contended that the finding returned by the learned Tribunal below on issue No. 4 Is liable to be set aside being contrary to pleadings and evidence adduced on record by respective parties. He further contended that it stands duly proved on record that claimants at first instance had preferred a claim petition under Workmen's Compensation Act, wherein it was stated that deceased was under employment of respondent No. 8 as cleaner but when said averment was denied by the respondent No. 8, claimants withdrew said petition. Dr. Lalit K. Sharma further contended that another claim petition under Section 166 of Motor Vehicles Act was also withdrawn. Dr. Lalit K. Sharma stated that in the present case, it is third petition wherein claimants have taken a plea that deceased was traveling alongwith his goods i.e. cabbages and he was also discharging duties of cleaner with the truck of respondent No. 8. He stated that as per RX-2 i.e. copy of insurance policy, RX-3 i.e. copy of RC, truck was a goods carriage, where no risk of unauthorized passenger was covered. Dr. Lalit K. Sharma contended that claimants in order to support the factum that deceased was traveling alongwith goods have not examined any witness as such, present appeal deserves to be allowed and liability is required to be shifted upon respondent No. 8. Learned counsel for the appellant-Insurance Company further contended that the learned Tribunal below erred in taking monthly income of the deceased as Rs. 8100/- [Rs.5400 + 2700(50% addition)] for the purpose of compensation, whereas learned Tribunal below ought to have deducted 1/3rd from the salary of deceased i.e. Rs.5,400/-, and as such, impugned award is liable to be set aside. Lastly, Dr. Lalit K. Sharma contended that deceased was not serving in any regular establishment and learned Tribunal below ought not have made addition of 50% in the established income of deceased, as has been laid down by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157. Dr. Lalit K. Sharma also contended that learned Tribunal below also erred in awarding interest at the rate of 9% per annum because, as per prevalent market rate, interest could not be awarded more than 7.5% per annum. While placing reliance upon the judgment rendered by Hon'ble Apex Court in **Pranay Sethi (**supra**)**, Dr. Lalit K. Sharma contended that the learned Tribunal below has awarded a sum of Rs. 1,00,000/- each on account of loss of loss of love and affection and Rs. 1,00,000/- to claimant No.1 under the head of loss of

consortium, and Rs. 25,000/- on account of funeral charges, whereas, as per aforesaid judgment passed by Hon'ble Apex Court, only Rs. 40,000/- and Rs.15,000/- can be awarded under the heads of loss of consortium and funeral charges and no amount can be awarded under the head of loss of love and affection. Dr. Lalit K. Sharma also placed reliance upon judgment passed by Hon'ble Apex Court in **Laxmidhar Nayak and ors** v. **Jugal Kishore Behera and Ors**, (Civil Appeal No. 19856 of 2017, arising out of SLP(C) No. 31405 of 2016), to suggest that interest awarded by the learned Tribunal below is on higher side.

8. Mr. H.C. Sharma, learned counsel representing respondents No.1 to 7 (claimants) supported the judgment passed by the learned Tribunal below and contended that there is no illegality or infirmity in the impugned award and same deserves to be upheld. While inviting attention of this Court to the evidence available on record, Mr. H.C. Sharma contended that it stands duly proved on record that the deceased died due to rash and negligent driving of driver of the offending vehicle, which was admittedly insured with the appellant-Insurance Company at the relevant time. She further contended that it stands duly proved on record that monthly income of deceased was Rs.5,400/- per month, as such, learned Tribunal below drawing strength from law laid down in **Reshma Kumari**'s case (supra) rightly made an addition of 50% to the actual salary while assessing future prospects. Learned counsel fairly conceded that in terms of judgment rendered in **National Insurance Company Limited** v. **Pranay Sethi and others,** AIR 2017 SC 5157, claimants are entitled to Rs.15,000/- on account of funeral charges and Rs.40,000/- on account of loss of consortium to claimant No.1.

9. Having heard the learned counsel for the parties and perused the record, this Court finds that the claimants successfully proved on record that the monthly income of deceased was Rs.5,400/- at the time of accident. Learned Tribunal below has further held that the deceased was not traveling as a gratuitous passenger in the vehicle in question, rather, he was traveling with his agricultural produce, which has not been rebutted by the appellant-Insurance Company. Besides, the appellant-Insurance Company has not led any proof to show that the vehicle in question was being plied in violation of the terms of the insurance policy. So far as objection taken by the appellant-Insurance Company that the claimants had earlier filed two petitions, one under Workmen's Compensation Act and another under Motor Vehicles Act but it would be pertinent to note here that both these petitions were not decided on merit and were withdrawn with liberty to file afresh as such, this objection does not have any weight and deserves dismissal. Learned Tribunal below while placing reliance upon judgment rendered in **Sarla Verma & Ors.** v. **Delhi Transport Corporation and Anr**., AIR 2009 SC 3104, rightly applied multiplier of 15 because undisputedly deceased was 38 years old at the time of accident.

10. Having perused judgment rendered by the Hon'ble Supreme Court in **Pranay Sethi's** case, this court is persuaded to agree with the contention of Dr. Lalit K. Sharma, learned counsel representing the appellant-Insurance Company that the Tribunal has erred in making addition of 50% of actual salary /income of deceased while determining future prospects. This Court is also in agreement with the contention of Dr. Lalit K. Sharma that in the aforesaid judgment Hon'ble Apex Court has specifically quantified the amounts to be paid under conventional heads i.e. loss of estate, loss of consortium and funeral charges. Relevant paragraphs of aforesaid judgment are reproduced herein below:

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral

expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-

"17. ... In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.

50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another it has been reiterated by stating:-

"...we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

"3. General Damages (in case of death):

The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses- Rs.2,000/-.

(ii) Loss of Consortium, if beneficiary is the spouse- Rs.5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage

amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be

an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case

of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

11. In view of aforesaid exposition of law laid down in **Pranay Sethi's** case, amount awarded under various heads i.e. funeral expenses and loss of consortium needs to be reassessed.

12. Accordingly, amount awarded under funeral expenses and loss of consortium is modified to Rs.15,000/- and Rs.40,000/- instead of Rs.1,00,000/- each. Similarly, as has been observed above an addition of 40% of established could have been made by the learned Tribunal below in the case of deceased who was self employed and 38 years old, while assessing compensation on account of future prospects. In the case at hand, established income of deceased is Rs.5400/- per month and after adding 40% of the actual income/salary of deceased, same comes to Rs.7560/- (Rs. 5400+2160) per month. Learned Tribunal below taking note of the ratio of law laid down in **Sarla Verma's** case has deducted 1/5th amount towards personal living expenses of the deceased and as such, contribution of deceased towards family comes to Rs.7560-1520 = 6048 per month and Rs.72,576/- per annum and after applying multiplier of 15, total loss of dependency comes to Rs. 10,88,640/-.

13. In view of aforesaid modification, claimants are entitled to a sum of Rs. 10,88,640/-, on account of loss of dependency instead of Rs. 11,66,400/- as awarded by the learned Tribunal below. However, this Court while exercising powers under Order XLI, Rule 33 CPC, wherein appellate court enjoys power to pass any decree and make any order, which ought to have been passed or made, as the case may be, deems it fit to grant an amount of Rs. 15,000/- on account of loss of estate. In view of aforesaid modification, now the claimants shall be entitled to the following amount:

1.	Loss of dependency	Rs.10,88,640/-
2.	Loss of Estate	Rs. 15,000/-
3.	Funeral charges	Rs.15,000/-
	Total	**Rs.11,18,640/-**
4.	Loss of consortium (petitioner No. 1)	Rs. 40,000/-
	Total	**Rs.11,58, 640/-**

14. Though, reliance placed on the judgment rendered by the Hon'ble Apex Court in **Laxmidhar Nayak** (supra) by the learned counsel representing the appellant-Insurance Company in support of his contention that the learned Tribunal below has fallen in grave error while awarding interest at the rate of 9% to the claimants on the awarded amount, is wholly misplaced because there is no thumb rule/law that interest on the compensation /awarded amount cannot be awarded at the rate of 9%, however, in the given facts and circumstances of the case, interest awarded at the rate of 9% is modified to 7.5% and as such, claimants shall be entitled to interest at the rate of 7.5% on the awarded amount.

15. The compensation of Rs.11,18,640/- shall be apportioned amongst claimants No.1 to 6 as under:

50% to claimant No.1 being wife

10% each to claimants No.2 to 6

Rs. 40,000/- to claimant No.1 under the head of loss of consortium

16. Consequently, in view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications if any.

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

State of Himachal Pradesh ....Appellant

Versus

Sanjay Dahiya ....Respondent

Criminal Appeal No.426 of 2010
Date of Decision: 17.04.2018

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Sections 279, 337 and 304-A – **Motor Vehicles Act, 1988-** Section 185- Trial Court convicting and sentencing accused for offences punishable under Sections 279, 337 and 304-A of I.P.C. on proof that he was driving car rashly and also under influence of liquor which led to motor accident resulting in death of 'B' – In appeal, Sessions Judge setting aside conviction and sentences and acquitting accused on ground that his identity as a driver of vehicle not clearly established - On facts, High Court found that none of witnesses stated before trial court that he had seen accused driving car at relevant time or he was pulled out from driver's seat from fallen vehicle – Held – Identity of accused as driver of offending vehicle not proved beyond doubt – Appeal dismissed- Acquittal upheld. (Paras-11 to 15 and 20)

Cases referred:

State of H.P. versus Ashok Kumar; 2018(Suppl.) Him. L.R.3055
C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645
Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406
State of Karnataka v. Satish,"1998 (8) SCC 493

For the Appellant Mr. Vikrant Chandel, Deputy Advocate General.
For the Respondent : Mr. Anand Sharma, Advocate with Mr.Karan Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Instant Criminal Appeal is directed against the judgment of acquittal dated 23.4.2010, passed by learned Sessions Judge, Kullu, District Kullu, H.P., in Criminal Appeal No. 4 of 2008, whereby the judgment of conviction and sentence, dated 24.3.2008/27.3.2008, passed by the learned Judicial Magistrate 1st Class, Manali, District Kullu, H.P., in Criminal case No.102-I/2007 & 36-II/2007, has been set-aside.

2. Facts, as emerge from the record are that on 17.02.2007, at about 10:30 PM, a telephonic message was received at police Station, Manali that a Maruti car bearing registration No.DL-1CC-6169 met with an accident at a place called Ranghri and two persons, in an injured conditions, were trapped in the same. On the basis of aforesaid information, ASI Lal Chand (PW-7), alongwith other police Officials, reached at the spot and pulled out two persons lying trapped

in the vehicle, whereafter they were taken to Mission Hospital, Manali. According to prosecution story, the police lateron came to know that accused Sanjay Dahiya was driving the car, whereas another occupant namely Bhopinder Singh was second person sitting in the vehicle. Since, it was raining on 17th February, 2007, spot was inspected by the police on the next day i.e.18th February, 2007. During spot inspection, police found that there were 30 feet long skid marks of the vehicle at the spot. During investigation, police arrived at a conclusion that alleged accident occurred due to rash and negligent driving by the accused, who at that relevant time was driving the vehicle under the influence of liquor. On the basis of aforesaid investigation, formal FIR Ex. PW1/B came to be registered against the accused. After completion of the investigation, police presented the challan in the competent court of law i.e. Judicial Magistrate 1st class, Manali, District Kullu, Himachal Pradesh.

3. The learned trial Court after satisfying itself that a prima-facie case exists against the accused, put notice of accusation to him under Sections 279, 338 and 304-A of IPC and Section 185 of the Motor Vehicles Act, to which he pleaded not guilty and claimed trial. It may be noticed that another occupant of the vehicle namely Sh. Bhopinder Singh, who remained admitted in Mission Hospital, Manali, succumbed to his injuries after three days of the unfortunate accident and as such, Section 304-A of IPC came to be inserted in the FIR, mentioned hereinabove.

4. Learned trial Court vide judgment dated 24.3.2008, held the respondent/accused guilty of having committed the offences punishable under Sections 279, 338 and 304-A of IPC, and accordingly convicted and sentenced him as under:-

1. To undergo simple imprisonment for a period of three months and to pay fine of Rs.500/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month under Section 279 of IPC;

2. To undergo simple imprisonment for a period of six months and to pay fine of Rs. 500/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month under Section 338 of IPC;

3. To undergo simple imprisonment for a period of one year and to pay fine of Rs. 2000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month under Section 304-A of IPC;

Vide aforesaid judgment learned trial Court acquitted the accused of notice of accusation put to him for having committed the offence punishable under Section 185 of the Motor Vehicles Act.

5. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the learned trial Court, respondent/accused preferred an appeal in the Court of learned Sessions Judge, Kullu, which came to be registered as Criminal Appeal No.4 of 2008, however fact remains that appeal having been preferred by the respondent/accused was allowed, as a consequence of which, judgment of conviction and sentence recorded by the learned trial Court came to be set-aside. In the aforesaid background, appellant-State, has approached this Court by way of instant proceedings, praying therein for restoration of the judgment passed by the learned trial Court, after setting aside the judgment of acquittal recorded by the learned First Appellate Court.

6. Mr. Vikrant Chandel, learned Deputy Advocate General, while inviting attention of this Court to the impugned judgment of acquittal recorded by learned First Appellate Court, contended that same is not sustainable in the eye of law because same is not based upon the proper appreciation of the evidence and as such, same deserve to be quashed and set-aside. Mr. Chandel, while referring to the evidence led on record by the prosecution to prove its case, strenuously argued that the prosecution proved its case beyond reasonable doubt that on the alleged date of incident, accused was driving the vehicle rashly and negligently under the influence of liquor, as a consequence of which, another occupant of the vehicle namely Bhopinder Singh lost his life and as such, learned trial court rightly held him guilty of having committed the

offences punishable under Sections 279, 338 and 304-A of IPC. He further contended that there is no illegality and infirmity in the judgment of the conviction recorded by the learned trial Court. Mr. Chandel, while making this Court to travel through the impugned judgment of acquittal recorded by learned First Appellate Court, strenuously argued that learned First Appellate Court, has miserably failed to appreciate the evidence in its right perspective, as a consequence of which, erroneous findings have come on record and the accused has been let of on very flimsy grounds.

7. While referring to the statement of Devender (PW-8) i.e. so called independent witness, Mr. Chandel, contended that though this witness was declared hostile, but it has specifically come in his statement that at the time of the accident, vehicle in question was being driven by the accused and as such, findings to the contrary recorded by the learned First Appellate Court is not sustainable. While referring to the statement of PW-7(Investigating Officer), Mr. Chandel, also contended that it has also come in the statement of this witness that accused Sanjay Dahiya was driving the vehicle at that relevant time and as such, learned First Appellate Court has fallen in grave error while concluding that the prosecution has not been able to prove that at the time of the alleged accident, respondent/accused was driving the vehicle. Lastly, Mr. Chandel, while placing reliance upon the spot map Ex.7/B, contended that 30 feet skid marks were observed by the Investigating Officer at the time of spot inspection, which itself suggests that vehicle at that relevant time was being driven by the respondent/accused rashly and negligently and as such, findings to the contrary recorded by the learned First Appellate Court is not sustainable.

8. Mr. Karan Sharma, learned counsel representing the respondent-accused, while supporting the impugned judgment of acquittal, contended that same is based upon the correct appreciation of the evidence and as such, same needs to be upheld. While refuting the aforesaid submissions having been made by learned Deputy Advocate General, Mr. Sharma, strenuously argued that bare perusal of the impugned judgment of acquittal recorded by the learned First Appellate Court, suggest that learned First Appellate Court has dealt with each and every aspect of the of the matter very meticulously and there is no scope of interference as far as this Court is concerned. With a view to substantiate his aforesaid argument, Mr. Sharma, made this Court to travel through the entire evidence led on record by the prosecution, to demonstrate that none of the prosecution witnesses categorically stated something specific with regard to rash and negligent driving, if any, by the respondent/accused. He further contended that none of the prosecution witness has categorically stated that respondent-accused was driving the vehicle in question at that relevant time and as such, learned First Appellate Court, rightly came to the conclusion that prosecution was not able to prove beyond reasonable doubt that vehicle in question was being driven by the respondent-accused at that relevant time.

9. Mr. Sharma, further contended that as per own statement of PW-7 i.e. Investigating Officer, spot was inspected on the next day, which action on the part of the investigating Officer itself create doubt with regard to the correctness of the spot map and as such, learned First Appellate Court rightly not placed reliance upon the same. He further contended that there is no illegality and infirmity in the findings returned by the learned court below with regard to consumption, if any, of liquor by the respondent/accused at the time of alleged accident. Mr. Sharma, contended that otherwise also, learned trial court had acquitted the respondent/ accused under Section 185 of the Motor Vehicles Act, while holding him guilty of having committed the offence punishable under Sections 279, 338 and 304-A of IPC and that finding was never assailed by the appellant-State in the appeal preferred before the learned First Appellate Court and as such, appellant-State cannot be allowed to raise this plea in the instant proceedings. Learned counsel representing the respondent-accused has placed reliance upon the judgment passed by this Court in case titled as ***State of H.P. versus Ashok Kumar; 2018(Suppl.) Him. L.R.3055.***

10. Having heard the learned counsel representing the parties and gone through the evidence led on record, this Court finds considerable force in the argument of learned counsel

representing the respondent-accused that prosecution was not able to prove beyond reasonable doubt that at the time of the alleged accident, vehicle in question was being driven rashly and negligently by the accused. Admittedly, careful perusal of the evidence adduced on record by the prosecution, nowhere suggest that the prosecution was able to prove that at the time of alleged accident, vehicle in question was actually being driven by the respondent/accused, Sanjay Dahiya, who as per prosecution story was in hurry to catch the bus from Manali to Delhi. Interestingly, all the prosecution witnesses have not stated something specific that they saw the respondent-accused driving the vehicle at the time of alleged accident.

11. PW-1, Constable Mohinder Pal while proving the case of the prosecution, reiterated that on 17.2.2007, ASI Lal Chand (PW-7) after having received information, went to the spot of accident and found that car bearing registration No.DL-1CC-6169 had fallen about 30 feet downwards from the road. He further stated that two occupants of the car were taken out by the police in an injured condition and they were taken to Mission Hospital, Manali. He categorically stated that the spot was inspected on 18.2.2007 i.e. one day after the alleged accident, because on the date of accident, it was raining. He further stated that police during the investigation found that accident in question had taken place due to the fact that the vehicle skidded down from the road. Though, this witness stated before the Court below that since driver was under the influence of liquor, he was unable to control the speed of the vehicle, but it is not understood that once he was not present at the time of alleged accident, how he could make such statement. In his cross-examination, he categorically admitted that the accident in question did not take place in his presence. He further admitted in his cross-examination that at the place of occurrence there was a 'U' shape turn on the road, but otherwise same has been shown as blind curve in Ex.PW7/B i.e. spot map. Similarly, though in the statement of this witness it has come that vehicle in question was being driven by respondent/accused Sanjay Dahiya, but question remains that who disclosed him that vehicle in question was being driven by the respondent/accused. Neither, it is the case of the prosecution nor it has come in the statement of this witness that they found respondent/accused sitting on the driver seat when they went to the spot to pull the persons tapped in the offending car.

12. ASI, Lal Chand (PW-7) Investigating Officer, also stated that on 17.2.2007, he received a telephonic message regarding the accident of car bearing registration No.DL-1CC-6169. He further stated that he found on the spot that vehicle had rolled down up to the distance of 30 feet down and the said car had struck a tree. It has also come in his statement that two persons, in an injured condition, were also trapped in it, who were taken out and were admitted in Mission Hospital, Manali. Interestingly, this witness stated that lateron he came to know about the fact that accused-respondent Sanjay Dahiya was driving the vehicle and second occupant according to him was Bhopinder Singh. Interestingly, this witness has nowhere stated that from whom he came to know that vehicle was being driven by the respondent/accused and not by the other occupant Bhopinder Singh. He also like PW-1 nowhere stated that he found respondent-accused trapped in the driving seat. He also admitted that spot was inspected on the next date i.e. 18.2.2007 because on 17.2.2007, it was raining. Though, he admitted that during spot inspection, he found skid marks up to the distance of 30 feet, but he also not denied the suggestion put to him that number of vehicles passes through that road. Since, the accident had occurred on 17.2.2007, skid marks, if any ,observed by PW-7 on 18.2.2007 i.e. near the alleged site of the accident, has no relevance because admittedly as per own version of PW-7 numbers of vehicle passes through that road and he has nowhere stated that during the intervening period i.e. after the accident on 17.2.2007, till the time spot was inspected, no vehicle had passed through that road and as such, learned First Appellate Court, rightly came to the conclusion that no much reliance could be placed upon the report of spot inspection.

13. Another independent witness PW-8 stated that on the date of alleged occurrence at about 9/ 9:50 PM, accused Sanjay Dahiya was planning to go to Delhi. He stated that since bus had already left Manali, accused Sanjay Dahiya took maruti car in order to board the said bus. He further stated that alongwith him Bhopinder Singh Cook was also in the vehicle. In his statement there is no specific mention, if any, with regard to the fact that vehicle in question was

being driven at the relevant time by accused-respondent. He only stated that accused Sanjay Dahiya, who had to catch the bus for Delhi, took out the maruti car and left alongwith Bhopinder Singh. Though, this witness was declared hostile, but in his cross-examination by learned APP, nothing could be elicited to the contrary, what he stated in his examination-in-chief. Save and except, these three witnesses PW-1, PW-6 and PW-7, other witnesses are formal in nature and their version are not relevant for ascertaining the correctness of the judgment of acquittal recorded by the learned First Appellate Court. Since, factum with regard to death of other occupant namely Bhopinder Singh is not in dispute, there is no occasion for this Court to refer medical evidence led on record by the prosecution in this regard. As far as statement of PW-2 Dr. Philip Alexander, who proved the MLC Ex.PW2/A, is concerned, same is also of not much relevance because admittedly in the case at hand no urine and blood sample of accused were drawn for arriving at a conclusion that he was driving the vehicle in question under the influence of liquor. Otherwise also, as has been taken note above, learned trial Court while holding respondent/accused guilty of having committed the offence punishable under Sections 279,338 and 304-A of IPC, has already acquitted the accused for the commission of offence punishable under Section 185 of the motor vehicles Act, which finding of the learned trial court has already attained the finality.

14. Conjoint reading of the statements made by these material prosecution witnesses, discussed hereinabove, certainly creates doubt with regard to the correctness of the story put forth by the prosecution as there are material contradictions and inconsistencies in their statements and as such, no reliance could be placed upon the same.

15. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:- (SCC p.704, para 14)***
>
> > ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of***

all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.

16. Leaving everything aside, close scrutiny of the evidence adduced on record by the prosecution, clearly suggest that none of the prosecution witness stated something specific with regard to high speed and rash and negligent driving, if any, by the respondent/accused. Moreover, as has been observed above, none of the prosecution witness had an occasion to see the respondent/accused driving the vehicle at the time of the accident. True, it is that bare perusal of MLCs adduced on record, suggest that accused himself suffered injuries, whereas another occupant of the car died on account of the injuries suffered by him in the alleged accident, but that may not be sufficient to hold respondent/accused guilty of having committed the offence punishable under Sections 279,338 and 304-A of IPC, especially when there is no direct evidence led on record by the prosecution to prove that at the time of alleged accident vehicle in question was being driven by the respondent/accused. Merely bald statement to the effect that vehicle was being driven rashly and negligently may not be sufficient to conclude that at the relevant time vehicle was being driven rashly and negligently, rather it was incumbent upon the prosecution to bring on record specific evidence, if any, with regard to the alleged rash and negligent driving of the vehicle by the respondent-accused. None of the witnesses have stated something specific with regard to the speed of the car being driven by the respondent-accused at the time of accident, which could be one of the guiding factors while ascertaining the rashness and negligence, if any, on the part of the respondent-accused.

17. Reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406**, which reads as under:-

"6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused- appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.

8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279 IPC is not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."

18. The Hon'ble Apex Court in case titled "***State of Karnataka v. Satish,"1998 (8) SCC 493***, has also observed as under:-

"1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338 and 304A IPC and sentenced to various terms of imprisonment.

The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

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

3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

19. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the

aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

20. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned judgment passed by the learned First Appellate Court, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the appeal is dismissed, alongwith pending application(s), if any.

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

United India Ins. Co.Ltd .....Appellant.

Versus

Sh. Ram Avad Pal and others .....Respondents

FAO No. 152 of 2017
Decided on : 17.4.2018

Motor Vehicles Act, 1988- Section 149(2)- Liability of Insurer – Validity of driving licence – Claims Tribunal burdening insurer with liability to indemnify award – Appeal against – Insurer submitting before High Court that driver was not authorized to drive motor cycle being so, it has no liability – Driver intending to lead additional evidence showing that he was also authorized to drive motor cycle at the time of accident - Matter remanded to Claims Tribunal for recording additional evidence and deciding claim application afresh in light of finding on validity of driving licence. (Paras-4 to 6)

For the Appellant: Mr. Ashwani K. Sharma, Adv.
For Respondents: Mr. Dinesh Bhanot, Advocate, for respondent No. 1.
Mr. Saurabh Rattan, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge (oral).

The Insurance Company, whereon, the apposite indemnificatory liability, was, fastened by the learned Tribunal, has through the extant appeal, hence cast a challenge thereon. The learned counsel for the Insurance company has, prima-facie, at this stage, adequately demonstrated that respondent No. 2, was, at the relevant time, driving a motor cycle, whereas, he was authorized to solitarily drive a Light Motor Vehicle, (a) and, with apparently the category of the vehicle, he was driving at the relevant time, falling in a contra distinct category, therefrom, in as much as a motor cycle, (b) hence the pronouncement recorded by the Hon'ble Apex Court, in (2008) 12 Supreme Court Cases 385, the relevant paragraph whereof is extracted hereinafter:

> **"In the light of the above settled proposition of law, the appellant Insurance Company cannot be held liable to pay the amount of compensation to the claimants for the cause of death of Shukurullah in road accident which had occurred due to rash and negligent driving of scooter by Ram Surat who admittedly had not valid and effective license to drive the vehicle on the day of accident. The scooterist was possessing a driving license of driving HMV and he was driving a**

totally different class of vehicle, which act of his is in violation of Section 10(2) of the MV Act."

(c) wherein, it is clearly expostulated, that, a driver authorized to drive a light motor vehicle, hence not ipso-facto thereupon being also bestowed, with an authorization, to also drive a motor cycle, rather being squarely attracted hereat, (a) the aforesaid submission addressed by the learned counsel, for the Insurance Company, for his hence challenging fastening, of the apposite indemnificatory liability, vis-à-vis it, concomitantly, prima-facie, attains, tremendous legal force.

2. Nonetheless, during the pendency of the instant appeal, before this Court, the learned counsel for the respondent concerned, has instituted an application, cast under the provisions of Order 41 Rule 27 CPC, wherewith a photo copy, of driving license, issued on 4.5.2017, stands appended, (i) with a clear display therein, of, the respondent No. 2, being authorized to drive, a motor cycle in category whereof the offending vehicle, hence also falls. However, the Insurance Company has meted its reply thereto, and, has therein contended, that leave to adduce photo copy, of the driving license, cannot be granted, it being inadmissible, and, irrelevant, for rendering any efficacious findings, upon the issue appertaining, to validity of the apposite driving license. He also contends, that, since the driving license, is apparently issued, on 4.5.2017, whereas, the accident involving, the motor cycle rather occurred in the year 2011, hence also, at the relevant stage, it holds no force or validity.

3. Be that as it may, the force of the aforesaid contention stands blunted, given the non-applicants/ respondents, hence omitting to append along with its reply, all the relevant records, held, by the licensing authority concerned, tritely the one, commencing from the period immediately prior to the occurrence, upto, the year 2017, with clear revealation(s) therein, that, neither respondent No. 2, ever applied, for a driving lincense, for, authorizing him to drive a motor cycle, nor it being issued, in close proximity vis-à-vis the relevant occurrence hence taking place.

4. Consequently, if the relevant records, are held, by the RLA concerned, respondent No. 2/applicant may elicit it them therefrom, for his hence proving qua even at the time contemporaneous, to the occurrence, he held the apposite driving license. Moreover, the appellant shall be permitted to adduce rebuttal evidence thereto.

5. Pre-eminently, since the record, has, to be elicited, by the respondent No. 2, from, the RLA concerned, and is to be obviously thereafter produced, before, the MACT concerned, and, whereafter findings are to be returned by it, upon the issue appertaining to the validity of the apposite driving license, photo copy whereof is appended with the instant application by respondent No. 2, hence the application cast under the provisions of Order 41 Rule 27, is allowed. The appeal is partly allowed, and, the impugned award is quashed and set aside, only with respect to the findings returned vis-à-vis the issue(s) appertaining to the validity of driving license. The matter is remanded to the learned MACT concerned, to return findings afresh, upon, the issue appertaining to the validity of the apposite driving license, copy whereof is appended with the instant application. However, liberty is reserved to the counsel for the Insurance company, to, through a fresh appeal, raise objections, with respect to the quantum of compensation already determined under the impugned award.

6. In view of the aforesaid submissions/observations, the instant appeal is disposed of. All pending application(s), if any, are also disposed of. No costs.

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

Bal Krishan ...Appellant.
Versus
State of H.P. ...Respondent.

Cr.Appeal No. 320 of 2017
Decided on: 20.4.2018

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Possession of 'charas' – Accused was convicted of offence under Section 20 of Act for possessing 425 grams of 'charas' – Sentenced to seven years rigorous imprisonment and fine of Rs.50,000/- with default clause by trial court - Appeal against – Accused arguing that 'case property' produced before trial court does not link him with crime – Defence relying upon alleged discrepancies regarding 'seals' embossed on bulk parcel vis-à-vis description given in recovery memo, NCB Form and FSL reports – High Court found that no cross-examination was done on witnesses qua 'seals' embossed on parcel – Evidence on record was found consistent - Bulk parcel, cloth with sample seal as well as recovery memo, were bearing signatures of accused and witnesses – Conviction upheld – However, in view of young age of accused, sentence reduced to 2 years and fine of Rs.25,000/-. (Paras- 10 to 13 and 15)

For the Appellant: Mr. Tarun K. Sharma, Advocate.
For the Respondent: Mr. Hemant Vaid, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge(oral).

The instant appeal is directed against the judgment rendered on 22.12.2016, by the learned Special Judge, Hamirpur, District Hamirpur, upon, Sessions Trial No.25 of 2015, whereby the appellant stands convicted, AND, is consequently sentenced to undergo rigorous imprisonment, for seven years AND to pay a fine of Rs. 50,000 /-, for commission of an offence punishable under Section 20(B) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') AND in default of payment of fine, he is sentenced to suffer simple imprisonment for six months.

2. Brief facts of the case are that on 29.7.2015, a police party headed by ASI Khem Singh accompanied by HC Naresh Kumar No. 43, HC Pawan Kumar No. 58, HHC Rajesh Kumar No. 237, Const. Rajeev Kumar No. 148 and Const. Gogi Ram No. 149 left Police Station Sujanpur, District Hamirpur at 6:21 p.m. in official vehicle No. HP-67-1718 (Bolero Jeep) being driven by Constable Shashi Kant No. 108 for routine patrolling and illegal mining checking towards Chauri, Saphal etc. vide GD entry No. 49 (A) dated 29.7.2015. At about 7:40 P.M., the police party while patrolling Chauri, Sapahal road was present at a place about 1 ½ Kms ahead of Chauri where they stopped the accused coming from opposite side. The accused on seeing the police party and the police vehicle, turned around and ran towards "Ghasni". The police officials associated Satish Kumar and Rajeev Kumar who were passing by at the relevant time, thereafter apprehended the accused and ascertained his name and identity in their presence. Thereafter, ASI Khem Singh disclosed lhis intention to conduct the personal search of the accused on suspicion. ASI Khem Singh along with other police officials and independent witnesses offered themselves to be searched by the accused in the presence of Constable Rajeev Kumar No. 148 and HHC Rajesh Kumar No. 237,but nothing incriminating was found. Separate memo was prepared duly signed by the independent witnesses. ASI Khem Singh constituted a raiding party by associating independent witnesses Satish Kumar and Rajeev Kumar along with Babita Thakur, Pradhan

Gram Panchayat Saphal. Accused was apprised of his legal right to be searched either before a Gazetted officer or the Magistrate. The accused exercised his option to be searched by the police party vide written endorsement to this effect on the consent memo. Personal search of the accused was conducted in the presence of independent and official witnesses leading to recovery of one polythene bag concealed inside T-shirt near the waist area contained red colour carry bag containing black colour substance in the shape of Pancake (Chapati) and small sticks wrapped in thin transparent polythene wrapper. On checking, the substance was found to be charas. It was weighed with the help of electronic weighing scale available with the IO and was found 425 gms along with polythene wrappers. The contraband substance was thereafter put in the same red carry bag which was put in the polythene bag and sealed in the cloth parcel after affixing 6 seals bearing impression "H". The sample seal "H" was taken on separate piece of cloth. Thereafter, ASI Khem Singh filled up the relevant columns of NCB-I form in triplicate. Fascimile seal impression "H" was taken on NCB-1 form. Seal "H" after its use was handed over to independent witness Satish Kumar, ASI Khem Singh after completing search and recovery formalities, prepared Ruka and handed over the same to Constable Rajeev Kumar No. 148 for the registration of FIR. The case FIR No. 67/2015, dated 29.7.2015 under Section 20 of the NDPS Act was registered against the accused. Statements of the witnesses were recorded under Section 161 Cr. P.C. Accused was arrested. SI Prakash Chand re-sealed the parcel, containing contraband substance in the presence of official witnesses. The sealed parcel was resealed after affixing 4 seals bearing impression "M". The sealed parcel was handed over to HC Ravi Kumar, P.S. Sujanpur for safe custody. On 30.7.2015, the sealed parcel containing contraband substance was sent to State FSL Junga vide RC No. 93/15, dated 30.7.2015 through HHC Desh Raj No. 261.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed before the learned trial Court.

4. The accused was charged for committing, an offence punishable, under Section 20(B) of the ND & PS Act. In proof of the prosecution case, the prosecution examined twelve witnesses. On conclusion of recording of prosecution evidence, the statement of the accused, under Section 313 Cr.P.C., was, recorded by the trial Court, wherein he made disclosures qua his false implication. He did not lead any defence evidence.

5. On an appraisal of evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

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

7. On the other hand, the learned Additional Advocate General, has with compatible force and vigor, contended that the findings of conviction recorded by the learned Court below, standing, based on a mature and balanced appreciation of evidence on record, and, theirs not necessitating interference, rather theirs meriting vindication.

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

9. The Investigating Officer concerned, through, recovery memo borne in Ext. PW1/E, effectuated from the conscious and exclusive possession of the convict, recovery, of, Charas weighing 450 gms. In sequel to recovery(s) of the aforesaid quantum of contraband, standing effectuated, from the purported conscious and exclusive possession, of, the accused

person, the Investigating Officer concerned, prepared NCB form, form whereof stands comprised in Ext. PW12/A "wherein" revelations occur, of, his "embossing upon" the bulk parcel(s) comprised in Ext. P-1 , six seals of English Alphabet "H" (ii) also echoings occur in Ext.PW7/C, of, thereafter Ext. P-1 standing re-sealed, by the SHO concerned, at the Police Station concerned, with four seals, carrying English Alphabet "M". The aforesaid exhibit containing therein "the" Charas, exhibit whereof stood seized under Ext.PW 1/E (iii) "from the" purported conscious and exclusive possession, of, the accused "stood" under a road certificate comprised, in Ext.PW-12/F, hence sent for analysis to the FSL concerned. The FSL Junga purveyed its report thereon, report whereof is comprised in Ext.PZ, wherein it recorded a firm opinion, of, the contents enclosed in the aforesaid bulk parcel "sent to it" for analysis, holding ingredients of Charas. Apart therefrom, the prosecution for establishing the charge, to which the accused stood subjected to, relied upon the depositions' of, official witnesses and, also upon the testification(s) of independent witnesses.

10. The learned Additional Advocate General, has contended, that, with the FSL concerned receiving "in an untampered condition" the bulk parcel, comprised in Ext. P-1, recovery whereof stood effectuated, "through" memo comprised in Ext.PW1/E "from the" purported conscious and exclusive possession of the accused, (i) also with the FSL concerned, in its report, rendered in respect of, contents enclosed therein, report whereof is comprised in Ext. PZ, "unveiling" the trite factum of "its" containing Charas, hence "ought to" constrain this Court, to affirm the findings of conviction recorded upon the accused. He contends that with the apposite NCB form, comprised in Ext. PW12/A (ii) holding complete connectivity "with" the road certificate besides with the seizure memo, comprised in Ext. PW1/E, AND, also with the report of the FSL concerned, comprised in Ext. PZ (iii) importantly "in respect" of all the relevant descriptions vis-à-vis all seal impression(s), initially embossed thereon "at" the relevant site of occurrence, by the Investigating Officer (iv) also in respect "of" description(s) of all the re-embossed/resealed "seal" impression(s) thereon, "by" the SHO concerned, (v) "ultimately", with the prosecution witness(es), to whom the case property stood shown in Court, theirs' thereat categorically "voicing", of, the case property "holding absolute analogity" with respect, to, all the apt description(s), in respect thereof, respectively, held in NCB form Ext. PW12/A, road certificate Ext.PW-12/F, AND, with the report of FSL, comprised in Ext.PZ, (vi) thereupon the judgment of conviction returned upon the accused hence warranting affirmation. The learned counsel appearing for the accused, has contended with much vigor, that the relevant intra se connectivity(s)/congruity(s) interse the seizure of bulk parcel, "through", Ext. PW1/E, "from" the purported conscious and exclusive possession of accused/appellant, vis-à-vis all the aforesaid relevant descriptions (vii) "not" standing efficaciously proven to be linked vis-à-vis the case property "at the stage of its" production in Court. He espouses that the relevant interse lack of analogity(s) in respect of description(s), of all seal impression(s) embossed thereon, at the stage when it stood seized, under memo Ext. PW1/E (viii) and also at the stage when it stood resealed, by the SHO concerned, besides in respect of all the apposite seal impression(s), displayed in the report of the FSL, comprised in Ext.PZ vis-à-vis the ultimate stage, of its production, in Court, whereat it stood shown to the prosecution witnesses, (ix) "is aroused" by the factum of (a) the Public Prosecutor concerned "at" the stage, of, the prosecution witness(es) concerned, standing shown, "in Court" the relevant case property "his" not adducing before the trial Court, the relevant abstract, of, the Malkhana Register, with portrayal(s) therein (x) that at the time of its standing retrieved, from, the Malkhana concerned, by its Incharge, the latter in contemporanity thereof, recording in the relevant register, apposite entries in respect thereof (xi) the Public Prosecutor concerned at the time, of production of the case property in Court, for its hence being shown to the prosecution witnesses concerned, "their not" making any communication(s) therebefore, that "it" stood delivered to him, by an authorized official. (xii) However, the aforesaid submission, does not obtain any strength. (xiii) "Significantly" when a close discernment, of, the depositions', of, the material prosecution witnesses' "unveil", that the learned defence counsel "during" the course of holding them to cross-examination, (xiv) his thereat "omitting to" put apposite suggestion to them, in respect of the apposite bulk parcel borne in Ext.P-1, seizure whereof occurred, through, memo comprised, in Ext. PW1/E hence "not" standing related, to the

apposite subsequently therewith prepared NCB Form, comprised in Ext. PW12/A, (xv) AND vis-à-vis road certificate comprised in Ext.PW-12/F, AND vis-a-vis the report, of the FSL comprised in Ext. PZ"(xvi) "intra se un-relatability whereof", arising from their occurring apparent intra se incongruity(s), with respect to all the apposite description(s), of all seal impression(s), drawn thereon vis-à-vis the ones embossed, on, Ext.P-1 AND vis-à-vis all the apposite display(s) borne in NCB form, embodied in Ext. PW 12/A. (xvii) Even though, the learned defence counsel "at" the stage, of production of Ext.P-1 in Court "had" an opportunity to decipher, from, the case property "occurrence of" any apparent mis-descriptions, AND, also want of any intra se congruity(s) inter se, all the aforesaid exhibits vis-à-vis bulk parcel Ext.P-1 also when the learned defence counsel thereat, held the best opportune moment, to hence make/the relevant unearthings, with respect, to, lack of all purported intra se incongruities interse the aforesaid exhibits vis-à-vis Ext.P-1 (bulk parcel) (xviii) "yet/his" failing to thereat put apposite suggestion(s) to the prosecution witness "in respect of" any lack of any intra se analogity(s) erupting inter se the relevant echoings, made in bulk parcel borne in Ext.P-1, seizure whereof occurred "through" memo Ext.PW-1/E, AND, respectively vis-à-vis NCB Form borne in PW12/A, road certificate Ext.PW-12/F AND the report of the FSL comprised in Ext. PZ" (xix) "significantly" with respect to all seal impression(s) embossed upon Ext. P-1 hence standing displayed or not displayed, in all the aforesaid memos. Consequently, his omitting to hence make any apposite unearthings, from PWs', at the relevant stage, especially with respect to lack of any intra se interse analogity(s), with, respect to all relevant description(s) borne thereon, (xx) conspicuously with respect to all seal impression(s) borne thereon vis-à-vis all seal impression(s) borne, on all memos, prepared subsequently thereto, (xxi) hence begets an inference, of, the defence acquiescing, to recovery of Charas, occurring "through" Ext.PW1/E, also its conceding, of, recovery of the relevant contraband, hence occurring, from, the conscious and exclusive possession of the accused, also thereupon an inference is galvanized, of, bulk parcel Ext.P-1, at, the imperative stage of its production in Court, hence standing efficaciously proven, to stand recovered from the site of occurrence, from, the conscious and exclusive possession of the accused.

11. This Court has with great circumspection dwelt, upon, the efficacy of the aforesaid submission(s), also has traversed, through, the entire evidence apposite thereto. Importantly, with the case property, rather uncontrovertedly bearing the signatures of the accused; b) besides, of, the prosecution witnesses concerned ; c) importantly, with its bearing absolute concurrence(s) interse all the embossed seal impressions thereon, vis-à-vis, those borne in the relevant memos, d) thereupon, with, each of the prosecution witnesses' aforesaid, to whom the case property stood shown, in Court (ii) hence also thereat all in tandem therewith rendering testification(s) with absolute unanimity, of its, thereat bearing concurrence(s), on all the aforesaid fronts, vis-à-vis the apposite therewith recital(s) borne in memo comprised in Ext. PW1/E, whereunder its recovery(s) stood effectuated.(iii) thereupon, does reinforce the above stated conclusion, of, upon its production in Court, its evidently holding all apt concurrence(s) with the connected therewith memos.

12. Furthermore, the sample seal taken, on piece(s) of cloth, bearing Ext. P-1, holds the signatures of the accused, as also of witnesses thereto, even Exhibit PW3/C holds the signatures of the accused, as well as of all the official witnesses thereto, (i) besides sample seal cloth parcel Ext. P-1 holds the signatures of the accused, and, of the witnesses thereto. (ii) With occurrence of all aforesaid signatures thereon, especially when the learned defence counsel, has not, made any attempt for ripping apart authenticity(s) thereof (iii) also his failing to make attempts, in respect of the signatures, of the accused being obtained under compulsion or under duress, also, boosts an inference of his conceding vis-à-vis the truth of all the recitals occurring therein. (iv) Conspicuously, therefrom, it is to be concluded of his omitting to, make endeavour(s) in respect of the relevant item(s) of contraband, recovered under Ext. PW 1/E, being unrelated to parcel Ext.P-1. (v) Omission(s) of aforesaid endeavour(s) also negate the submission of the learned counsel for the appellant, of, the relevant recovery being bereft of any sanctity, theirs being sequelled by sheer contrivance, deployed by the Investigating Officer concerned, for thereupon his falsely implicating the accused.

13. Nowat, the effect of independent witnesses, to recovery memo Ext.PW-1/E, reneging, from their respective previous statements recorded in writing, is to stand construed, alongwith, the factum of theirs' in their respective cross-examinations, to which they stood subjected, to, by the learned Public Prosecutor "on" theirs standing declared hostile, hence admitting the factum of their signatures occurring thereon. Consequently, when they admit the occurrence of their signatures, on the relevant memo(s), thereupon the mandate of Section 91 and 92 of the Indian Evidence Act whereupon they "on" admitting the occurrence of their signatures thereon, hence stood statutorily estopped to renege from all the recitals borne thereon, (i) thereupon the effect of theirs orally deposing in variance or in detraction of the recitals which occur therein, gets statutorily belittled, (ii) rather, when hence they naturally emphatically hence statutorily prove all the recitals comprised in the apposite memo, thereupon theirs orally reneging from all the recitals borne thereon "holds no evidentiary clout" (iii) nor it is legally apt to outweigh the creditworthiness of the testimony(s) of the official witnesses qua the recovery of contraband under recovery memo Ext.PW 1/E, hence standing effectuated from the conscious and exclusive possession of the co-accused. Contrarily the uncontroverted factum of their, authentic signatures occurring in the relevant exhibits, concomitantly renders all the apposite recitals borne thereon to hence hold the gravest probative worth. The ensuing sequel thereof, is that with the statutory estoppel constituted in Sections 91 and 92 of the Indian Evidence Act, barring independent witnesses to orally resile from the contents of Ext.1/E, (iv) especially when they admit that the apposite signatures occurring thereon, belong to them, thereupon renders unworthwhile besides insignificant the factum qua theirs orally deposing in variance of its recorded recitals, (v) whereupon per se an inference stands enhanced qua dehors theirs reneging from their previous statement(s) recorded in writing, rather deduction(s) standing capitalized qua hence theirs' proving the genesis of the prosecution case. Aggravated momentum, to, of the aforesaid inference(s), is garnered (i) by the aforesaid witnesses' also, during the course of their respective cross-examination(s), to which both stood subjected to, by the learned APP, on theirs being, declared hostile, rather making echoings, of the relevant recovery(s), made, under memo borne in Ext. PW1/E, being in their respective presence(s), hence standing effectuated from the conscious, and, exclusive possession, of, the accused.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material on record by the learned trial Court, does not, suffer from any gross perversity or absurdity of mis-appreciation, and, non appreciation of evidence on record. The impugned judgment is affirmed and maintained.

15. However, the learned counsel for the appellants/convicts, makes a prayer, at this stage, for reducing the sentence of imprisonment imposed upon the appellants/convicts. He submits that the aforesaid submission hence being amenable to acceptance, given the convict, being a young person, and, his hence being enabled to reform himself. The aforesaid submission is accepted. The sentence of imprisonment imposed, upon, the appellant/convict is reduced, from, seven years' rigorous imprisonment to, two years' rigorous imprisonment. Sentence of fine, imposed upon the appellant/convict is, reduced from Rs. 50,000/- to Rs. 25,000/- each. In default of payment of fine, he shall further undergo simple imprisonment for three months. The period of detention already undergone by him, is ordered to be set off, from the sentence of imprisonment imposed upon him.

16. Consequently, the sentence(s) of imprisonment and of fine, imposed upon the convict, is to the extent above, hence, modified. Records be sent back forthwith.

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

IFCO Tokio General Insurance Company .....Appellant.
Versus
Budhi Singh and others .....Respondents

FAO No. 261 of 2017
Decided on : 20.4.2018

Motor Vehicles Act, 1988- Sections 149 and 166- Liability of insurer - Driver not authorized to drive offending vehicle – Whether insurer liable ? Held, no – Respondent – Driver was holding driving licence of LMV category – He was not authorized to drive motor cycle – Accident occurred when he was driving motor cycle – High Court held the owner liable but directed insurer to first satisfy award and then recover amount from insured - Kulwant Singh and others versus Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186 relied upon. (Para-2)

Cases referred:
Kulwant Singh and others versus Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186
S Iyyapan versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62

For the Appellant: Mr. Chandan Goel, Advocate.
For Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 to 3.
Mr. Naveen Awasthy, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge (oral).

The Insurance Company, whereon, the apposite indemnificatory liability, was, fastened by the learned Tribunal, has through the extant appeal, hence cast a challenge thereon. The learned counsel for the Insurance company has, prima-facie, at this stage, adequately demonstrated that respondent No. 4, was, at the relevant time, driving a motor cycle, whereas, he was authorized to solitarily drive a Light Motor Vehicle, (a) and, with apparently the category of the vehicle, he was driving at the relevant time, hence falling in a contra distinct category, therefrom, in as much as a motor cycle, (b) thereupon the pronouncement recorded by the Hon'ble Apex Court, in (2008) 12 Supreme Court Cases 385, the relevant paragraph whereof is extracted hereinafter:

> " In the light of the above settled proposition of law, the appellant Insurance Company cannot be held liable to pay the amount of compensation to the claimants for the cause of death of Shukurullah in road accident which had occurred due to rash and negligent driving of scooter by Ram Surat who admittedly had not valid and effective license to drive the vehicle on the day of accident. The scooterist was possessing a driving license of driving HMV and he was driving a totally different class of vehicle, which act of his is in violation of Section 10(2) of the MV Act."

(c) wherein, it is clearly expostulated, that, a driver authorized to drive a light motor vehicle, hence not ipso-facto thereupon being also bestowed, with an authorization, to also drive a motor cycle, rather being squarely attracted hereat, (a) the aforesaid submission addressed by the learned counsel, for the Insurance Company, for his hence challenging fastening, of the apposite indemnificatory liability, vis-à-vis it, concomitantly, prima-facie, attains, tremendous legal force. Moreso, when the respondent No. 4 in his cross-examination

acquiesced, to the trite factum, of his not at the relevant time, holding the apposite authorization, to drive the offending motor cycle.

2. However, in view of the law laid down by the Hon'ble Supreme Court in **(2015) 2 Supreme Court Cases 186, Kulwant Singh and others versus Oriental Insurance Company Limited,** and **(2013) 7 Supreme Court Cases 62, S Iyyapan versus United India Insurance Company Limited and another, the apposite** indeminificatory liability, is, however fastened upon the owner of the offending vehicle(s). Even if the offending vehicle, was, at the relevant time, hence driven by a person, not holding apposite valid driving license, to drive it, yet the Insurer being enjoined to initially defray the compensation amount vis-à-vis the claimants whereafter it being empowered to recover it from the owner of the offending vehicle. Consequently, the compensation amount, assessed vis-à-vis the claimant, in consonance therewith, shall initially be liquidated by the Insurer of the offending vehicle, and, thereafter the insurer shall have the right to recover it, from, the owner.

3. In view of the aforesaid submissions/observations, the appeal is partly allowed. All pending application(s) are disposed of.

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

Sanjay Hallon .....Petitioner.
Versus
State of Himachal Pradesh & others .....Respondents.

Cr.MMO No.458 of 2017
Date of Decision: 20.04.2018

Code of Criminal Procedure, 1973- Section 482- Inherent powers – **Indian Penal Code, 1860-** Sections 279, 337 and 304-A – Quashing of FIR – Held – In appropriate cases, High Court may quash FIR and consequent proceedings even in offences categorized as 'non-compoundable' provided compromise inter se parties is bonafide and without pressure, to meet ends of justice and to prevent misuse of process of court – As compromise between parties was found bonafide, High Court quashed FIR and consequent proceedings. (Paras- 5 & 8)

Cases referred:
Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466
Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497

For the petitioner Mr. T.S.Chauhan, Advocate.
For the respondents Mr. Dinesh Thakur, Additional Advocate General, with Mr. R.R.Rahi, Deputy Advocate General, for the respondent-State.
Mr. Abhey Kaushal, Advocate, for respondents No.2 to 4.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, a prayer has been made on behalf of the petitioners-accused ***(hereinafter referred to as the accused)*** for quashing of the FIR No.398 of 2017 dated 31.08.2017, under Sections 279,

337 and 304-A of Indian Penal Code (**hereinafter referred to as 'IPC')** registered at Police Station, Paonta Sahib, District Sirmaur H.P., and consequent proceedings pending adjudication before the learned Additional Chief Judicial Magistrate, Paonta Sahib, District Sirmaur, Himachal Pradesh.

2. Facts, as emerge from the record are that FIR, detailed hereinabove, came to be lodged at the behest of respondent No.4, Sh. Sher Singh, who reported the matter to police Station, Paonta Sahib that minor daughter of respondents No.2 and 3, while crossing the road has received injuries, after being hit by the vehicle bearing registration No.UP-14AE-4097(Alto Car) being driven by the petitioner-accused. On the basis of aforesaid statement made by respondent No.4, formal FIR, as mentioned hereinabove, came to be registered against the petitioner. After completion of the investigation, police presented the challan in the competent Court of law i.e. Additional Chief Judicial Magistrate, Paonta Sahib, District Sirmaur, Himachal Pradesh.

3. Mr. T.S.Chauhan, learned counsel representing the petitioner, while placing on record joint application having been preferred under Section 482 of Code of Criminal Procedure on behalf of petitioner-accused and respondents No.2 to 4, states that the parties with the intervention of elderly people have resolved to settle their dispute *inter se* them amicably and as such, present case can be ordered to be compounded by this Court while exercising its power under Section 482 of Code of Criminal Procedure. Application is taken on record. Registry is directed to register the same.

4. Mr. Abhey Kaushal, learned counsel representing respondents No.2 to 4, on the instructions of their respective clients, who are present in court, fairly acknowledged the factum with regard to compromise arrived inter *se* the petitioner and respondents No.2 to 4. Mr. Kaushal, further stated that joint application, as referred hereinabove, has been jointly filed by the petitioner and respondents No. 2 to 4 and in view of the compromise arrived *inter se* the parties, respondents, referred hereinabove, have no objection in case the FIR as well as consequent proceedings initiated against the petitioner at the behest of the respondents are quashed and set-aside.

5. Though, perusal of the compromise placed on record, suggest that the petitioner and respondents No. 2 to 4 with a view to leave peacefully in future have resolved to amicably settled the dispute *inter se* them, but this Court solely with a view to ascertain the correctness of aforesaid compromise also recorded the statements of respondents No. 2 to 4 on oath, wherein respondents No. 2 to 4 have categorically stated before this Court that they have entered into the compromise with the petitioner of their own volition without there being any external pressure and they have no objection in case the FIR as well as consequent proceedings initiated by the police at their behest are ordered to be quashed and set-aside. Their statements are taken on record. At this stage, it may be noticed that minor daughter of respondents No.2 and 3, succumbed to the injuries allegedly sustained by her in the unfortunate accident, but, complaint in the instant case was lodged by respondent No.4, who categorically stated before this Court that since respondents No.2 and 3 have resolved their dispute with the petitioner amicably, he has no objection in case the FIR registered against the petitioner on his complaint is ordered to be quashed and set-aside.

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

7. This Court, after having carefully perused the compromise, which has been duly effected between the parties, sees substantial force in the prayer having been made by the learned counsel for the petitioners-accused that offences in the instant case can be ordered to be compounded.

8. Since the application has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the present application in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014)6 Supreme Court Cases 466,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section

482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> **"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:**
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> **29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.**
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> **29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:**
>
> **(i) ends of justice, or**
>
> **(ii) to prevent abuse of the process of any Court.**
>
> **While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.**
>
> **29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.**
>
> **29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.**
>
> **29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.**
>
> **29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the**

> **prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.**
>
> **29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".**

9. The Hon'ble Apex Court in case ***Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303*** has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497** has also held as under:-

> ***"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the***

correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)

> ***61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)***

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

10. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in **Central Bureau of Investigation v. Maninder Singh** (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

> "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in **State of Tamil Nadu v R Vasanthi Stanley** (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> "… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of

documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an

essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

11. Accordingly, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the parties that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the compromise being genuine, this Court has no inhibition in accepting the compromise and quashing the FIR as well as proceedings pending in the trial Court.

12. Consequently, in view of the peculiar facts and circumstances of the case, wherein parties have compromised the matter at hand, this Court while exercising power vested in it under Section 482 Cr.P.C., deems it fit to accept the prayer having been made by the learned counsel representing the petitioner.

13. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, FIR No.398 of 2017 dated 31.08.2017, under Sections 279, 337 and 304-A of Indian Penal Code registered at Police Station, Paonta Sahib, District Sirmaur H.P., and consequent proceedings pending adjudication before the learned Additional Chief Judicial Magistrate, Paonta Sahib, District Sirmaur, Himachal Pradesh, are quashed and set-aside.

The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

The New India Assurance Company ....Appellant.

Versus

Smt. Vimla Devi & others ....Respondents.

FAO No.343 of 2017
Date of Decision: 20.04.2018

Motor Vehicles Act, 1988- Section 166- Grant of compensation- Quantum of – Deceased was self employed – Claims Tribunal gave 50% increase towards future income and granted Rs. 1 lac each towards loss of estate, loss of consortium (to widow) and loss of love and affection besides Rs.25,000/- towards funeral charges – Also directed payment of compensation with interest @ 9% P.A. – Appeal against by insurer mainly on ground of wrong and excessive quantum of compensation – In appeal, High Court granted 40% increase towards future prospects instead of 50%, and also reduced compensation payable under conventional heads in view of ratio laid down

in **Pranay Sethi's** case (AIR 2017 SC 5157) – Also directed payment of interest @ 7.5% P.A.- Appeal partly allowed- Award modified. (Paras– 8, 10 and 11)

Cases referred:
Rajesh and others vs. Rajbir Singh and others, (2013)9 Supreme Court Cases 54
National Insurance Company Limited v. Pranay Sethi and Ors., AIR 2017 SC 5157
Sarla verma & Ors. V. Delhi Transport Corporation and Anr. AIR (2009) 9 SCC 126

For the Appellant Mr. B.M.Chauhan, Advocate.
For the respondents Mr. Vivek Darhel, Advocate, for respondents No.1 to 6.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant appeal, challenge has been laid to the Award, dated 30.5.2017, passed by the learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushehar, Himachal Pradesh, in MAC petition No.63-R/2 of 2016/2015, whereby learned Tribunal while allowing the claim petition having been preferred by respondents No.1 to 6 ***(for short 'claimants'),*** awarded a sum of Rs.24,53,000/- alongwith interest at the rate of 9% to the claimants.

2. Briefly stated facts, as emerge from the record are that the claimants filed a claim petition under Section 166 of the Motor Vehicles Act ***(for short 'M.V.Act'),*** seeking therein compensation to the tune of Rs.50,00,000/-on account of death of Sh.Mast Ram, being his dependents. On 19.07.2014, deceased Mast Ram, alongwith person namely Sh. Ved Prakash hired vehicle bearing registration No. HP-06A-4287 from Rampur to Gaura Mashnoo, to carry welding machine and other welding material. But, unfortunately when aforesaid vehicle reached near Rattanpur, it met with an accident, resulting into death of both Sh.Mast Ram and Sh. Ved Prakash. Driver Amar Singh also died on the spot.

3. Appellant-Insurance Company refuted the claim petition having been filed by the claimants on the ground that driver of the ill-fated vehicle was not having effective and driving licence and the vehicle in question was being driven in violation of the terms and conditions of the insurance policy and as such, appellant-Insurance company is not liable to indemnify the insured. Respondent No.2 i.e. owner of the vehicle claimed that the vehicle was comprehensively insured with the insurance company and as such, insurance company is liable to indemnify the insured.

4. Learned Tribunal below on the basis of the evidence adduced on record by the respective parties, held claimants entitled to compensation to the tune of Rs.24,53,000/- alongwith interest at the rate of 9% per annum. Learned Tribunal below on account of loss of dependency granted a sum of Rs.17,28,000/-, whereas drawing strength from the ratio laid down in the judgment rendered by Hon'ble Supreme Court in ***Rajesh and others vs. Rajbir Singh and others,*** (2013)9 Supreme Court Cases 54, awarded sum of Rs.1,00,000/- as loss of consortium to respondent No.1. i.e. wife of the deceased Mast Ram, Rs.25,000/-as funeral expenses. Apart from above, Tribunal also granted a sum of Rs.1,00,000/- under the head of loss of love and affection to respondents No.2 to 6 each. Tribunal below further held claimants entitled to Rs.1,00,000/- under the head of loss to the estate.

5. Mr. B.M. Chauhan, learned counsel representing the appellant-Insurance company, vehemently argued that the impugned award is against the law and facts and as such, is liable to be set-aside. He further submitted that since compensation has not been awarded as per the settled principles for assessment of compensation by the learned Tribunal below and as such, liable to be quashed and set-aside. Mr. Chauhan, also contended that the deceased was alleged to be in self employment and as such, learned Tribunal below erred in law by awarding

50% increase over and above the income assessed by it. While placing reliance upon the judgment rendered in **National Insurance Company Limited v. Pranay Sethi and Ors.**, AIR 2017 SC 5157, Mr. Chauhan, contended that learned Tribunal has erred in awarding Rs. 25,000/- on account of funeral expenses and sum of Rs.1,00,000/- on account of love and affection to respondents No.2 to 6 each. He further contended that in terms of the aforesaid judgment rendered by the Hon'ble Apex Court, only a sum of Rs.40,000/-could be awarded under the head of loss of consortium to the wife of the deceased and Rs.15,000/- under the head of loss of estate. Lastly, Mr. Chauhan, contended that learned Tribunal below has also erred in law in awarding interest at the rate of 9% on the assessed compensation, whereas it ought to have awarded interest at the rate of 7% i.e. prevailing rate of interest at the time of passing award. In support of his aforesaid contention, he placed reliance upon the judgment passed by the Hon'ble Apex Court in **Laxmidhar Nayak and Ors.** v. **Jugal Kishore Behera and Ors.**, in Civil Appeal No. 19856 of 2017 (arising out of SLP (C) No. 31405 of 2016).

6. Mr. Vivek Darhel, learned counsel representing claimants-respondents No.1 to 6, while supporting the impugned award, contended that there is no illegality and infirmity in the impugned award passed by the learned Tribunal below and as such, same deserves to be upheld. He further contended that it stands duly proved on record that income of the deceased at the time of the accident was Rs.8000/- per month and as such, learned Tribunal below while placing reliance upon the judgment rendered by Hon'ble Apex Court in ***Smt. Sarla verma & Ors. V. Delhi Transport Corporation and Anr.*** AIR (2009) 9 SCC 126, rightly enhanced the income of deceased, who at that relevant time was 34 years of age, by 50% while computing future prospects. Mr. Darhel, while referring to the judgment rendered by the Hon'ble Apex Court in **Pranay Sethi's** case supra, fairly conceded that the claimants are entitled to Rs.15,000/- as funeral expenses and Rs.40,000/- as loss of consortium, however, he disputed the contention raised by the learned counsel representing the appellant-Insurance company that no amount could be awarded under the head "loss of love and affection".

7. Having heard learned counsel representing the parties and carefully gone through the judgment rendered by the Hon'ble Apex Court in **Pranay Seth's** case (supra), this Court finds considerable force in the arguments of learned counsel representing the appellant-Insurance company that in the case of deceased, who was self employed and below the age of 40 years, an addition of 40% of the established income should have been made while computing the future prospects. In the case at hand, admittedly learned Tribunal below made an addition of 50% of actual established income of deceased and as such, award on that account needs to be modified.

8. While making an addition of 40% of the actual established income of deceased, his monthly income comes out to Rs.11,200/-(Rs.8000+Rs.3200=Rs.11,200/-). In the case at hand, 1/4th income of the deceased is liable to be deducted from his income for his personal expenses and after deducting 1/4th income as personal expenses, his contribution towards the family comes to Rs.8400/-(Rs.11200-Rs.2800=Rs.8400/-) There is also no dispute with regard to multiplier of '16' applicable in the present case, as the deceased was 34 years of age at the time of the accident and as such, applying the multiplier of '16' loss of dependency comes out to Rs.16,12,800/-(Rs.8400x12x16=Rs.16,12,800). In view of aforesaid modification, claimants shall be entitled to an amount of Rs.16,12,800/ on account of loss of dependency. Learned Tribunal below while applying the law laid down by Hon'ble Apex Court in **Rajesh case** (supra), awarded a sum of Rs.1,00,00/- under the head of loss of estate and a sum of Rs.1,00,000/- as loss of consortium to respondent No.1. i.e. wife of the deceased, whereas in terms of the recent judgment rendered by Hon'ble Apex Court in **Pranay Seth's** case, only a sum of Rs.40,000/- and Rs.15,000/- can be awarded on account of loss of consortium and loss of estate.

9. Having perused the judgment rendered by the Hon'ble Apex Court in **Pranay Seth's** case (supra), this Court is persuaded to agree with the contention of Mr. B.M.Chauhan, learned counsel representing the appellant-Insurance company that no money could be awarded under the head, "loss of love and affection". Hon'ble Apex Court has categorically held that head

relating to loss of care and guidance for the minor children does not exist. The Hon'ble Apex Court has further quantified the amount to the paid under the aforesaid conventional heads i.e. loss of estate, loss of consortium and funeral expenses. Relevant paras of the aforesaid judgment are reproduced here in below:-

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the Tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-
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> "17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."
>
> 49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.
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> 50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another it has been reiterated by stating:-
>
> "…we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

"3. General Damages (in case of death):

The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses- Rs.2,000/-.

(ii) Loss of Consortium, if beneficiary is the spouse- Rs.5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the Tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made

by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the Tribunal is quite wide, yet it is obligatory on the part of the Tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The Tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the Tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of

computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the Tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the Tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

10. While applying ratio of aforesaid law laid down by the Hon'ble Apex Court in **Pranay Sethi'**s case, amounts awarded under the various heads i.e. funeral expenses, loss of love and affection, loss of estate and loss of consortium, need to be re-assessed. Accordingly, the amount awarded qua the funeral expenses, loss of estate and loss of consortium is modified to Rs.15,000/-, Rs.15,000/- and Rs.40,000/- instead of Rs.25,000/-, Rs.1,00,000/- and Rs.1,00,000/-, as awarded by the learned MACT below. As has been observed above, no amount, if any, could be awarded under the head of "loss of love and affection" and as such, amount award qua the same is quashed and set-aside. Consequently, in view of the aforesaid modifications made hereinabove, now the respondents-claimants No.1 to 6 shall be entitled to following amount:-

Compensation for dependency	= Rs. 16,12,800/
Funeral expenses	= Rs.15,000/-.
Loss of consortium	= Rs.40,000/-
Loss of estate	= Rs.15,000/-
Total	**16,82,800**

11. Though, reliance placed on the judgment rendered by the Hon'ble Apex Court in ***Laxmidhar Nayak*** (Supra), by learned counsel representing the appellant-Insurance company in support of his contention that learned Tribunal below has fallen in grave error while awarded 9% rate of interest to the claimants on the awarded amount, is wholly misplaced because there is no thumb rule/law that interest on the compensation/awarded amount cannot be awarded at the rate of 9%, however, in the given facts and circumstances of the case, interest awarded at the rate of 9% is modified to 7.5% and as such, claimants shall be entitled to interest at the rate of 7.5%

on the awarded amount. The award amount shall be apportioned among the claimants/respondents No. 1 to 6 as under:-

1. Smt. Vimla Devi, wife of late Sh. Mast Ram (including consortium)	Rs. 3,90,000/-
2. Kumari Shalu, D/o late Sh. Mast Ram	Rs. 3,00,000/-
3. Master Abhishek son of late Sh. Mast Ram	Rs. 3,00,000/-
4. Master Ankush son of late SH. Mast Ram	Rs. 3,00,000/-
5. Smt. Ganga Devi, mother of late Sh.Mast Ram	Rs.2,50,000/-
6. Sh. Dhani Ram, father of late Sh. Mast Ram	Rs. 1,42,800/-

12. Needless to say, the amount awarded in favour of respondents/claimants No. 2 to 4(minor) shall be invested in their names, in the fixed deposit, till their attaining the age of majority.

13. Consequently, in view of the detailed discussion made hereinabove and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and the impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications, if any.

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

Reliance General Insurance Company Limited ..Appellant

Versus

Smt. Manju Kumari and others ..Respondents

FAO No. 74 of 2016
Decided on: April 21, 2018

Motor Vehicles Act, 1988- Section 166- Grant of compensation- Claims Tribunal assessed monthly income of deceased aged 27 years at relevant time at Rs.13,000/- p.m., allowed 50% increase towards future income and after applying multiplier of '17' awarded compensation to his widow and mother – Tribunal further holding that accident was result of rash driving of truck, and there was no negligence of deceased, who was driving motorcycle- Appeal against by insurance company – Insurer pleading before High Court that income was wrongly assessed and compensation under conventional heads was on higher side – High Court found that (i) deceased was self employed and (ii) his income was Rs.13,000/- p.m. at relevant time – In view of **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, High Court allowed 40% increase towards loss of future income and after making 1/3rd deduction towards self expenses, awarded compensation to claimants with interest @ 7.5% P.A. – Payments under conventional heads also modified in tune with ratio laid down in **Pranay Sethi's,** case – Appeal partly allowed – Award modified. (Paras-9 & 10)

Cases referred:

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157
Reshma Kumari . Madan Mohan and others 2013 (2) ACJ 1253
National Insurance Company Limited v. Pranay Sethi and others, AIR 2017 SC 5157
Sarla Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SC 3104

For the Appellant : Mr. Jagdish Thakur, Advocate.

For the Respondents : Ms. Kamlesh, Advocate vice Mr. Sanjeev Kuthiala, Advocate, for respondents No.1 and 2.
Mr. Suneet Goel, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Respondents No. 1 and 2 being widow and mother of Lalit Kumar (deceased), filed a claim petition under Section 166 of the Motor Vehicles Act before the learned Motor Accident Claims Tribunal-I Solan District Solan, Himachal Pradesh, claiming therein compensation to the tune of Rs.20,00,000/- on account of death of deceased Lalit Kumar, who at the relevant time was 27 years old and was doing job in a factory. Allegedly, on 1.6.2012 at about 2.45 pm, when deceased was going to factory, a truck being driven by respondent No. 3-Hira Lal came from the behind and struck the motor cycle of the deceased, as a consequence of which deceased suffered multiple injuries and ultimately expired. Claimants claimed before the learned Tribunal below that they had been deprived of the love and affection of the deceased and as such, they are entitled to compensation to the tune of Rs.20,00,000/-.

2. Respondents No.3 and 4 i.e. driver and owner of the offending truck bearing registration No. HP-12D-3164, denied the factum with regard to the accident and claimed that the vehicle in question was not involved in the accident. Both the respondents claimed that accident occurred on account of rash and negligent driving of the vehicle being driven by deceased. Aforesaid respondents also averred in the reply that the vehicle in question was insured with the appellant-Insurance Company at the time of accident and as such, appellant-Insurance Company is liable to indemnify the insured.

3. Appellant-Insurance Company resisted the claim of the claimants by raising preliminary objections of maintainability and offending truck being plied in violation of terms and conditions of insurance policy as such, it was not liable to indemnify the owner. Appellant-Insurance Company further claimed that the motor cycle was being driven by the deceased in violation of the Motor Vehicles Act, without having a valid and effective driving licence, as such, claimants are not entitled to any compensation. Learned Motor Accident Claims Tribunal below, on the basis of pleadings as well as evidence adduced on record by the respective parties allowed the claim petition and held them entitled to compensation to the tune of Rs. 27,52,000/- alongwith interest at the rate of 9% per annum from the date of filing of petition till realization. In the aforesaid background, appellant-Insurance Company being aggrieved and dissatisfied with the aforesaid award passed by learned Tribunal below, approached this Court in the instant proceedings, praying therein for setting aside the impugned award.

4. Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company argued that the impugned award is against law and facts as such, same is liable to be set aside. He further contended that bare perusal of impugned award clearly suggests that the learned Tribunal below has not appreciated the evidence in its right perspective, as a consequence of which, erroneous findings have come on record to the detriment of the appellant-Insurance Company. Mr. Thakur, further contended the learned Tribunal below while returning its findings qua issue No.1 has fallen in grave error because bare perusal of post-mortem report of deceased, Exhibit PW-2/A, clearly shows that the deceased was under the influence of liquor at the time of accident and as such, learned Tribunal below ought to have presumed that deceased himself was negligent. Mr. Thakur further contended that findings returned by the learned Tribunal below qua issue No.4 are also against evidence because post-mortem report Exhibit PW-2/A was proved in accordance with law by the appellant-Insurance Company by examining PW-2, Junior Assistant of Referral Hospital, Nalagarh as such, learned Tribunal below fell in grave error while not holding deceased responsible for the accident. Learned counsel for the appellant-Insurance Company further contended that the learned Tribunal below erred in taking monthly income of the deceased as Rs. 19,500/- [Rs.13000 + 6500(50% addition)] for the purpose of

compensation, whereas learned Tribunal below ought to have deducted 1/3rd from the salary of deceased i.e. Rs.13,000/-, and as such, impugned award is liable to be set aside. Lastly, Mr. Thakur contended that deceased was not serving in any regular establishment and learned Tribunal below ought not have made addition of 50% in the established income of deceased, as has been laid down by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157. Mr. Thakur also contended that learned Tribunal below also erred in awarding interest at the rate of 9% per annum because, as per prevalent market rate, interest could not be awarded more than 7.5% per annum. While placing reliance upon the judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**(supra), Mr. Thakur contended that the learned Tribunal below has erred in awarding a sum of Rs. 50,000/- on account of loss of consortium to claimant No.1 and an equal sum of Rs.50,000/- on account of funeral charges. He contended that as per aforesaid judgment passed by Hon'ble Apex Court, only Rs. 40,000/- and Rs.15,000/- can be awarded under the heads of loss of consortium and funeral charges. Mr. Thakur also placed reliance upon judgment passed by Hon'ble Apex Court in **Laxmidhar Nayak and ors** v. **Jugal Kishore Behera and Ors**, (Civil Appeal No. 19856 of 2017, arising out of SLP(C) No. 31405 of 2016), to suggest that interest awarded by the learned Tribunal below is on higher side.

5. Ms. Kamlesh, learned vice counsel representing respondents No.1 and 2, supported the judgment passed by the learned Tribunal below and contended that there is no illegality or infirmity in the impugned award and same deserves to be upheld. While inviting attention of this Court to the evidence available on record, Ms. Kamlesh contended that it stands duly proved on record that the deceased died due to rash and negligent driving of driver of the offending vehicle, which was admittedly insured with the appellant-Insurance Company at the relevant time. She further contended that it stands duly proved on record that monthly income of deceased was Rs.13,000/- per month, as such, learned Tribunal below drawing strength from law laid down in **Reshma Kumari** . **Madan Mohan and others** 2013 (2) ACJ 1253, rightly made an addition of 50% to the actual salary while assessing future prospects. Learned counsel fairly conceded that in terms of judgment rendered in **National Insurance Company Limited** v. **Pranay Sethi and others,** AIR 2017 SC 5157, claimants are entitled to Rs.15,000/- on account of funeral charges and Rs.40,000/- on account of loss of consortium to claimant No.1.

6. Having heard the learned counsel for the parties and perused the record, this Court finds no force in the contention having been raised by the learned counsel representing the appellant-Insurance Company that the deceased died on account of his own rash and negligent driving, rather, bare perusal of evidence available on record clearly suggests that accident was result of rash and negligent driving of vehicle in question, by respondent No. 3 (driver of the offending vehicle), who while driving vehicle rashly and negligently, hit motor cycle of deceased causing injury to him, which subsequently resulted into his death. Similarly, this Court finds from the evidence available on record that the onus to prove that driver of the offending vehicle was not having valid and effective driving licence to drive the same and offending vehicle was being plied in violation of terms and conditions of insurance policy was on the appellant-Insurance Company, which has not been able to discharge aforesaid onus, rather, it stands duly proved on record that respondent No.3 (driver) was having a valid and effective driving licence to drive the offending vehicle. Evidence available on record further reveals that the claimants successfully proved on record that the monthly income of deceased was Rs.13,000/- at the time of accident. Learned Tribunal below while placing reliance upon judgment rendered in **Sarla Verma & Ors.** v. **Delhi Transport Corporation and Anr**., AIR 2009 SC 3104, rightly applied multiplier of 17 because undisputedly deceased was 27 years old at the time of accident. However, this Court is in agreement with the contention of Mr. Jagdish Thakur that since deceased was 27 years old and self employed, addition of 40% of the established income of the deceased is/was to be made while determining future prospects as has been held in **Pranay Sethi's** case (supra).

7. Having perused judgment rendered by the Hon'ble Supreme Court in **Pranay Sethi's** case, this court is persuaded to agree with the contention of Mr. Jagdish Thakur, learned

counsel representing the appellant-Insurance Company that the Tribunal has erred in making addition of 50% of actual salary /income of deceased while determining future prospects. In the aforesaid judgment Hon'ble Apex Court has specifically quantified the amounts to be paid under conventional heads i.e. loss of estate, loss of consortium and funeral charges. Relevant paragraphs of aforesaid judgment are reproduced herein below:

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-
>
> "17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."
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> 49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.
>
> 50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another it has been reiterated by stating:-
>
> "…we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

"3. General Damages (in case of death):

The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses- Rs.2,000/-.

(ii) Loss of Consortium, if beneficiary is the spouse- Rs.5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made

by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of

computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of selfemployed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

8. In view of aforesaid exposition of law laid down in **Pranay Sethi's** case, amount awarded under various heads i.e. funeral expenses and loss of consortium needs to be reassessed.

9. Accordingly, amount awarded under funeral expenses and loss of consortium is modified to Rs.15,000/- and Rs.40,000/- instead of Rs.50,000/- each. Similarly, as has been observed above an addition of 40% of established income could have been made by the learned Tribunal below in the case of deceased who was self employed and 27 years old, while assessing compensation on account of future prospects. In the case at hand, established income of deceased is Rs.13,000/- per month and after adding 40% of the actual income/salary of deceased, same comes to Rs.18,200/- (Rs. 13000+5200) per month. Learned Tribunal below taking note of the ratio of law laid down in **Sarla Verma's** case has deducted 1/3rd amount towards personal living expenses of the deceased and as such, contribution of deceased towards family comes to Rs.18,200-6067 = 12133, which comes to Rs.145,596 or say Rs.1,45,600/- per annum and after applying multiplier of 17, same comes to Rs. 24,75,200/-.

10. In view of aforesaid modification, claimants are entitled to a sum of Rs. 24,75,200/-, on account of loss of dependency instead of Rs. 26,52,000/- as awarded by the learned Tribunal below. However, this Court while exercising powers under Order XLI, Rule 33 CPC, wherein appellate court enjoys power to pass any decree and make any order, which ought to have been passed or made, as the case may be, deems it fit to grant an amount of Rs. 15,000/- on account of loss of estate. In view of aforesaid modification, now the claimants shall be entitled to the following amount:

1.	Loss of dependency	Rs.24,75,200/-
2.	Loss of Estate	Rs. 15,000/-
3.	Funeral charges	Rs.15,000/-
	Total	Rs.25,05,200/-

4.	Loss of consortium (payable to petitioner No. 1)	Rs. 40,000/-
	Total	Rs.25,45,200

11. The award amount shall be apportioned in the ratio of 60:40 as held by the Motor Accident Claims Tribunal below.

12. Though, reliance placed on the judgment rendered by the Hon'ble Apex Court in **Laxmidhar Nayak** (supra) by the learned counsel representing the appellant-Insurance Company in support of his contention that the learned Tribunal below has fallen in grave error while awarding interest at the rate of 9% to the claimants on the awarded amount, is wholly misplaced because there is no thumb rule/law that interest on the compensation /awarded amount cannot be awarded at the rate of 9%, however, in the given facts and circumstances of the case, interest awarded at the rate of 9% is modified to 7.5% and as such, claimants shall be entitled to interest at the rate of 7.5% on the awarded amount.

13. Consequently, in view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications if any.

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

Reliance General Insurance Company Limited ....Appellant.

Versus

Ishwar Singh & others ....Respondents.

FAO No.43 of 2018
Date of Decision: 23.04.2018

Motor Vehicles Act, 1988- Section 166- Assessment of income- Held- If there is no documentary evidence in proof of income of claimant/deceased, compensation can be awarded by assessing income on basis of minimum wages fixed by Government prevalent at the time of accident. (Paras-10 and 11)

Motor Vehicles Act, 1988- Section 166- Compensation for personal injuries – Claimant, then a student of 12th class, suffered bodily injuries when a tipper driven rashly by its driver dashed against his stationary motorcycle – Ankle of claimant was amputated and he sustained permanent disability to the extent of 70% with respect to left leg – Claims Tribunal assessing monthly income of injured at Rs. 6,000/- and granting compensation in sum of Rs.9,90,658/- with interest – Appeal by insurer – Appellant pleading that compensation granted by Claims Tribunal was on higher side – On finding that there was no documentary evidence regarding income of injured by sale of milk, High Court granted compensation for bodily injuries on basis of minimum wages of Government prevalent at the time of accident – Further, in view of age of injured and permanent disability suffered by him, High Court applied multiplier of '18' and also enhanced compensation under heads 'pain & suffering', 'future discomfort' etc. – Appeal partly allowed – Award modified. (Para-15)

Motor Vehicles Act, 1988- Section 166- Enhancement of compensation- Held- In appropriate cases, High Court can enhance compensation payable to claimant(s) even in an appeal filed by Insurance Company if compensation awarded by Tribunal is not just and fair- Compensation awarded to claimant enhanced by High Court even when there was no appeal against award at his instance – Appeal partly allowed – Award modified. (Paras-9 and 14 to 16)

Cases referred:

Lal Singh versus Himachal Road Transport Corporation and another, 2006 ACJ 482

V.Mekala versus M. Malathi and another, (2014)11 Supreme Court Cases 178

Ranjana Prakash and others versus Divisional Manager and another, (2011) 14 Supreme Court cases 639

Govind Yadav versus New India Assurance Company Limited,2012(1) ACJ 28

Pappi Devi and others versus Kali Ram and others, Latest HLJ2008 (Himachal Pradesh) 1440

Amresh Kumari versus Niranjan Lal Jagdish PD. Jain and others, (2015)4 Supreme Court cases 433

Reliance General Insurance Company Limited versus Shalu Sharma and others (2018)2 Supreme Court Cases 753

S. Thangaraj versus National Insurance Company Limited (2018)3 Supreme Court Cases 605

For the Appellant	Mr. Jagdish Thakur, Advocate.
For the respondents	Mr. O.C.Sharma, Advocate, for respondent No.1.
	Mr. Shriyek Sharda, Advocate, for respondents No.2 & 3.

The following judgment of the Court was delivered:

Sandeep Sharma, J (Oral)

Instant appeal is being taken up for final disposal at pre-admission stage with the consent of the learned counsel representing the parties.

2. Being aggrieved and dissatisfied with the impugned award, dated 4.7.2017, passed by the learned Motor Accident Claims Tribunal-II, Solan (camp at Nalagarh), District Solan, Himachal Pradesh, in MAC Petition No.22-NL/2 of 2014, whereby learned Tribunal below while allowing the petition under Section 166 of the Motor Vehicles Act,1988, having been preferred by respondent No.1 ***(for short 'claimant'),*** saddled the appellant-Insurance Company with liability to pay compensation to the tune of Rs.9,90,658/-alongwith interest at the rate of 8% per annum from the date of filing of the petition till deposit of award amount by insurance company, appellant-Insurance Company has approached this Court by way of instant proceedings, with a prayer to quash and set-aside the impugned award, dated 4.7.2017, passed by the learned Motor Accident Claims Tribunal.

3. Briefly stated facts, as emerge from the record are that the claimant filed a claim petition under Section 166 of the Motor Vehicles Act ***(for short 'Act'),*** seeking therein compensation to the tune of Rs.25,00,000/- on account of the injuries sustained by him in the motor vehicular accident. On 8.3.2014, at around 6:00 PM, at place Harraipur, Police station, Baddi, District Solan, Himachal Pradesh, when the petitioner was standing with his motorcycle bearing registration No. HP-12A-4594 in front of Dogra vegetable shop, a tipper bearing registration No.HP-12F-0980, being driven by respondent No.2 came from Chunri road and hit the motorcycle of the petitioner, as a consequence of which, one leg of the petitioner was crushed. Claimant alleged that the accident occurred due to the rash and negligent driving of respondent No.2. Claimant further claimed that on account of the injuries suffered by him, he remained admitted for four days at PGI, Chandigarh, whereafter he remained admitted in the hospital at Nalagarh w.e.f.12.3.2014 to 19.4.2014, and in this process, he spent huge amount towards his treatment. Claimant also claimed that at the time of the accident, he was studying in 12th class and doing part time work by selling milk and doing agriculture work. Unfortunately, in this accident, his left ankle was amputated and he was unable to appear in examination. Claimant further claimed that in view of the injuries sustained by him, he is not able to get service in army, Police Department etc. and as such, he has lost his future earnings.

4. Respondents No.1 and 2 by way of separate reply refuted aforesaid claim of the claimant and denied that the accident took place due to rash and negligent driving of respondent

No.2. Appellant-Insurance Company while refuting the claim of the claimant, claimed that respondent No.2 was driving the offending truck without having valid and effective driving licence and as such, Insurance Company is not liable to indemnify the insured. Appellant- Insurance Company also denied that the accident took place due to rash and negligent driving of respondent No.2. Appellant-Insurance Company also denied the factum with regard to permanent disability to the extent of 70% suffered by the claimant in the accident.

5. Learned Tribunal below on the basis of the evidence adduced on record by the respective parties, held claimant entitled to compensation to the tune of Rs.9,90,658/- alongwith interest at the rate of 8% per annum jointly and severally against the respondents from the date of filing of petition till the deposit of award amnount by the appellant-insurance company. In the aforesaid background, appellant-Insurance Company has approached this Court by way of instant proceedings.

6. Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance company, while referring to the impugned award, strenuously argued that same is not sustainable in the eye of law, being contrary to the evidence available on record and as such, same deserve to be quashed and set-aside. Mr. Thakur, further contended that bare perusal of the impugned award, clearly suggest that learned Tribunal below has not appreciated the evidence in its right perspective, as a consequence of which, erroneous findings to the detriment of the Insurance company have come on record and as such, same being contrary to the evidence deserves to be quashed and set-aside. Mr. Thakur, contended that as per own case set up by the claimant he was studying in 12th class at the time of the accident and as such, it is not understood that on what basis learned Tribunal below came to the conclusion that monthly income of the claimant was Rs.6,000/- per month. He further stated that it is well settled principle of law that in the absence of documentary evidence, if any, with regard to the income, Tribunal ought to have taken into consideration minimum wages, prevalent at the time of the accident, as prescribed by the Government to assess the income. He further stated that in the year, 2014, the minimum wages of the unskilled worker were not more than Rs.3600/- per month and as such, learned Tribunal below erred in taking income of the claimant as Rs.6000/- instead of Rs.3600/- and as such, impugned award is liable to be quashed and set-aside.

7. Mr. Thakur, further contended that otherwise bare perusal of the evidence available on record, nowhere suggest that the claimant successfully proved on record that he at the relevant time was studying in 12th class. Learned counsel further contended that though certificate placed on record, suggests that the claimant suffered 70% permanent disability with respect to lower left leg, but if the statement of Doctor is read in its entirety, it nowhere suggests that whole body has become dysfunctional on account of the injuries suffered by the claimant in the accident. He further stated that not even a single word has been suggested to the Doctor, who has proved the disability certificate, that due to this disability what amount of loss can be there to the respondent and as such, learned Tribunal below erred in substituting its own opinion, which is not permissible under the law. While referring to the Schedule-1 of the Employee's Compensation Act, 1923, Mr. Thakur, contended that otherwise also as per the schedule, percentage of loss of earning capacity could not be more than 60% on account amputation below middle thigh and as such, award made in this regard, being excessive, deserve to be modified/rectified, in accordance with law. Lastly, Mr. Thakur, contended that learned Tribunal below also erred in awarding interest at the rate of 8% on the awarded amount from the date of filing of the claim petition, whereas same ought to have been from the date of the award. In this regard, he placed reliance upon the judgment rendered by this Court in ***Lal Singh versus Himachal Road Transport Corporation and another*****,** 2006 ACJ 482.

8. Mr.O.C.Sharma, learned counsel representing respondent No.1-claimant, while supporting the impugned award, contended that there is no illegality and infirmity in the impugned award, passed by the learned Tribunal below and as such, same deserve to be upheld. While refuting the aforesaid contentions put forth on behalf of the appellant-Insurance company, Mr. Sharma, strenuously argued that the evidence available on record, clearly suggest that the

claimant successfully proved on record that at the time of the accident, he was studying in class 12th and on account of the injuries suffered by him, he lost future prospect of his being recruited in Army, Police and other Government job and as such, learned Tribunal below rightly awarded just and fair amount of compensation while assessing the future loss of earning.

9. Mr. Sharma, while placing reliance upon the judgment passed by the Hon'ble Apex Court in ***V.Mekala versus M. Malathi and another*****,** (2014)11 Supreme Court Cases 178, contended that learned Tribunal below has not committed any illegality, while taking income of claimant as Rs.6000/- because in similar case of student, Hon'ble Apex Court has taken income of student as Rs.10,000/- per month. Mr. Sharma, further contended that amount of compensation awarded qua other heads i.e. pain and sufferings and future discomfort i.e. Rs.20,000/- and Rs.10,000/- awarded by the learned Tribunal below, is on very lower side and same needs to be enhanced adequately by taking note of the fact that the claimant has lost his one foot in the unfortunate accident. He further contended that learned Tribunal below has also failed to award adequate amount for loss of amenities. While placing reliance upon the judgment rendered by Hon'ble Apex Court in ***Ranjana Prakash and others versus Divisional Manager and another***, (2011) 14 Supreme Court cases 639, Mr. Sharma, contended that this Court enjoys vast power to enhance the amount of compensation even in the appeal preferred by the Insurance company, if it comes to the conclusion that the learned Tribunal below has not awarded just and fair compensation.

10. After having carefully heard the arguments advanced by the learned counsel representing the parties and perused the record; this Court finds considerable force in the argument of Mr. Jagdish Thakur, learned counsel for the appellant-Insurance company that claimant has not led on record specific evidence to prove his income. No doubt, claimant has claimed that he was studying in class 12th at the time of the accident and was doing part time work by selling milk, but no evidence has been led on record in this regard. Needless to say, learned Tribunal below in the absence of specific evidence, if any, led on record by the claimant with regard to his income, ought to have assessed income on the basis of minimum wages prevalent at the time of the accident. In this regard reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Govind Yadav versus New India Assurance Company Limited***,2012(1) ACJ 28, wherein it has been held as under:-

> "17. A brief recapitulation of the facts shows that in the petition filed by him for award of compensation, the appellant had pleaded that at the time of accident he was working as helper and was getting salary of Rs. 4,000/- per month. The Tribunal discarded his claim on the premise that no evidence was produced by him to prove the factum of employment and payment of salary by the employer. Learned Tribunal then proceeded to determine the amount of compensation in lieu of loss of earnings by assuming the appellant's income to be Rs. 15,000/- per annum. On his part, the learned single Judge of the High Court assumed that while working as a cleaner, appellant may have been earning Rs. 2,000/- per month and accordingly assessed the compensation under the first head. Unfortunately, both the Tribunal and the High Court overlooked that at the relevant time minimum wages payable to a worker were Rs.3,000/- per month. Therefore, in the absence of other cogent evidence, Tribunal and the High Court should have determined the amount of compensation in lieu of loss of earnings by taking the appellant's notional annual income as Rs. 36,000/- and the loss of earnings on account of 70 percent permanent disability as Rs.25,200/- per annum.
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> The application of multiplier of 17 by the Tribunal, which was approved by the High Court, will have to be treated as erroneous in view of the judgment in ***Sarla Verma V. Delhi Transport Corporation 2009 ACJ 1298(SC).*** In para 21 of that judgment, the court has indicated that if the age of the victim of an accident is 24 years, then the appropriate multiplier would be 18. By applying

that multiplier, we hold that the compensation payable to the appellant in lieu of the loss of earnings would be Rs.4,53,600/-".

11. Reliance is also placed upon the judgment passed by this Court in ***Smt. Pappi Devi and others versus Kali Ram and others***, Latest HLJ2008 (Himachal Pradesh) 1440, which reads as under:-

> "6. It has come in the statement of claimant Smt. Kala Devi (PW-1) that the deceased while working as a labourer and also selling milk was having an income of Rs. 4000/- per month. Importantly, there is no cross-examination on this point at all. But the fact of the matter, is that no documentary evidence has been placed on record to prove the income. This is the only evidence with regard to income of the deceased on record.
>
> 7. It has come on record that the deceased was illiterate and working as a labourer. In my view, his income determined by the Tribunal i.e. Rs.50/- per day, is on the lower side. Taking the deceased to be employed as a daily wager, the minimum wages paid by the government in the year, 2001 to the labourers was more than Rs.70/- per day. This is not disputed at the Bar. Therefore, the same can be made the basis for determining the income of the deceased. Thus, the monthly income of the deceased is determined as Rs.70x30 Rs.2100/- and after deducting 1/3rd of the amount i.e. Rs.700/- for the purpose of dependency is determined as Rs.1400/-."

12. Mr. O.C.Sharma, learned counsel representing respondent No.1-claimant, fairly admitted that at the time of the accident, minimum wages of unskilled worker in Himachal Pradesh was Rs.170/- and as such, annual income of the claimant, if is assessed on the basis of the minimum wages, comes out to Rs.5100/- per month.

13. Having carefully perused the evidence led on record by the claimant in support of his claim that he suffered 70% permanent disability on account amputation of his leg, this Court is not inclined to agree with the contention having been made by learned counsel representing the appellant-Insurance company that claimant was not able to prove that on account of disability suffered by him, he was totally incapacitated. No doubt, PW-4, Dr. Amarjeet, has stated in his cross-examination that disability of the person is not qua whole body, which is mentioned in Ex.PW4/A, but that is not sufficient to conclude that claimant has not suffered permanent disability to the extent of 70%, which otherwise duly stands proved on record. Similarly, this Court taking note of age of the claimant, who at that relevant time was 20 years of age, sees no illegality in applying multiplier of '18'. In view of the aforesaid findings returned by the learned Tribunal below, amount awarded qua future loss of income of the claimant needs to be re-assessed at Rs.5100/- on the basis of monthly income. Monthly income of the claimant is assessed at Rs.5100/-. Since, the claimant has suffered 70% permanent disability, therefore, his monthly loss of income comes to Rs.3570/-(Rs.5100x70 ÷ 100)**,** which comes to Rs.42,840/-(3570x12) per annum. Total loss of future income of the claimant comes to Rs.7,71,120/-(Rs.42,840x18).

14. As far as amount awarded by learned Tribunal below on account of attendant charges, medical expenses and taxi bills i.e. Rs.10,000/-, Rs.32958 and Rs.10,500**/-** is concerned**,** there appears to be no illegality because same is totally based upon the documentary evidence adduced on record by the claimant and as such, need not to be re-assessed. The Hon'ble Apex Court in ***Ranjana Prakash*** case (supra) has held that amount of compensation can be enhanced even in the appeal preferred by the Insurance Company, if court comes to the conclusion that learned Tribunal below has not awarded just and fair compensation. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as

the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

15. Having perused the evidence available on record, especially disability suffered by the claimant in the unfortunate accident, this Court is persuaded to agree with Mr. O.C. Sharma, learned counsel representing the claimant that learned Tribunal below has not awarded adequate compensation on account of pain and suffering and future discomfort and inconvenience and as such, this Court deems it proper to enhance the same from Rs.20,000/- and Rs.10,000/- to Rs.1, 00,000/- each under the aforesaid heads.

16. Consequently, in view of the aforesaid modifications made hereinabove, now the respondent-claimant shall be entitled to following amount:-

Loss of future loss of income	= Rs. 7,71,120/-
Attendant charges	= Rs.10,000/-.
Pain and suffering	= Rs.1,00,000/-
Future discomfort and Inconvenience	= Rs.1,00,000/-
Medical expenses	= Rs.32958/-
Taxi bills	= Rs.10,500/-
Total	**Rs. 10,24,578/-**

17. In the case at hand, interest has been awarded by the learned Tribunal below from the date of filing of the claim petition. Mr. Jagdish Thakur, learned counsel for the appellant-Insurance company, while placing reliance upon the judgment rendered by this Court in ***Lal Singh case (supra),*** contended that learned Tribunal below has erred in awarding interest at the rate of 8% on the amount relating to loss of future income and future medical expenses from the date of filing of claim petition, rather same was to be awarded from the date of the award by the Tribunal. In the aforesaid judgment, referred hereinabove, Co-ordinate Bench of this Court while modifying the award passed by the learned Tribunal, though held entitled claimant to compensation of Rs.4,34,000/-, but held him entitled to interest at the rate of 9% per annum on an amount of Rs.2,15,000/-, from the date of filing of the petition. But, as far as amount awarded on account of loss of future income and future medical expenses, Court held that the claimant will be entitled to the interest of 9% per annum from the date when the petition was decided by the learned Tribunal.

18. Mr. O.C. Sharma, learned counsel representing the claimant, while placing reliance upon the judgment rendered by the Hon'ble Apex Court in **Amresh Kumari versus Niranjan Lal Jagdish PD. Jain and others,** (2015)4 Supreme Court cases 433, contended that the claimant is entitled to interest, as awarded by the learned Tribunal from the date of filing of the petition not from the passing of the award. Mr. Sharma, also placed reliance upon the judgment passed by Hon'ble Apex Court in **Reliance General Insurance Company Limited versus Shalu Sharma and others (**2018)2 Supreme Court Cases 753 and contended that the claimant is entitled to interest at the rate of 9% qua the compensation awarded to him on account of future loss of income from the date of filing petition.

19. Having perused the judgments, referred hereinabove, this Court sees no reason as to why interest at the rate of 8% cannot be awarded from the date of filing of the petition. In all the aforesaid judgments, Hon'ble Apex Court has awarded interest at the rate of 9% from the date of filing of the petition. At this stage, it would be profitable to reproduce para No.4-5 of the judgment herein below:-

> "4. The judgment of a Constitution Bench of this Court in **National Insurance Com. Ltd. V. Pranay Sethi (2017)16 SCC 680,** settles the issue. The deceased was self-employed. In such a case, future prospects cannot be denied. The grant must be in accordance with the following principle set down in the judgment :(SCC para 59.4)
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> > " 59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded and the necessary method of computation. The established income means the income minus the tax component."
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> Since, the deceased 42 years of age, an addition of 25% on the ground of future prospects would be warranted instead of 30% computed by the Tribunal.
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> 5. The Tribunal has held that the annual income of the deceased on the basis of the income tax returns for 2010-2011, 2011-2012 and 2012-2013 would be Rs. 1, 81,500. Adding a component of 25% for future prospects the income would stand at Rs., 2,26,875. Deducting an amount of one fourth towards personal expenses, the loss of dependency per annum works out to Rs. 1,70, 156. Applying a multiplier of 14, the total loss of dependency would work out to Rs. 23,82,187. The Tribunal has awarded a sum of Rs.3,14,335 towards medical expenses. An addition of Rs. 70,000/- would be required to be made in terms of the decision in Pranay Sethi, on account of the conventional heads of loss of estate (Rs.15,000), loss of consortium (Rs.40,000) and funeral expenses (Rs.15,000). Hence, the total compensation is quantified at Rs.27,66,522 on which the claimants would be entitled to interest @9% p.a. from the date of filing of the claim petition. The apportionment shall be carried out in terms of the award of the Tribunal. We order accordingly."

20. Leaned counsel representing the claimant also placed reliance upon the judgment rendered by Hon'ble Apex Court in **S. Thangaraj versus National Insurance Company Limited** (2018)3 Supreme Court Cases 605; wherein it has been held as under:-

> "8. On perusing the record it is evident that the injuries sustained by the appellant are indeed of a serious nature. As a result of the multiple fractures sustained by him, the appellant has lost complete sensation below the abdomen. Evidently he cannot work anymore as load man. In these circumstances, the assessment of disability at 70% is incorrect. On a realistic view of the matter, the nature of the disability must be regarded as being complete. In the circumstances, we find no reason or justification for the deduction of an amount of Rs. 2,91,600/- by the Tribunal (Rs.9,72,000 minus Rs.6,80,400). The amount so deducted must be restored and is rounded off to Rs.3,00,000. Moreover, we are of the view that the appellant is entitled to interest @ 9% per annum from the date of the claim petition."

21. From the bare reading of aforesaid judgment, It is quite apparent that Hon'ble Apex Court while adding 20% for future prospects, modified the award and held claimants entitled to interest at the rate of 9% per annum from the date of filing of the claim petition.

22. Leaving everything aside, Section 171 of the Motor Vehicles Act, which is reproduce herein below, itself mandates for awarding simple interest on the awarded amount from the date of making the claim i.e. filing of the petition.

> ***"171. Award of interest where any claim is allowed:- Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."***

23. Consequently, in view of the detailed discussion made hereinabove and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and the impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications, if any.

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

Gulshan Kumar ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

CrMP(M) No. 427 of 2018
Decided on April 24, 2018

Code of Criminal Procedure, 1973- Section 438- **Narcotic Drugs & Psychotropic Substances Act, 1985-** Sections 20 & 29- Pre-arrest bail- Entitlement - Recovery of charas from a car- Petitioner-owner of vehicle fled away leaving car and other occupants in it- Petitioner seeking bail on ground of his illness- However, three other cases under Act already registered against him- State opposing bail on ground of petitioner being an habitual offender but admitting that he suffered stroke, when he was in jail in some other case and he was suffering from paralysis – Petitioner found having joined investigation and his custodial interrogation was found unnecessary – Recovered stuff was an intermediate quantity (111.34 grams) – Rigors of Section 37 of Act not attracted – Petitioner granted pre-arrest bail subject to conditions. (Paras-10 to 17)

Cases referred:
Maulana Mohammed Amir Rashadi v. State of U.P. (2012) 2 SCC 382
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Dheeraj K. Vashisht, Advocate.
For the respondent : Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

CrMP No. 428 of 2018

For the reasons stated in the application, which is duly supported by an affidavit, application is allowed. Documents annexed to the application are taken on record.

CrMP(M) No. 427 of 2018

2. By way of instant bail petition filed under Section 438 CrPC, prayer has been made for grant of pre-arrest bail in connection with FIR No. 74/18 dated 5.4.2018 under Sections

20 and 29 of the Narcotic Drugs & Psychotropic Substances Act registered at Police Station Amb, District Una, Himachal Pradesh.

3. Sequel to orders dated 10.4.2018 and 17.4.2018, Investigating Officer concerned has come present with record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

4. Perusal of status report suggests that on 5.4.2018, Investigating Officer, on the basis of a secret information intercepted vehicle bearing registration No. HP-72A-4040 at Amb. Occupants of the car after having seen the police made an attempt to run away but they were apprehended and on search of car, contraband i.e. Charas weighing 111.34 grams was recovered. Allegedly, the present bail petitioner ran away leaving behind his car, whereas other two occupants namely Gopal Giri and Raman were apprehended by the police, who disclosed during investigation that car belonged to the bail petitioner and at the relevant time, bail petitioner was driving the vehicle. On the basis of information divulged by co-accused named herein above, FIR detailed herein above came to be lodged against the bail petitioner and other co-accused named herein above. Investigation reveals that at the time of occurrence i.e. 5.4.2018, vehicle in question was being driven by the bail petitioner, who despite there being signal given by the police, speeded his car and managed to get away.

5. It may be noticed that during the proceedings of the instant case held on 17.4.2018, Mr. Dheeraj K. Vashisht, learned counsel representing the bail petitioner, while disputing presence of the bail petitioner on the spot, contended before this Court that though car belongs to bail petitioner but at the relevant time, vehicle in question was being driven by a person namely Radhey Shyam, who has purposely not been interrogated by the police till date. Taking note of aforesaid plea of the learned counsel representing the bail petitioner, this Court on 17.4.2018 specifically directed the Investigating Officer to investigate the person named Radhey.

6. Mr. Dheeraj K. Vashisht, learned counsel representing the bail petitioner strenuously argued that keeping in view the medical condition of the bail petitioner, who has suffered paralysis, story put forth by the investigating agency that the vehicle in question was being driven by the bail petitioner, is not at all trustworthy rather, he has been falsely implicated in the case. Mr. Dheeraj K. Vashisht, Advocate, while inviting attention of this Court to the medical record of the bail petitioner contended that he has suffered brain stroke and at present is under treatment from Dr. Rajinder Prasad Government Medical College, Tanda. Lastly, Mr. Dheeraj K. Vashisht, submitted that otherwise also quantity allegedly recovered from the car of the bail petitioner is less than commercial quantity i.e. 111.34 grams as such, rigours of Section 37 of the Narcotic Drugs & Psychotropic Substances Act are not attracted in the present case and bail petitioner deserves to be enlarged on bail. He further contended that bail petitioner is a local resident and shall always remain available for investigation and trial.

7. Mr. Dinesh Thakur, learned Additional Advocate General, while inviting attention of this Court to the fresh status report filed today, stated that the person named Radhey and Chandan Thakur were interrogated by the police in terms of the direction issued by this Court and both of them categorically disclosed to the investigating agency that on the date of alleged incident, vehicle was being driven by the present bail petitioner and they are not involved in the offence allegedly committed by the bail petitioner and other co-accused.

8. Mr. Dinesh Thakur, learned Additional Advocate General opposed aforesaid prayer having been made by the learned counsel representing the bail petitioner and contended that keeping in view the past record of the bail petitioner, against whom already three cases stand registered under Narcotic Drugs & Psychotropic Substances Act, he does not deserve to be enlarged on bail. While fairly acknowledging the fact that the bail petitioner had suffered brain stroke, while he was in jail in connection with some other case, Mr. Thakur contended that bail petitioner is a habitual offender and in the event of being enlarged on bail, there is every

likelihood of his indulging in illegal trade of narcotic substances and as such, it would not be safe to release him on bail.

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

10. Though perusal of record/status report made available to this Court clearly suggests that on the date of alleged incident, vehicle in question was being driven by bail petitioner, it also emerges from the investigation that bail petitioner has been indulging in illegal trade of narcotics in the past also and there are three cases already registered against him under Narcotic Drugs & Psychotropic Substances Act but having perused the medical record, there appears to be some force in the arguments of the learned counsel representing the bail petitioner that very presence of bail petitioner on the spot is doubtful because as per medical record made available to the Court, bail petitioner is suffering from paralysis. It is also not in dispute that four months back, petitioner while in custody had suffered brain stroke and he was shifted to Dr. Rajinder Prasad Government Medical College, Tanda. Moreover, Bail petitioner has joined the investigation, as has been fairly admitted by the learned Additional Advocate General, on the instructions of the Investigating Officer and he is fully cooperating with the investigation, as such, this Court taking note of the health condition of the bail petitioner, sees no reason for custodial interrogation of the bail petitioner. The contraband allegedly recovered from the car owned by bail petitioner is also less than commercial quantity and as such, rigors of Section 37 of the Act ibid are not attracted.

11. In the totality of the circumstances discussed herein above, this Court is of the view that bail petitioner deserves to be enlarged on bail. No doubt, record made available to this Court suggests that the bail petitioner is a habitual offender and has been indulging in illegal trade of narcotics in the past also, but that cannot be a ground to deny bail to the bail petitioner.

12. Hon'ble Apex Court in **Maulana Mohammed Amir Rashadi** v. **State of U.P.** (2012) 2 SCC 382 has held that merely on the basis of criminal antecedents, the claim of the bail petitioner cannot be rejected. Hon'ble Apex Court has observed as under:

> "10. It is not in dispute and highlighted that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc."

13. In the case at hand, there is nothing on record suggestive of the fact that in the event of petitioner being enlarged on bail, he may flee from justice, rather, petitioner being a local resident of District Una, shall always be available for the purpose of investigation and trial.

14. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the Investigating Officer and was not absconding or not appearing when required by the Investigating Officer. Hon'ble Apex Court has further held that if an accused not hiding from the Investigating Officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found

guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

15. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

16. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

17. In view of above, order dated 10.4.2018 is made absolute, subject to his furnishing furnish bail bonds in the sum of Rs.2,00,000/- (Rs. Two Lakh) with one local surety in the like amount, to the satisfaction of the Investigating Officer concerned, besides following conditions:

a. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

d. He shall not leave the territory of India without the prior permission of the Court.

e. He shall surrender passport, if any, held by him.

18. It is clarified that if the petitioner misuses the liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

19. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of instant petition alone.

The petition stand accordingly disposed of.

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

Rajender Singh. .....Petitioner.

Versus

State Information Commission & ors. .....Respondents.

CWP No. 2728 of 2017

Date of decision: April 24, 2018.

Right to Information Act, 2005- Section 8(j)- Information personal in nature, when can be given? - Applicant, a litigant sought information from Bar Council of Himachal Pradesh regarding University from which Advocate of opposite party which had instituted multiple cases against

him, had passed his law degree – Also sought certified copies of such degree(s) – Request declined by Public Information Officer on ground that information being personal in nature, and no public purpose would be served by supplying such information – Appeal dismissed by Appellate Authority i.e. Chairman Bar Council of Himachal Pradesh – However, State Information Commissioner allowing appeal and directing Bar Counsel to supply the information sought – Petition against – Held, even if information is personal in nature, disclosure thereof is in larger public interest – Public including applicant has a right to know whether petitioner is a qualified lawyer or not – Petition disposed of with direction to PIO to supply information qua enrolment of petitioner as maintained by Bar Council – Certified copies of law degree not to be supplied as no public purpose would be served by supplying copies thereof. (Paras-2 and 3)

For the petitioner	Mr. Ashok Kumar Thakur, Advocate.
For the respondents	Mr. Surender Mohan Sharma, Advocate, for respondent No. 1. Mr. Sunil Mohan Goel, Advocate, for respondent No. 2. Mr. S.C. Sharma, Mr. Vikas Rathore, Mr. Narinder Guleria, Addl. AGs with Mr. Kunal Thakur, Dy. AG for respondent No. 3. Mr. Y.P. Sood, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

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

Petitioner herein is a practicing Advocate. Respondent No. 4 Anant Ram Negi is a litigant and the petitioner is representing the opposite party in number of cases instituted against Anant Ram Negi aforesaid. Respondent No. 4 has made an application to the PIO-cum-Secretary, Bar Council of Himachal Pradesh under the Right to Information Act with a prayer to supply him the information as to from which university the petitioner did his LLB and certified copy of the documents i.e. degree/diploma etc. of the petitioner have also been sought to be supplied. The PIO-cum-Secretary, Bar Council of Himachal Pradesh has, however, turned down the prayer so made by respondent No. 4 on the grounds, inter-alia, that the information sought to be supplied is personal, hence cannot be supplied to the applicant-respondent No. 4 herein. Also that, no public purpose would be served by supplying such information to respondent No. 4.

2. Respondent No. 4 has challenged the order passed by the PIO-cum-Secretary, Bar Council of Himachal Pradesh before the Appellate Authority i.e. the Chairman, Bar Council of Himachal Pradesh. The appeal, however, met the same fate being dismissed by the Appellate Authority. The respondent No. 4 preferred appeal before the State Information Commissioner against the aforesaid order. The said appeal has been allowed vide order under challenge in this writ petition and the PIO-cum-Secretary, Bar Council of Himachal Pradesh has been directed to supply the sought for information to respondent No. 4 herein, free of costs.

3. Having gone through the record produced by learned Counsel representing the Bar Council of Himachal Pradesh and learned Counsel on both sides, in our considered opinion, the information sought to be supplied by respondent No. 4 does not fall under any exempted category within the meaning of Section 8(j) of the Right to Information Act. Even if the information sought to be supplied is treated personal to the petitioner, the disclosure thereof is required in the larger public interest because the petitioner is a lawyer by profession and the public including respondent No. 4 has the right to know as to whether he is qualified lawyer or not. The information if supplied does not amount to invasion of the privacy of the petitioner. The information rather has direct nexus with the public at large because the petitioner is a lawyer by profession. Learned State Information Commissioner, therefore, has not committed any illegality or irregularity while allowing the application made by respondent No. 4 and directing the PIO-cum-Secretary, Bar Council of Himachal Pradesh to supply the requisite information. It is further clarified that only the information as per record qua enrollment of the petitioner

maintained in the Bar Council has to be supplied and not the certified copies of his degree/diploma etc. as the same are not required by the respondent No. 4 nor any public purpose is likely to be served by supplying the copies thereof.

4. The writ petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

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

Ravinder Kumar ...Appellant
Versus
State of H.P. ...Respondents

Cr. Appeal No. 427 of 2017
Decided on : 24.4.2018

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of 'Charas' from accused - Proof of – Trial Court convicting and sentencing accused for said offence – Appeal against – Accused raising plea that case property produced before trial court does not link him with crime – High Court found that (i) parcel containing contraband and produced before trial court was not bearing 'seals' of FSL as mentioned in its report (ii) Two seals on parcel were broken and (iii) no attempt was made to join independent witnesses in recovery proceedings though easily available - High Court allowed appeal and set aside conviction and sentence imposed by trial court. (Paras-11 to 14)

For the appellant: Mr. Bimal Gupta, Senior Advocate with Ms. Salochna Rana, Advocate.
For the respondent : Mr. Hemant Vaid, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the accused/convict, against, the judgment rendered by the learned Special Judge, Chamba, upon, Sessions trial No. 5 of 2015, whereon, he returned findings of conviction, against, the accused/convict in respect of charges framed, under, Section 20(b) (ii) (B) of the ND & PS Act AND consequently sentenced him, to, undergo five years' rigorous imprisonment AND to pay a fine of Rs. 20,000/- and in default, he was sentenced to undergo simple imprisonment for six months.

2. The facts relevant to decide the instant case are that on 5.1.2015, ASI Rajesh Kumar Investigating Officer, CID Unit, Chamba along with ASI Pawan Kumar (PW1), HC Som Prakash, HHC Ajay Kumar and HHC Surinder Kumar was on patrolling duty and detection of drugs cases at Baroti Chowk at Dharagala link road at about 5:20 PM. The accused on seeing the police party got scared and started moving in the other direction. On suspicion, the accused was apprehended. ASI Rajesh Kumar had constituted a search party by associating the police officials and apprised the accused of his right to be searched either by the gazetted officer or a Magistrate. Accused consented to be searched by the police officials. Memo Ext. PW1/A was prepared. Police party had offered themselves to be searched by the accused. Memo Ext. PW1/B was prepared. Nothing incriminating was recovered from the police officials. The police party searched the bag of the accused. On opening the bag, a white envelop (Ext. P-3) found containing in it a black coloured substances in the form of sticks and balls. It was identified to be cannabis (Ext.P-4). With the help of electronic scale, the cannabis was weighed and it was found to be 750 gms. The

cannabis was then put back in the same envelope, which in turn was put in carry bag Ext. P-2 and then packed in a cloth parcel (Ex. P-1) and sealed with six seal impression “T”. NCB-I form Ext. PW4/C was prepared in triplicate. Seal impression T was put on NCB forms. The seal after use was handed over to ASI Pawan Kumar. The parcel containing cannabis was seized vide memo Et. PW1/D. Rukka Ext. PW8/A was prepared and it was handed over to HHC Ajay Singh with the direction to fax it to Police Station, State CID, Bharari, District Shimla for registration of the case. FIR Ext. PW4/A was registered. Investigation was conducted by ASI Rajesh Kumar. Accused was arrested and arrest memo Ext. PW1/E was prepared. The case property consisting ofa parcel, NCB-I form in triplicate and sample of seal “T” was handed over to Inspector Virender Chauhan (PW-7) for resealing the parcel. The parcel was resealed with six seals of impression “C”. Sample seal “C” was taken on a piece of cloth Ext. PW7/B and reseal certificate Ext. PW4/K was prepared. Case property along with documents was then handed over to MHC Parkash Chand. MHC had made entry in the register of Malkhana at sr. No. 294, copy of which is Ext.PW4/B and deposited them in Malkhana. The case property along with documents was handed over to HHC Gopal Singh (PW-5) on 7.1.2015 with the direction to carry these to State FSL,Junga, vide RC No. 9 of 2015, copy of which is Ext. PW4/C. The report of FSL is Ext. PX,in which it was shown that the exhibit was an extract of cannabis and sample of charas. Statements of the witnesses were recorded as per their version and after completion of the investigation, challan was prepared and it was presented before the Court.

3. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed in the Court concerned.

4. The accused was charged by the learned trial Court, for, his committing offence(s) punishable under Section 20 of the ND & PS Act. In proof of the charge, the prosecution examined 8 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case. However, no defence evidence was adduced by the accused.

5. On an appraisal of evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellant herein.

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

7. On the other hand, the learned Additional Advocate General, has also with considerable force and vigour, contended that the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation, by it, of evidence on record, and, theirs not necessitating interference, rather theirs meriting vindication.

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

9. The Investigating Officer concerned, through, recovery memo borne in Ext.PW1/D, hence effectuated, from, the conscious and exclusive possession of the convict, recovery, of, charas weighing 750 grams. In sequel to recovery of the aforesaid quantum of contraband, hence standing effectuated, from the purported conscious and exclusive possession, of, the accused, the Investigating Officer concerned, prepared NCB form, (i) form whereof stands comprised in Ext. PW4/D “wherein” revelations occur, of, his “embossing upon” the bulk parcel(s) comprised in Ext. P-1 , six seals of English Alphabet “” (ii) also echoings occur in Ext.PW 4/K, of, thereafter Ext. P-1 standing re-sealed, by the SHO concerned, at the Police

Station concerned, with six seals, carrying English Alphabet "C". The aforesaid exhibit containing therein "the" bulk of charas, exhibit whereof stood seized under Ext.PW 1/D (iii) "from the" purported conscious and exclusive possession, of, the accused "stood" under a road certificate comprised, in Ext.PW-4/C, hence sent for analysis to the FSL concerned. The FSL Junga purveyed its report thereon, report whereof is comprised in Ext. PX, wherein it recorded a firm opinion, of, the contents enclosed in the aforesaid bulk parcel "sent to it" for analysis, holding ingredients of charas. Apart therefrom, the prosecution for establishing the charge, to which the accused stood subjected to, relied upon the depositions', of, official witnesses. Even though, the testification(s), rendered by the official witnesses' concerned, do not, make any marked underscorings, vis-à-vis existence of any rife a) interse contradiction(s) in their respectively rendered testification(s) nor reveal, of theirs, hence, rendering testification(s) with occurrence therein, of, blatant intrase contradictions, borne in their respective examinations-in-chief, vis-à-vis their respective cross-examination(s); C) importantly, with theirs at the stage of production of case property in Court, whereat, it stood shown to the prosecution witnesses' concerned, hence rather making forthright, and, candid echoing(s), of, it bearing analogity, on all fronts, vis-à-vis its seizure, made, under memo Ext. PW1/D, d) thereupon, evident display(s), of, all the apposite linkage(s), on all fronts, interse the recovery of the case property, at the site of occurrence, under memo Ext. PW1/D, vis-à-vis its production in Court, e) hence renders the prosecution case, to, achieve success.

10. Be that as it may, though, for all the aforesaid reasons, this Court would be constrained to affirm findings of conviction, pronounced by the learned trial Court, upon the accused, yet for the reasons to be assigned hereinafter, this Court rather is prodded to form a formidable conclusion, of, the findings of conviction, hence warranting reversal by this Court.

11. (i) On production of Ext. P-1 in Court, whereat it stood shown to PW-1 (a) their occurring reflection(s), of it, carrying thereon, embossing, of, six seal(s) at four places, seals whereof are echoed to carry thereon English alphabet "T", however, at two places the seal impression(s) were found to be broken. However, as apparent, from, a reading of Ext. PX, exhibit whereof comprises the report of the FSL, Junga, qua (i) the latter also embossing thereon, the seal, of, the FSL. Consequently, in consonance therewith, also thereat, especially during the course of recording of the deposition of PW-1, by the learned trial Court, to whom Ext. P-1 stood thereat hence shown, an imperative reflection was enjoined to occur, of, Ext. P-1, also carrying the seals of FSL. Contrarily, lack of any reflection(s), during, the recording of the testification, of PW-1, qua Ext. P-1 carrying thereon also the seals of the FSL, (i) rather constrains, this Court to conclude that hence, Ext. P-1, at the stage of its production, obviously remaining un-connected, with the report of the FSL, borne in Ext. PX, (ii) also besides hence the imperative connectivity interse its recovery under memo Ext. PW1/D, from, the purported conscious and exclusive possession of the accused, vis-à-vis its production in Court, being also visibly snapped, dehors its carrying therein the contraband, purportedly recovered, under memo Ext. PW1/D, from the conscious and exclusive possession of the accused, rather some other case property being produced before the learned trial Court, (iii) besides it constrains this Court, to conclude that hence the apposite link interse the recovery memo, borne in Ext. PW1/D, vis-à-vis, the opinion of the FSL, borne in Ext. PX, also hence not standing efficaciously proven. In aftermath, it is also concluded, that the prosecution rather miserably failing to establish, that Charas, if any, recovered under memo, Ext. PW1/D, being formidably proven to be hence Charas.

12. Further more, the factum of, as disclosed by PW-2, in his cross-examination, of, a the liquor vend being available at a distance of 200 mtrs. from the site of occurrence and it being manned, (i) thereupon the persons manning the liquor vend were peremptorily, enjoined to be associated as independent witnesses, vis-à-vis the relevant proceedings, (ii) conspicuously hence when the aforesaid infirmity may, prima-facie, be eroded, (iii) yet, evidently, no efforts were made by the Investigating Officer, to solicit them, as independent witnesses, vis-a-vis the relevant proceedings, (iv) omissions' whereof, are construable to be both deliberate and intentional, for hence facilitating the Investigating Officer concerned, to carry skewed/slanted investigation(s). Also, the aforesaid deliberate omissions, rather lend aggravated momentum, to the aforesaid

inferences, of the prosecution not establishing the relevant connectivity interse the recovery of case property, under recovery memo, borne in Ext. PW1/D, from the purported conscious and exclusive possession of the accused, vis-à-vis its production in Court.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned appellate Court, suffers, from a perversity or absurdity of mis-appreciation and non-appreciation of evidence on record.

14. The appeal is allowed. The impugned judgment is quashed and set aside. The accused is acquitted. Case property be destroyed after the expiry of the period of limitation, for filing an appeal. Fine amount, if deposited by the accused be forthwith refunded to him. Personal and surety bond(s) be forthwith discharged.

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

Balbinder Singh .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr. Revision No. 63 of 2007
Decided on: 25th April, 2018

Indian Penal Code, 1860- Sections 279 and 337- Trial Court convicting and sentencing accused for offences punishable under Sections 279 and 337– Additional Sessions Judge maintaining conviction and order of sentence of trial Court- Revision against – Accused submitting before High Court that manner of accident not proved and evidence is contradictory, warranting his acquittal – High Court found that offending car had gone to wrong side of the road and then hit the cyclist, there were skid marks upto 30 feet on the road indicating that despite applying brakes, offending vehicle could not be stopped owing to high speed – Oral evidence stands corroborated from documentary evidence – Accused not denying that he was driving said car at the relevant time – Conviction upheld – Petition dismissed. (Paras-9 to 13)

For the petitioner: None.
For the respondent: Mr. Narinder Guleria, Addl. A.G with Mr. Kunal Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Petitioner herein is a convict. He has been convicted by learned Judicial Magistrate 1st Class, Court No.3, Mandi for the commission of offence punishable under Sections 279 and 337 of the Indian Penal Code and sentenced to undergo simple imprisonment for two months and pay Rs. 500/- as fine under Section 279 IPC and to undergo simple imprisonment for two months and pay Rs. 500/- as fine under Section 337 IPC vide judgment dated 2nd March, 2006 passed in Police Challan No. 20-II/2000. In appeal, learned lower appellate Court has affirmed the findings of conviction recorded against the convict-petitioner and dismissed the appeal vide impugned judgment dated 18.01.2007.

2. The legality and validity of the impugned judgment has been questioned on the grounds *inter-alia* that the manner in which the accident has occurred is not at all proved. There is no evidence to show that the injured witness PW-4 Tara Chand sustained injuries on his

person in the accident of the vehicle being driven by the convict-petitioner. There is again no proof qua the vehicle was being driven by him in a rash and negligent manner. Also that, complainant PW-1 Balam Ram and other eye witnesses examined by the prosecution in support of its case have turned hostile. Such evidence as has come on record by way of their testimony could have not been considered nor relied upon to record the findings of conviction. The evidence as has come on record otherwise is stated to be contradictory in nature and full of discrepancies.

3. Now if coming to the facts of this case. The convict-petitioner allegedly was driving maruti car bearing registration No. DL-5C-6095 from Kullu side towards Mandi on 12.12.1999 at 12.30 p.m. Complainant PW-1 Balam Ram was standing outside his shop at Takoli at that time. Injured witness PW-4 Tara Chand was going to a Barber shop at Takoli on his bicycle. The convict-petitioner as a result of rash and negligent driving hit the injured Tara Chand in wrong side of the road. Irrespective of applying the brakes, he failed to control the vehicle. The accident was witnessed by Balam Ram aforesaid and PW-2 Hem Raj. PW-3 Girdhari Lal and PW-6 Sangat Ram allegedly also witnessed the accident.

4. The accident was reported to the police by PW-1 Balam Ram. His statement Ext. PW-1/A was recorded under Section 154 Cr.P.C and on the basis thereof, FIR Ext. PW-7/A was recorded. The investigation was conducted by PW-12 Head Constable Abhimanyu of Police Station, Aut, District Mandi. The medical examination of the injured was conducted by PW-9 Dr. Niru Kapoor. Spot map Ext. PW12-E was prepared. The maruti car along with its documents and keys was taken into possession vide recovery memo Ext. PW-1/B. The same was got mechanically examined from PW-5 (Mechanic) Head Constable Brestu Ram, who has submitted the report Ext. PW-5/A. The photographs of the place of accident Ext. PW-12/A and Ext. PW-12/B were also taken. The negatives thereof Ext. PW-12/C and Ext. PW-12/D were also added in the record. The statements of witnesses namely Hem Raj, Girdhari Lal and Shaunkia Ram Ext. PW-12/F, Ext. PW-12/G and Ext. PW-12/H were recorded as per their version.

5. On the completion of investigation, report under Section 173 Cr.P.C., was filed in the trial Court. Learned trial Judge on hearing the accused and learned Public Prosecutor and on finding a prima-facie case made out against the convict-petitioner framed and put the notice of accusation under Section 279 and 337 of IPC against him. He, however, pleaded not guilty and claimed trial. Therefore, the prosecution in order to prove its case against him had examined 12 witnesses in all.

6. Learned trial Judge on consideration of the oral as well as documentary evidence produced by the prosecution during the course of trial has arrived at a conclusion that the prosecution has proved its case against the convict-petitioner beyond all reasonable doubt. He, as such, was convicted and sentenced as pointed out at the very out set. In appeal, learned lower appellate Court has dismissed the same and affirmed the judgment passed by learned trial Court. This petition was admitted for hearing and in the interim, substantive sentence of imprisonment passed against the convict-petitioner by learned trial Court and affirmed by learned lower appellate Court though was ordered to be suspended, however, subject to his furnishing personal bonds in the sum of Rs.5000/- with one surety in the like amount to the satisfaction of learned trial Court with an undertaking that in case the revision petition is not admitted he shall surrender to serve out the sentence. The convict-petitioner though had put in appearance through Mr. Peeyush Verma, Advocate, however, subsequently absconded. Even bail bonds in terms of the interim order were also not furnished. He even could not be traced out when fresh warrants were ordered to be issued against him.

7. On 29.03.2018, when this petition came to be listed for hearing, Mr. Lalit Sehgal, Advocate appearing vice Mr. Peeyush Verma, Advocate had pleaded no instruction. Therefore, following order came to be passed on that day:-

> "Mr. Lalit Sehgal, Advocate, has again pleaded no instructions on behalf of the convict-petitioner. Though as per order dated 07.12.2017 appropriate proceedings in accordance with law, including declaring him as proclaimed

offender, have been ordered to be initiated, however, now he is not an offender and rather a convict, hence, the proceedings under Section 82 Cr.P.C. against him are not admissible. Now, it is for the trial Court to ensure that the execution of sentence has been passed against him in accordance with law.

So far as this petition is concerned, the same has to be considered and disposed of on merits. The impact of the convict-petitioner absconded and not available, is also to be taken into consideration during the course of arguments. List on **7th April, 2018**.

An authenticated copy of this order, be sent to learned trial Court for compliance."

8. Again today, there is no appearance on his behalf, therefore, this Court is proceeded to hear learned Additional Advocate General and decide the petition finally.

9. Be it stated that the complainant PW-1 Balam Ram has turned hostile to the prosecution, however, when allowed to be cross-examined by learned APP, he has admitted his signatures on the statement Ext. PW-1/A, he made before the police under Section 154 Cr.P.C. Not only this but, he has admitted portion 'A' to 'A' of his statement Ext. PW-12/F recorded under Section 161 Cr.P.C., which reveals that he was present in the shop at the time of accident and noticed the offending car being driven in a rash and negligent manner from Kullu side and the same having hit the cyclist. As a result thereof he fell down and became unconscious. His cycle also got broken. Accident as per this portion of his statement had occurred due to rash and negligent driving attributed to the convict-petitioner. Being so, PW-1 irrespective of having turned hostile has supported the entire prosecution case during the course of his cross-examination. PW-3 Girdhari Lal though has also turned hostile, however, when cross-examined by learned APP, he has admitted his signatures on his statement Ext. PW-12/G and also admitted portion 'A' to 'A' thereof. The victim of the accident is Tara Chand, PW-4. His statement also supports the entire prosecution case. PW-6 Sangat Ram again is an eye witness to the occurrence. He has stated that at the time of accident, he was standing near to his 'Khoka' at Takoli. He noticed the offending car being driven by the accused having struck against the cycle of PW-4 Tara Chand. The car, according to him, was being driven in a high speed. Although, he has been subjected to cross-examination, however, learned defence counsel has failed to shatter his version in his examination-in-chief. The another material witness is PW-8 Sonkhia Ram. As per his version, car was being driven by the convict-petitioner in a high speed and as a result thereof, the accident had taken place. A new plea in defence that PW-4 struck against a bus is not proved because the suggestions to this effect put to PW-8 were denied being wrong. He rather is very specific in stating that it is the convict-petitioner who was driving the offending car at a high speed and hit the cycle on which PW-4 was going to Barber shop.

10. In addition to the oral evidence, the prosecution case also finds support from the position reflected in the spot map Ext. PW-12/E. At place mark 'A', the offending car could be stopped after applying the brakes up to a distance of 30 feet. The skid marks on the road are visible in this document. It is due to over speed and out of control, the car came in right side of the road and hit the cycle of PW-4 i.e. who was going on his own side of the road. This circumstance was put to the convict-petitioner in his statement recorded under Section 313 Cr.P.C., to which he has expressed his ignorance. The photographs Ext. PW-12/A and Ext. PW-12/B also depict the position of the vehicle which has gone from left to right and the skid marks are also visible on the road.

11. The present, as such, is a case where the prosecution has successfully pleaded and proved that the accident occurred due to rash and negligent driving attributed to the convict-petitioner. In view of such evidence available on record, the burden got shifted on the convict-petitioner, however, except for his statement under Section 313 Cr.P.C., he has not opted for producing any evidence to prove otherwise that he was not driving the offending car in a rash and negligent manner. In his statement also, the incriminating circumstances appearing against him

in the prosecution evidence have been simply denied either being incorrect or for want of knowledge without any explanation thereto.

12. The link evidence as has come on record by way of the testimony of PW-4 Head Constable Brestu Ram also reveals that when the offending vehicle was mechanically in order, the only cause of accident was rash and negligent driving and none-else. PW-9 Dr. Niru Kapoor has proved the injuries which PW-4 Tara Chand received on his person in the accident. PW-10 Head Constable Ram Lal and PW-12 Head Constable Abhimanyu are the Investigating Officers, who have partly investigated the case. Their testimony also lends support to the prosecution case.

13. The re-appraisal of the evidence by this Court lead to the only conclusion that it is the convict-petitioner alone responsible for the accident, which has occurred with car bearing registration No. DL-5C-6095 being driven by him at the relevant time in a rash and negligent manner. It is not a case of mere rashness and negligence, however, in view of the evidence in the shape of skid marks visible on the spot, the present is a case of criminal rashness and negligence and as such, the present is a fit case where it can be said that the convict-petitioner by driving the car in a rash and negligent manner has endangered the life of other road users. He, as such, has rightly been convicted and sentenced by both Courts below.

14. The impugned judgment, therefore, neither suffers from any illegality nor irregularity. There is no error apparent on the face of the record. The impugned judgment, as such, calls for no interference by this Court in the exercise of its limited revisional jurisdiction. The revision petition is accordingly dismissed.

15. Learned trial Judge to ensure that the convict-petitioner is arrested and made to serve out the sentence.

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

State of Himachal Pradesh & anr. .....Applicants-Petitioners.

Versus

M/S Sanbir Motor Store. .....Respondents.

CMP(M) No. 1019 of 2017 &
CRST No. 20072 of 2017
Date of decision: April 25, 2018.

Arbitration & Conciliation Act, 1996- Section 8(1)- Direction for referring parties to arbitration - Arbitration clause providing for adjudication of all disputes by way of arbitration, if arose during 'progress of work' or after 'its completion or abandonment'- However, work not commenced at all - Senior Civil Judge refusing to refer dispute to Arbitrator – Petition against – Held – In factual matrix that dispute had not arisen during progress of work or after its completion or abandonment, court could not have referred parties to Arbitration – Order of trial Court upheld. (Para-4)

Arbitration & Conciliation Act, 1996- Section 8(1)- Direction for referring parties to arbitration- Essential requirements- Held, application seeking direction of Court for reference of dispute to arbitrator, is required to be filed on first day on entering appearance – Defendants entered appearance in suit on 19.12.2013 and sought adjournments for filing written statement on 19.12.2013 and 3.2.2014 – Application under Section 8(1) of Act was filed alongwith written statement on 2.5.2014- Further held, that such application under Section 8(1) of Act was not maintainable and rightly dismissed by trial court – Petition dismissed – Order of trial Court upheld. (Paras-5 & 6)

Case referred:
P. Anand Gajapathi Raju and Others versus P.V.G. Raju (Dead) and others, (2000) 4 Supreme Court Cases 539

For the applicants-petitioners	Mr. SC. Sharma, Mr. Vikas Rathore, Mr. Narinder Guleria, Addl. AGs, with Mr. Kunal Thakur, Dy. AG.
For the respondent	Mr. Harish Dod, Advocate.

The following judgment of the Court was delivered:

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

The delay of 162 days as occurred in filing the revision petition against order dated 28.7.2016 passed by learned Senior Civil Judge, Palampur, District Kangra in an application under Section 8 (1) of the Arbitration & Conciliation Act, hereinafter referred to as the 'Act' in short, has been sought to be condoned on the ground that the same is neither intentional nor deliberate and rather occurred due to time consuming official process and other circumstances beyond the control of the applicants.

2. Order dated 28.7.2016 passed by learned Civil Judge (Senior), Court No. 1, Palampur is under challenge in the main petition which is time barred. Learned trial Court has dismissed an application under Section 8 (1) of the Act filed by the petitioners-defendants in the main suit. The plaintiff has filed the suit in the trial Court for the recovery of Rs.1,55,000/- against the defendants. As per the trial Court record the defendants were served for 19.12.2013 and had entered appearance on that day through learned Assistant District Attorney. They had sought time for filing written statement, which was allowed. On the next day also, further time was prayed for and allowed by the trial Court. The written statement was filed on 2nd May, 2014 as is apparent from the zimni order passed on that day. Annexed thereto was an application under Section 8 (1) of the Act filed with a prayer to refer the matter to Arbitrator for adjudication of the dispute on the ground that there exist an agreement between the parties and in terms thereof the dispute having arisen between them can only be resolved by resorting to arbitral proceedings.

3. Learned trial Court on going through the contents of arbitration clause in the agreement and hearing the parties on both sides has arrived at a conclusion that the work has never commenced on the site and as such, the matter could have not been referred for adjudication to the Arbitrator. Though original agreement has not been filed along with the application, however, a copy thereof is in the trial Court record. Clause 25 thereof reveal that all questions and disputes relating to the designs and drawing etc. and also quality of workmanship of material used or any other question whatsoever concerning the works or the execution or failure to execute the same whether arising during the progress of the works or after the completion or abandonment thereof needs to be referred to the sole arbitration of the person appointed as arbitrator by the Engineer-in-Charge/Chief Engineer, Himachal Pradesh Public Works Department.

4. Learned trial Judge on having considered such provisions in Clause 25 of the agreement has concluded that the disputes brought to the Court in the civil suit have neither arisen during progress of the work or after completion or on its abandonment as the work never commenced at the site. The findings so recorded cannot be said to be illegal nor factually unsustainable for the reasons that as per Clause 25 only those disputes having arisen during the progress of the work or after its completion or abandonment can be referred to the Arbitrator for adjudication. Even if it is believed that the failure to execute the work is also covered under Clause 25 of the agreement, in that event also, the application which has been filed for referring the matter with a prayer to refer the disputes for adjudication to the Arbitrator could have not

been allowed because as per the legal requirement an application of this nature can only be filed by the parties seeking such reference the very first day on entering appearance in the action brought against it in the Court. As pointed out at the outset the defendants were served for 19.12.2013. They entered appearance on that day through learned District Attorney. Instead of filing the application under Section 8(1) of the Act on that day, the time was sought for filing written statement. Not only this, but on the next date i.e. 3.2.2014 also further time as sought for filing written statement was granted. The written statement was filed on 2.5.2014 and on that very day the application under Section 8(1) of the Act was also filed. The order passed by learned trial Court on 2.5.2014 reads as follow:

> "Written statement filed. Copy supplied. At this stage, an application U/S 8(1) of the Arbitration & Conciliation Act filed, copy supplied. Put up for reply and consideration on 7.7.2014."

5. Therefore, the ratio of the judgment of the Hon'ble Apex Court in ***P. Anand Gajapathi Raju and Others*** versus ***P.V.G. Raju (Dead) and others, (2000) 4 Supreme Court Cases 539*** takes away the right so vested in favour of the petitioners-defendants under Section 8(1) of the Act and as such action the respondent-plaintiff brought against the defendants has to be adjudicated by the Court. The judgment reads as follows:

> "5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:
>
> (1) there is an arbitration agreement;
>
> (2) a party to the agreement brings an action in the court against the other party;
>
> (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;
>
> (4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.
>
> This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration."

6. For all the reasons hereinabove, even on merits also no case is made out in favour of petitioners-defendants and as such, even if it is believed that the delay as occurred in filing the main petition stands explained and ordered to be condoned, no useful purpose is likely to be served thereby. Therefore, not only this application but also the main petition being devoid of any merit are dismissed.

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

8. The parties through learned counsel representing them are directed to appear in the trial Court on *30.5.2018.* Record be returned to the trial Court forthwith.

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

State of Himachal Pradesh ...Appellant.
Versus
Jagdish Chand ...Respondent.

Cr. Appeal No. 479 of 2007
Decided on: 25.04.2018

Prevention of Food Adulteration Act, 1954- Sections 10(7) and 16(1)(a)(i)- In appeal, Additional Sessions Judge setting aside judgment of conviction of trial court convicting accused of offence under Section 16(1)(a)(i) of Act by holding that provisions of Section 10(7) were not complied with by Food Inspector before taking sample- Appeal by State- Held- Provisions of Section 10(7) of the Act requiring the Food Inspector to associate independent witnesses at the time of taking of sample are mandatory – However, non-compliance, if reasonably explained is not fatal- On facts, it was doubtful that Food Inspector had even made efforts to comply with provisions of Section 10(7) of the Act- Held – In these circumstances, non-compliance is fatal to prosecution case- Appeal dismissed – Acquittal upheld. (Paras-12 to 14)

Case referred:
Ram Labhaya versus Municipal Corporation of Delhi and another, 1974 Cri.L.J. 672

For the appellant: Mr. Raju Ram Rahi, Deputy Advocate General.
For the respondent: Mr. Karan Sharma, Advocate, as Amicus Curiae.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

This appeal has been preferred by State against judgment, dated 18th April, 2007, passed by the learned Additional Sessions Judge, Shimla, Camp at Rohru, in Criminal Appeal No. 30-R/10 of 2004/02, whereby conviction of respondent vide judgment, dated 5th September, 2002, passed by learned Additional Chief Judicial Magistrate, Rohru, in Criminal Case No. 21-3 of 2000 in complaint under Section 16 (1) (a) (i) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act') has been reversed and the respondent has been acquitted on the ground that there was non-compliance of mandatory provisions of Section 10 (7) of the Act.

2. On previous date, hearing of this appeal was adjourned for non-appearance of learned counsel for the respondent. Today also, there is no representation on behalf of the respondent. Therefore, during pre-lunch session, Mr. Karan Sharma, Advocate, present in the Court, was requested to assist the Court on behalf of the respondent in the interest of justice. He graciously accepted the request and assisted the Court after going through the record made available to him. This Court places a word of appreciation for the valuable assistance rendered by him.

3. I have heard learned Deputy Advocate General as well as the learned Amicus Curiae and also gone through

the record.

4. The only issue involved in present case is as to whether the Food Inspector had complied with the provisions of Section 10 (7) of the Act or not. It is undisputed that compliance of provisions of Section 10 (7) of the Act is mandatory for the Food Inspector and non-compliance thereof, unless reasonably explained, would certainly be fatal to the prosecution case.

5. Learned Deputy Advocate General, while referring to statement of PW-2 Ashok Kumar made in cross-examination and that of PW-3 B.L. Justa, Food Inspector, made in examination-in-chief as well as cross-examination, has contended that the Food Inspector had made the efforts to associate independent witnesses in compliance of Section 10 (7) of the Act, but, no person had agreed to associate himself in the proceedings and, thus, non-compliance of the said provision of the Act is not fatal.

6. In support of his contention, learned Deputy Advocate General has relied upon pronouncement of the apex Court in case titled as **Ram Labhaya versus Municipal Corporation of Delhi and another,** reported in **1974 Cri.L.J. 672,** wherein it has been held that Section 10 (7) of the Act casts an obligation on the Food Inspector only to call one or more persons to be present on the spot when he takes action and he could not certainly compel their presence and, therefore, prosecution is relieved of its obligation under these provisions as and when the effort is made by Food Inspector to associate independent witnesses by calling them to join the investigation and non-compliance of Section 10 (7) of the Act on refusal of such persons to join the investigation will not vitiate the trial.

7. He has argued that in present case also, Food Inspector had tried to associate the independent witnesses, but, on their refusal, he was constrained to associate PW-2 Ashok Kumar, a peon of the Department, who was accompanying him at the time of taking sample.

8. From the careful scrutiny of the record as well as the statements of PW-2 Ashok Kumar and PW-3 B.L. Justa, Food Inspector, it appears that the contentions of the learned Deputy Advocate General are not tenable for the reasons recorded hereinafter.

9. PW-3 B.L. Justa, Food Inspector, in his examination-in chief, has stated that before taking samples, he had asked the persons to associate them as witnesses, but, they refused to sign. In his cross-examination, he has denied the suggestion put to him that he had not called any independent witness.

10. PW-2 Ashok Kumar, who was working as a peon in the CMO Office at the relevant point of time and was accompanying PW-3 B.L. Justa, Food Inspector, during the process of taking the sample, has stated that one witness, present in the shop, was asked by the Food Inspector for associating as a witness during sample taking process, but he had refused to do so.

11. It is categoric statement of PW-2 Ashok Kumar that one person present in the shop was asked by the Food Inspector to join the investigation, however, as per statement of PW-3 B.L. Justa, Food Inspector, he had asked the 'persons' to join the investigation whereas PW-2 Ashok Kumar, in his cross-examination, has admitted that they had not called the witnesses from the market or shops. Both these witnesses are public servants and working in the same office, therefore, it cannot be said that any of them would have made the statements to help the accused.

12. Moreover, the samples were taken from the shop situated in the market, there would have been shopkeepers in the adjoining shops. PW-2 Ashok Kumar, in his cross-examination, has admitted that in the market and shops, a large number of people remain present, but no witness was called from the market or from the shops. PW-3 B.L. Justa, Food Inspector, has not disclosed as to who were the persons asked by him to join the investigation, rather, in his cross-examination, he has expressed his inability to disclose the names of the persons whom he had called to join the investigation. There is no evidence on record with regard to the efforts made by him to associate the neighbouring shopkeepers or customers in the process of taking samples from the shop of the respondent. Therefore, there is no sufficient evidence on record so as to establish that PW-3 B.L. Justa, Food Inspector, had made any endeavour to join the independent witnesses, as required under Section 10 (7) of the Act.

13. PW-3 B.L. Justa, Food Inspector, in his deposition before the Court, has also admitted that PW-2 Ashok Kumar is his peon and is witness in his every case. Therefore, PW-2 Ashok Kumar can also be termed as a stock witness and, thus, his statement is liable to be discarded.

14. Viewed thus, the statements of PW-2 Ashok Kumar and PW-3 B.L. Justa, Food Inspector, render doubt about the deposition of these witnesses with regard to the efforts made to associate the independent witnesses before taking the sample.

15. So far ratio of law laid down in the judgment (supra) referred by learned Deputy Advocate General is concerned, there is no quarrel qua that. But, in the said case, it was established on record that the Food Inspector had made serious efforts to join the independent witnesses in compliance of Section 10 (7) of the Act, but, all the independent witnesses had refused to join the investigation. Therefore, the judgment referred (supra) is distinguishable on the facts of the case.

16. Learned Deputy Advocate General has also referred to observations of the apex Court in para 4 of the judgment (supra) wherein it has been held that since the Food Inspector was not in a position of an accomplice, his evidence alone, if believed, can sustain the conviction. Learned Deputy Advocate General has failed to notice that this observation has been made in continuation of the findings wherein the apex Court has held that the Food Inspector had made a sincere endeavour to comply with the provisions of Section 10 (7) of the Act and as he was not able to comply with the said provision on refusal of the persons approached by him, his statement alone was considered sufficient to convict the accused. The ratio of law laid down in the judgment (supra) is not at all that where the Food Inspector has not made efforts to call and associate any independent witness, conviction can be made on the basis of sole statement of the Food Inspector.

17. No doubt, it is settled law that conviction can be based on the sole statement of Food Inspector if it inspires confidence, however, it does not mean that it entitles the Food Inspector to give a go-by to the mandatory provisions of Section 10 (7) of the Act discharging him from the obligation of joining the independent witnesses in his action. Had it been found that he had made a sincere effort to associate the witnesses and despite that witnesses could not be associated, the things would have been different and definitely, then the accused would not have been entitled for acquittal on account of violation of provisions of Section 10 (7) of the Act as practically, there would have no such violation for the sincere efforts made on behalf of the Food Inspector. In present case, there is no cogent, reliable or plausible evidence to establish that the Food Inspector had made any sincere effort to associate the independent witnesses/persons, rather, the contradictory statements of PWs-2 and 3 cast doubt on veracity of their statements in this regard.

18. In view of above discussion, I find no infirmity or material irregularity in appreciation of evidence on record by the learned Additional Sessions Judge, especially, with respect to violation of provisions of Section 10 (7) of the Act. Learned Additional Sessions Judge has appreciated the evidence on record completely and correctly and it cannot be said that acquittal of respondent has resulted into travesty of justice or has caused miscarriage of justice. Rather, for want of sufficient evidence on record establishing the effort of Food Inspector to comply with provisions of Section 10 (7) of the Act, present appeal must fail.

19. Therefore, acquittal of respondent by the learned Additional Sessions Judge vide impugned judgment is upheld and the appeal is dismissed. Bail bonds furnished by the respondent and his surety are discharged. Record be sent back to the learned trial Court.

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

Sunil Kumar ..... Petitioner.
Versus
State of Himachal Pradesh ..... Respondent.

Cr. Revision No.119 of 2015
Date of Decision: 25th April, 2018

Code of Criminal Procedure, 1973- Sections 397 and 401- Revisional jurisdiction – Scope of – Held, Revisional powers may be used when court notices failure of justice or misuse of judicial mechanism or when procedure, sentence or order is not correct. (Para-11)

Indian Penal Code, 1860- Sections 380 and 457- Theft of thirteen cell phones from shop of complainant during night – Trial Court convicting accused for lurking house trespass and theft- Appeal of accused dismissed by Additional Sessions Judge and his conviction and sentence for said offences upheld- Revision against – High Court found (i) Sim of three sets were kept active by complainant through one of which 'S' was contacted by accused (ii) 'P', 'S', 'K' and 'Su' identified accused as person from whom they had purchased stolen cell phones (iii) Seven stolen cell phones were recovered from underneath bed of accused pursuant to his disclosure statement – Held – Accused was rightly convicted of offences under Sections 380 and 457 of Code by trial court, however, order of sentence modified in view of peculiar circumstances of case.

(Paras- 13 to 19 & 24)

Case referred:
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the Petitioner Mr. Jeevesh Sharma, Advocate.
For the Respondent Mr.Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral)

Being aggrieved and dissatisfied with the judgment dated 2.1.2015, passed by learned Additional Sessions Judge-II, Shimla, District Shimla, H.P., in Criminal Appeal No.84-S/10 of 2014/13, affirming the judgment of conviction and sentence, dated 7.1.2013, passed by learned Judicial Magistrate, 1st Class, Court No.6, Shimla, H.P., in Case No.112-2 of 2010/06, whereby learned trial Court while holding petitioner ***(for short 'accused')*** guilty of having committed the offences punishable under Sections 457 and 380 of the Indian Penal Code ***(for short 'IPC'),*** convicted and sentenced him as under:-

Sr. No.	Section	Imprisonment
1.	457 IPC	To undergo simple imprisonment for a term of two years and to pay fine of Rs. 1000/- and in default of payment of fine, to further undergo simple imprisonment for three months
2.	380 of IPC	To undergo simple imprisonment for one year and to pay fine of Rs. 1000/- and in default of payment of fine, to further undergo simple imprisonment for three months.

2. Briefly stated facts, as emerge from the record are that Vikram Thakur (PW-2), who was running a shop in the name and style of M/S Thakur General Store at Shogi, got his statement (Ex.PW2/A) recorded under Section 154 of the Code of Criminal Procedure, on the basis of which, formal FIR Ex.PW7/A, came to be registered against the accused, alleging therein that on 27.7.2006, at about 9:30 PM, he had locked his shop, but on the next day i.e. on 28.7.2006, at about 6/6:15 AM, when he came to his shop, he found shutter of his shop broken. He further complained that as many as 13 sets of mobile phones i.e. 4 mobiles of Nokia, five of reliance and four of Tata, were found to have been stolen. Complainant further alleged that some miscreant committed theft of the mobile sets from his shop by lurking house trespass. Complainant also stated to the police that out of the stolen mobiles, SIM of three mobiles sets, were active and he kept on calling on the said mobiles and ultimately, he could made contact on mobile No.93188-09342 and the person on the other side revealed his name to be Ranbir Singh and also disclosed his address. Aforesaid person, namely Ranbir Singh, disclosed that on 20.9.2006, he had purchased mobile from one Surinder, whose real name was lateron disclosed to be Sunil. On the basis of aforesaid complaint, police commenced its investigation. After completion of the investigation, police presented the challan in the competent court of law i.e. Judicial Magistrate, 1st class, Court No.6, Shimla, H.P.

3. The learned trial Court being satisfied that a prima-facie case exist against the accused as well as other co-accused namely Pankaj, Rohit Kumar and Jatinder Kumar, framed charge against them under Sections 457,380, 414 read with Section 34 of IPC, to which they pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of the evidence made available on record by the prosecution, acquitted the accused Pankaj, Jitender and Rohit Kumar of the charges framed against them, whereas held accused Sunil guilty of having committed the offence punishable under Sections 457 and 380 of IPC and accordingly convicted and sentenced him, as per the description given hereinabove.

5. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the learned trial Court, petitioner-accused preferred an appeal under Section 374 of the Code of Criminal Procedure, in the court of learned Additional Sessions Judge-II, Shimla, which came to be registered as Criminal Appeal No.84-S/10 of 2014/13, however fact remains that same was dismissed, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be upheld. In the aforesaid background, petitioner-accused has approached this Court by way of instant proceedings, praying therein for his acquittal, after setting aside the judgment of conviction recorded by the learned Courts below.

6. Mr. Jeevesh Sharma, learned counsel representing the petitioner, while referring to the impugned judgments, passed by the learned courts below, strenuously argued that same is not sustainable in the eye of law, as the same are not based upon the correct appreciation of the evidence and as such, same deserves to be quashed and set-aside. He further contended that bare perusal of the impugned judgment of conviction recorded by the learned courts below, clearly suggest that learned courts below have not dealt with the evidence available on record in its right perspective, as a result of which, erroneous findings to the detriment of the accused have come on record.

7. Mr. Sharma, while making this Court to travel though the entire evidence led on record by the prosecution, made a serious attempt to persuade this Court to agree with his contention that there are material contradictions and inconsistencies in the statements of the prosecution witnesses and as such, no much reliance could be placed by the learned courts below on their statements while ascertaining the guilt, if any, of the petitioner-accused, who has been falsely implicated in the case. He further contended that bare perusal of the judgment passed by the learned trial Court, itself suggest that the disclosure statement made by the accused under Section 27 of the Indian Evidence Act, was not accepted by the learned courts below and as such, there was no occasion for the learned courts below to arrive at conclusion that police effected recovery from the room of the accused at the behest of other co-accused. He

further contended that if the statements of prosecution witnesses are read juxtaposing each other, it creates doubt with regard to the presence of the accused in the room from where allegedly mobile phones were recovered. Mr. Sharma, further contended that both the courts below have fallen in grave error while omitting to take note of the fact that bills, if any, qua the mobile phones possessed by the complainant were not produced before the Court and as such, learned courts below had no occasion to arrive at a conclusion that mobile phones allegedly stolen by the accused belong to the complainant. Mr. Sharma, while inviting attention of this Court to Ex.PW2/D i.e. Fard, further contended that petitioner has been falsely implicated in the case, because recovery has been not proved, in accordance with law, as has been categorically stated by learned courts below in its judgment.

8. Mr. Sharma further contended that evidence adduced on record by the prosecution with regard to recovery, is also not trustworthy because all the recovery witnesses gave altogether different version with regard to presence of the accused and recovery, if any, of mobile phones made from his room. Lastly, Mr. Sharma, contended that though it is apparent from bare reading of the statements made by the prosecution witnesses that no case is made out against the petitioner-accused, but in case this Court intends to concur with the findings returned by the learned courts below, sentence awarded by the court below being excessive needs to be reduced taking note of the age and occupation of the accused. Mr. Sharma, further contended that accused, who is a painter by occupation works on daily wage, has a family to support and as such, it would be very harsh to the family in case, he is allowed to remain behind the bars strictly in terms of the judgment passed by the learned courts below.

9. Mr. Dinesh Thakur, learned Additional Advocate General, while supporting the impugned judgment of conviction recorded by the Courts below, strenuously argued that there is no scope of interference of this Court, especially in view of the concurrent findings of fact recorded by the learned Courts below. While refuting the aforesaid submissions having been made by learned counsel representing the petitioner, Mr. Thakur, invited attention of this Court to the statements made by the prosecution witnesses, to demonstrate that all the material prosecution witnesses have stated in once voice that they had purchased mobile phones from the accused, who had stolen the same from the shop of the complainant. Mr. Thakur, further contended that as per Section 378 of IPC, complainant was only required to prove that he was lawful owner of the property allegedly stolen by the accused and as such, there is no force in the arguments of learned counsel representing the petitioner that no bills with regard to mobile phones allegedly stolen by the accused, were made available to the courts below. Mr. Thakur, further contended that statements having been made by the prosecution witnesses i.e. PW-1, PW-4, PW-5 and PW-6, clearly suggest that petitioner-accused sold the mobile phones, allegedly stolen by him from the shop of the complainant to the persons i.e. prosecution witnesses, who were residing in the same village, where the petitioner-accused used to reside. Mr. Thakur, also contended that this Court while exercising power under Section 397 of Code of Criminal Procedure, has limited jurisdiction to interfere in the concurrent findings of fact and law recorded by the Coutts below.

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

11. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> ***8.The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High***

Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

12. Having carefully perused the impugned judgment of conviction recorded by the courts below vis-a-vis evidence adduced on record by the prosecution, this Court is not persuaded to agree with the contention of the learned counsel for the petitioner that the learned courts below have failed to appreciate the evidence in its right perspective, rather this Court having perused the entire evidence available on record, has no hesitation to conclude that prosecution successfully proved beyond reasonable doubt that on the date of alleged incident, petitioner-accused not only broke the lock of the shop of the complainant, rather he committed theft by stealing 13 mobile phones.

13. PW-1, Ranvir Singh, deposed before the Court below that on 16/17.09.2006, accused Surinder Kumar, who was present in Court had sold one mobile set having SIM No.93188-09342 and on 20.09.2006, he received a telephonic call on this number and his address was inquired. He further deposed before the court below that subsequent to aforesaid inquiry, 2-3 persons approached him and he disclosed that he has purchased mobile phone from the accused. He further stated that he identified the accused Surinder during the investigation, but lateron his name came to be revealed as Sunil and mobile phone was taken into possession vide memo Ex.PW1/A, whereupon he also identified his signatures. Aforesaid statement made by this witness, if read in its entirety juxtaposing the statement made by the complainant under Section 154 of Code of Criminal Procedure, it corroborates the initial version put forth by the complainant that since SIM of three sets, out of 13 sets were active and he had made a call on mobile No.93188-09342.

14. PW-2, Vikram Thakur (complainant) also stated before the Court below that when he made call on Sim No. 93188-09342, the person on the other side revealed his name as Ranbir and disclosed that he had purchased the mobile phone from the accused.

15. PW-4.Surinder, PW-5, Krishna and PW-6, Surya also stated that they had purchased the mobile sets from the accused Surinder Kumar. Cross-examination conducted on these witnesses, nowhere suggest that defence was able to shatter their testimonies, rather all the prosecution witnesses, as referred hereinabove, stuck to their statements made in examination-in-chief.

16. PW-3, Puran Singh, stated that search of the room of accused was conducted in his presence, wherein various mobile sets were recovered. He further stated that mobile sets were recovered under the bed of the accused in his presence and were taken into possession vide memo Ex.PW2/D and same were identified by the complainant, Vikram(PW-2). If the statements of these witnesses are read in its entirety, especially PW-3, PW-4, PW-5 and PW-6 they have categorically stated that mobile sets were recovered from the room of the accused and those were duly identified by the complainant in their presence.

17. PW-10, ASI Chanchal Singh, also corroborated the version put forth by all the prosecution witnesses, as discussed hereinabove. True, it is that in cross-examination, PW-10 admitted that there are many shops adjoining to the shop of the complainant, but he quantified

that since it was night hours, none of other shop keepers witnessed the alleged incident and as such, there was no occasion for him to associate independent witness. It is not in dispute that alleged incident of lurking house trespass and theft took place during night hours and as such, story put forth by the prosecution that incident was not witnessed by the adjoining shop keepers cannot be brushed aside. Since, theft took place during night hours and same was not witnessed by any independent witness, there was no occasion for the prosecution to cite independent witness, otherwise also in the case at hand, there is no interested witness, save and except complainant (PW-2), who alleged that on 28.7.2006, he found locks of his shop broken and 13 mobile sets missing from his shop. Save and except PW-2, all the prosecution witnesses are independent witnesses, who categorically stated before the court below that they purchased mobile sets from the accused. In the case at hand, it is not in dispute that complainant (PW-2) at the time of making initial report, reported to the police that 13 mobile sets have been stolen from his shop and undisputedly, 7 mobile sets were recovered from the room of the accused, whereas four persons i.e. PW-1, PW-4, PW-5 and PW-6 admitted that they had purchased the mobile phones from the accused Sunil.

18. Perusal of Ex.PW2/B further reveals that recovery was effected on the basis of the disclosure statement made by the accused. As per the testimony of PW-10, ASI Chanchal Singh, he on the basis of information furnished by the accused, searched his room in the presence of complainant (PW-2) and PW-9 and accordingly memo Ex.PW2/C was prepared. Learned Court below taking note of the statement having been made by PW-2 under Section 154 Cr.P.C Ex.PW2/A, statement of PW-11, Inspector Chaman Lal, FIR Ex.PW7/A, and site plan of occurrence Ex.PW7/A prepared on 28th July, 2006 arrived at a conclusion that place from where theft was committed was already known to the investigating agency and in such fact situation, statement, if any, made by the accused under Section 27 of the Indian Evidence Act, is not relevant.

19. Though, this Court having perused the overwhelming evidence available on record, sees no reasons to agree with the contentions of Mr. Jeevesh Sharma, learned counsel for the petitioner that recovery is not proved, in accordance with law. In view of the aforesaid findings returned by the learned trial court, it is quite apparent from the statements having been made by other prosecution witnesses that investigating agency having received initial information from PW-1, Ranbir Singh, searched the house of accused from where 7 mobile sets allegedly stolen by the petitioner from the shop PW-2 i.e. complainant came to be recovered. Since, factum with regard to theft committed by the petitioner-accused had come to the notice of complainant PW-2, on the date of alleged incident after having talked to PW-1, he rightly discussed the factum with regard to the same to police and as such, there is no force in the arguments of Mr. Jeevesh Sharma, learned counsel for the petitioner that police had prior knowledge with regard to the room, where the stolen property was allegedly kept by the petitioner.

20. Leaving everything aside, this court having perused the overwhelming evidence led on record by the prosecution, to demonstrate that mobile phones allegedly stolen from the shop of the complainant (PW-2) were recovered from the room of the petitioner, has no hesitation to conclude that statement, if any, made by the petitioner-accused under section 27 of the Indian Evidence Act, has no relevance and even if the same is ignored and not taken into consideration, result would remain same that 7 mobile phones allegedly stolen from the shop of the complainant were recovered from the room of the accused.

21. Having carefully perused the statements made by the material prosecution witnesses, this court is not inclined to agree with the contention of learned counsel for the petitioner that there are material inconsistencies and contradictions in the statements of prosecution witnesses, rather this Court is of the view that all the material prosecution witnesses corroborated the story put forth the prosecution beyond any doubt. It stands duly proved on record that the petitioner/accused committed theft of 13 mobile phones from the shop of the complainant after breaking its lock and as such, learned court below rightly came to the

conclusion that the petitioner has committed the offence punishable under Sections 457 and 380 of the Indian Penal Code.

22. Since, prosecution was not able to lead cogent and convincing evidence to prove involvement, if any, of other co-accused namely Pankaj, Rohit Kumar and Jatinder Kumar, they rightly came to be acquitted and no benefits, if any, can be drawn from their acquittal by the accused, against whom prosecution successfully proved the case under section 457 and 380 of the Indian Penal Code

23. Consequently, in view of the detailed discussion made hereinabove, this Court sees no reason to differ with the judgments of conviction recorded by the learned courts below, which otherwise appear to be based upon the correct appreciation of the evidence as well as law on the point and as such same are upheld.

24. However, this Court taking note of the fact that alleged incident had taken place in the year, 2006 i.e. 12 years back, whereafter case remained pending adjudication before the different forums including this Court and petitioner, who is a painter by occupation has a family to support, deems it fit to reduce the sentence awarded by the learned courts below, which otherwise appears to be excessive in the facts and circumstances of the case and as such, this Court modify the sentence awarded by the learned courts below to six months qua all the offences allegedly committed by him. Order dated 13.5.2015, passed by this Court, whereby sentence imposed by the court below was suspended, is hereby vacated and the petitioner-accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court subject to the modification made hereinabove.

Accordingly, the present criminal appeal is dismissed alongwith pending application(s), if any.

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

Ajay Kapur .....Petitioner.

Versus

State of H.P. .....Respondent.

Criminal Revision No. 48 of 2018.
Reserved on : 20th April, 2018.
Decided on : 26th April, 2018.

Code of Criminal Procedure, 1973- Section 319- **Factories Act, 1948-** Section 101- Exemption of occupier or manager from liability– When can be availed – Complaint was filed against A.L. Kapoor before trial court for offences under the Act – Complainant moved an application for his deletion and substitution by one Ajay Kapur as an accused – Trial Court allowing the application – Petition against by Ajay Kapur– State justifying order of trial court by recourse to Section 101 of Act - Held, In certain cases, Manager or occupier of a factory when charged with an offence under Act, can (i) file written application in trial Court showing that some other person was the actual offender (ii) and satisfy that he used due diligence to enforce execution of Act and (iii) such other person committed offence in question without his knowledge or consent or connivance – As no such application was filed by A.L. Kapoor before trial court, Section 101 of Act has no applicability – A.L. Kapoor could not have been substituted by recourse to Section 319 of Code – Petition allowed- Order of trial court set aside. (Para-5)

Code of Criminal Procedure, 1973- Section 319- Impleadment of accused- Complainant instituted a complaint against one A.L. Kapoor – During pendency of complaint, complainant filing application under Section 319 of Code for 'deletion' of A.L. Kapoor as an accused and his substitution by one Ajay Kapur as 'accused' – Trial court allowing this application, directing deletion of A.L. Kapoor and substitution of Ajay Kapur as an accused in his place – Petition

against – Held – This section of Code can be invoked only when i) during enquiry or trial some 'evidence' comes on record against left out persons and (ii) when 'such left out person can be jointly tried' for some offences with accused already before court- Application of complainant filed under Section 319 of Code was for deletion of accused already arrayed and impleadment of new accused in his place - There was not to be any joint trial of A.L. Kapoor and Ajay Kapur in that complaint – Application under Section 319 of Code thus was inherently defective – Remedy for complainant, if any, was to file fresh complaint against Ajay Kapur. (Para-4)

For the Petitioner: Mr. N. K. Sood, Sr. Advocate with Mr. Sunil Mohan Goel, Advocate.

For the Respondent: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The impugned orders, are, a sequel, to, an application preferred by the complainant/respondent herein, before the learned Judicial Magistrate concerned. Through, the application moved before the learned Magistrate concerned, a prayer was made for hence substituting, in the apposite complaint, the name of one Ajay Kapur, in place of Mr. A.L. Kapur. The necessity for casting the aforesaid application, before the learned Magistrate concerned, was a sequel, of this Court, proceeding, to, in Cr.MMO No. 275 of 2017, make an order, for, deletion in the apposite complaint, the name of, one, A.L. Kapur.

2. It appears that in the garb of the orders pronounced upon the aforesaid Cr.MMO No.275 of 2017, the application at hand, was, constituted by the complainant/respondent, before the learned Judicial Magistrate 1st Class, Nalagarh. Even if assumingly, this Court while making a pronouncement, upon, the aforesaid Cr.MMO, had ordered for the deletion, in the apposite complaint, the name of one A.L. Kapur, and with the application at hand, being subsequently cast, may yet give some leverage to the respondent/complainant, to make an espousal, (a) that the orders impugned before this Court prima facie, hence, not acquiring any stain of any illegality. However, for making, a, complete determination with respect to illegality, if any, ingraining, the orders impugned before this Court, dehors the factum of this Court recording, the aforesaid order upon Cr.MMO No. 275 of 2017, it is also imperative to adjudge, (b) whether in garb thereof, the complainant/respondent, yet omitting to beget compliance vis-a-vis the apposite statutory provisions, (c) and, irrespective of the factum of the application, being purportedly not cast within the domain, of the apposite statutory provisions appertaining vis-a-vis the required purpose.

3. A reading of the application, unfolds qua though, it concerting to seek, substitution, in the apposite application, of one Ajay Kapur instead of A.L. Kapur, (i) thereupon, the aforesaid simplicitor prayer, may hence be invested with an aura of legality, even if it is purportedly rested, upon, the orders pronounced by this court in Cr.MMO No. 275 of 2017, only upon evident satiation, being meted vis-a-vis the mandate of Section 319 of the Cr.P.C., (ii) conspicuously, when the aforesaid application is apparently, cast within the domain of Section 319 of the Cr.P.C., (iii) reiteratedly, hence, the validity(ies), of, orders pronounced thereon, is to be tested, especially, on anvil of evident compliance(s) being begotten vis-a-vis the mandate(s) enshrined therein. Sequel, of the aforesaid inference(s), is, of this Court being hence enjoined, to, extract the relevant provisions, borne in Section 319 of the Cr.P.C., provisions whereof stand extracted hereinafter:-

> "319. Power to proceed against other persons appearing to be guilty of offence.
>
> (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for

which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

(a) readings whereof discloses, investing of statutory powers in the court concerned, to, on evidence erupting, during, the course of inquiry or trial, of an offence, vis-a-vis commission, of, an offence by any person not earlier arrayed as accused, (b) thereupon, the person not initially arrayed, as an accused, being enjoined to be added, as an accused, alongwith the already arrayed accused. However, hereat, even before commencement of the trial vis-a-vis the apposite complaint, the instant application was constituted, before, the learned trial Magistrate concerned, (c) with a specific prayer therein of with prosecution sanction being nowat accorded vis-a-vis Ajay Kapur, his hence being ordered to be substituted in the apposite complaint, in place of one A.L. Kapur. Apparently, hence, with the mandate of Section 319 of the Cr.P.C., enjoining, the addition of a person, as an accused along with the already arrayed accused, upon apt evidence surfacing against him, during, the course of holding of an inquiry or trial, (d) thereupon, the continuation of A.L. Kapur, as an accused, in the apposite complaint, rather was peremptory, for validating any order qua one Ajay Kapur being added alongwith him as an accused, in the apposite complaint, (e) whereas, the deletion of Mr. A.L. Kapur has rather rendered unworthwhile the mandate thereof, besides evidently compliance therewith is not meted

4. Even if assumingly, (a) subsequent to this Court making a pronouncement, upon, the aforesaid Cr.MMO,, the apposite prosecution sanction, was accorded vis-a-vis one Ajay Kapur, his being the principal offender, (b) yet the apposite motions available, for recourse, by the respondent/complainant, were, may be comprised, in institution of a complaint afresh, against him, rather than, the respondent/complainant, through, an application purportedly, cast within the ambit of Section 319 of the Cr.P.C., seeking substitution of one A.L. Kapur, by one Ajay Kapur, (c) visibly when hence the aforesaid substitution rather effaces, from, the array, of, accused mentioned in the complaint, the sole accused therein, whereas, only on his being continued to be retained therein, as an accused, (d) hence would alone empower the respondents/complainant, to, on eruption of any apt evidence against the another accused, hence seek his addition, along with A.L. Kapur, in the apposite complaint. Consequently, with the apposite mandate applicable hereat, when has hence been visited with gross infraction(s), thereupon, the orders impugned before this Court, and, purportedly made within the mandate of Section 319 of the Cr.P.C., mandate whereof, for reasons aforestated stands infringed, rather necessitate interference by this Court.

5. During the course of hearing of this petition, the learned Additional Advocate General, has drawn attention of this Court, to the mandate comprised, in Section 101 of the Factories Act, 1948 (hereinafter referred as the Act), substantive provisions, whereof stand extracted hereinafter:-

"101. Exemption of occupier or manager from liability in certain cases.- Where the occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days' notice in writing of his intention so to do,

to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge;, and if, after the commission of the offence has been proved, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the Court-

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge consent or connivance,

that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offence:"

(a) and on anvil thereof, he urges that hence the deletion, of, one A.L. Kapur as an accused, in the complaint, and his being ordered, to substituted by one Ajay Kapur, rather falling within its ambit, (b) whereupon, he further canvasses of infirmity if any, arising from the aforesaid reasons, being hence cured, rendering hence the impugned orders before this Court, to acquire a tinge of validity. However, the aforesaid submission is outrightly rejected, (c) apparently, when a close reading of its mandate, brings to the fore, the apparent fact of its mandate evidently warranting satiation(s) being, meted thereto, comprised in (d) of the person against whom the complaint is filed, being charged with the offence punishable under the Act, whereupon, his being entitled to make an application, within, domain(s) thereof, for adding alongwith him any other person, given the latter being the actual offender. However, with A.L. Kapur, yet being not charged, rather his being deleted, and, obviously when he has not within the domain of Section 101 of the Act, rather make a complaint, with the disclosures therein, of one Ajay Kapur being the principal offender, (e) rather with the respondent/complainant, suo motu concluding, of the apposite offence, rather being committed by one Ajay Kapur, (f) thereupon, the latter proceeding, to, make an endeavour to substitute Ajay Kumar in place of A.L. Kapur, as an accused in the apposite complaint, renders hence the aforesaid endeavour to also fall outside, the ambit of Section 101 of the Act. In summa the aforesaid inferences, constrain a further conclusion,(i) of with the apposite application being purportedly, cast within the domain of Section 319 of the Cr.P.C., and, within the domain of Section 101 of the Act, and, its not evidently satiating ingredients thereof, (ii) and also with exercise of jurisdiction by the learned trial Magistrate rather purportedly falling within domains thereof, hence rendered the apt exercise, of jurisdiction, to be vitiated.

6. For the foregoing reasons, the instant petition is allowed and the order impugned before this Court, is quashed and set aside. The parties are directed to appear before the learned trial Court on 11th May, 2018. All pending applications also stand disposed of. Records be sent back forthwith.

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

Dharam Pal .....Appellant/plaintiff.

Versus

Smt. Kailasho Devi & Ors. .....Respondents/defendants.

RSA No. 358 of 2012.
Reserved on : 23rd April, 2018.
Decided on :26th April, 2018.

Specific Relief Act, 1963- Section 34- **Indian Succession Act, 1925-** Section 63- Will- Mode of Proof- Plaintiff filing suit for declaration and injunction on basis of Will – During trial, plaintiff only examining one 'R', who had signed Will as an 'identifier'- However, 'R' also deposing before

trial court about 'attestation' of Will in his presence – His deposition not contested in cross-examination – Trial court relying upon Will and decreeing suit of plaintiff- First Appellate Court setting aside decree of trial Court by holding that Will in question didn't stand proved – RSA by plaintiff – Defendants contended before High Court that as none of marginal witnesses to Will was examined before Trial Court, it was not proved in accordance with law – Held, there is no bar that identifier cannot testify as an 'attesting witness' - If his deposition satisfies due attestation of Will, he can be relied upon – Further held, deposition of 'R' proves due attestation of Will in question in favour of plaintiff – Judgment and decree of First Appellate Court set aside and of trial Court restored – Appeal allowed – Suit decreed. (Paras- 9, 10 and 12)

Cases referred:
N. Kamalam (dead) and another vs. Ayyasamy and another, (2001)7 SCC 503
S.R. Srinivasa and others vs. Padmavathamma, (2010)5 SCC 274

For the Appellant: Mr. Ashok Chaudhary, Advocate.
For the Respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for vacant possession of the suit property, stood decreed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the defendants, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiff instituted a suit against original defendant one Hem Raj (now deceased) for vacant possession of premises comprising single storeyed situated on part of Khasra No.1156 as shown in the site plan and for recovery of Rs.1000/- per month from the date of institution of the suit till realisation of the amount. It has been pleaded that land comprised in Khata No.243 min, Khatauni No.490, Khasra No.156, measuring 0-0097 hectares, situated in mohal and mouza Thakurdwara, Tehsil Indora, District Kangra, H.P., is shown to be iin the name of Bihari Lal, Kartara, Harnam Singh Brahmmo, Hazara Singh, Dasaundi Ram, Charan Dass, Parsinno, Vedo, Karmo, Swaran Kaur, Lachhman and Mehnga etc., while predecessor-in-interest of plaintiff, namely, Kesar Ram son of Sarno has been shown in possession as Kabiz and nature of the land is shown as gair mumkin shop. It is pleaded that in fact, Kesar Singh predecessor-in-interest of plaintiff took over possession of suit land in the year 1972-73 and constructed single stored two shops, three rooms walls and gates in Khasra No.1156 as shown in the site plan. It is further pleaded that Kesar Singh died on 12.10.1998 and before his death he had executed a registered Will with respect to his movable and immovable property in favour of the plaintiff. The said Will was registered on 7.4.1998. On the basis of the aforesaid Will, the plaintiff became the owner in possession of construction so raised by his father Kesar Singh and his predecessor namely Samo. It is pleaded that plaintiff became owner of construction by way of Will and also purchased land in Khata where construction is situated from one co-sharer Swaran Kaur on 8.9.2000 by way of registered sale deed. It is pleaded that deceased defendant Hem Raj, after the death of his father took forcible possession over part of construction on dated 12.10.1998 and possession of defendant is that of trespasser. It is submitted that defendant is co-sharer in Khata but not in structure situated in khasra No.1156. It is pleaded that plaintiff asked deceased defendant to vacate the possession of said structure which he has forcibly occupied but defendant did not accept request of plaintiff. Hence the sit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections of maintainability, cause of action, locus standi etc. It is submitted that the father of replying defendant, namely, Hem Raj deceased had purchased land

from original owners Bihari, Kartara, Harbans Singh sons of Hira vide sale deed No.60 of 17.01.2001 for consideration of Rs.5000/-. It has been pleaded that father of defendant namely Hem Raj had constructed two shops in Khasra No.1156 in the year 1980 and three rooms over suit land during settlement operation but settlement authorities had wrongly recorded the name of father of Hem Raj. It is further pleaded that father of defendant opened bicycle repair shop during settlement operation. Defendant's father had paid full and final sale consideration amount to Bihar, Kartara and Harbans. It is pleaded that the plaintiff is not owner of the suit property and plaintiff has filed wrong site plan. It is pleaded that the plaintiff is government employee and working in Punjab and is not living in village Thakurdwara. In fact, Kesar Singh, grand father of replying defendant is owner of suit land and Kesar did not execute any Will in favour of plaintiff. It is denied that plaintiff in accordance with Will dated 7.4.1998 became owner in possession of construction raised on the suit land. It is submitted that Hem Raj had constructed shops and rooms in the year 1980 and applied for electricity connection which was sanctioned in favour of Hem Raj. It is further pleaded that father of defendant had purchased 1/18th share measuring 0-01-01 hectares from original owners Bihari Lal, Kartara and Harbans and mutation has also been attested and sanctioned in favour of Hem Raj.

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

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

1. Whether plaintiff is owner of suit property as shown in the site plan, as alleged?OPP.
2. Whether the plaintiff is entitled for possession of structure as shown in the site plan, situated on part of Khasra No.1156, as alleged? OPP.
3. Whether the plaintiff is entitled for recovery of Rs.1000/- from date of institution along with interest as prayed for?OPP.
4. Whether the plaintiff is owner of structure on the basis of valid Will executed by Kesar Ram in favour of plaintiff, dated 7.4.1998?OPP.
5. Whether suit is not maintainable in the present form as alleged? OPD
6. Whether plaintiff has no cause of action to file present suit as alleged? OPD.
7. Whether plaintiff has no locus standi to file present suit, as alleged?OPD.
8. Whether suit is bad for non joinder of necessary parties, as alleged? OPD
9. Whether father of defendant purchased land from original owners Shri Bihari, Kartara and Harbans, residents of Thakurdwara vide document NO.60 of 17.01.2001, for consideration of Rs.5000/-, as alleged? OPD
10. Whether father of defendant is wrongly recorded as Kabiz (in possession) during the settlement operation as alleged?OPD.
11. Whether defendant Hem Raj has constructed disputed premises in the year 1980, as alleged?OPD
12. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom, by the defendants/respondents herein, before, the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded, in its impugned judgment

and decree, by the learned first Appellate Court. When the appeal came up for admission, on 20.07.2012, this Court, admitted the appeal instituted by the plaintiff/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the learned Appellate Court was correct in reversing the judgment of the learned trial Court holding that the Will Ex.PW2/A has not been proved in accordance with law?

Substantial question of Law No.1:

8. The deceased testator, one Kesar, executed a registered testamentary disposition vis-a-vis his estate, whereunder, he constituted the plaintiff, as his legatee. There, occur, specific recitals in Ex.PW2/A, of, one Karam Singh, and, one Anup Singh, being both designated as marginal witnesses thereto, also the scribed capacity, and, the designated role of one Ram Kumar, is, echoed therein, as identifier, of, the deceased testator. However, none of the marginal witnesses vis-a-vis Ex.PW2/A, either stepped into the witness box, nor obviously testified in consonance with the imperative statutory tenets, of, the deceased testator scribing his signatures thereon, in their respective presence(s), and, thereafter each of them, also, in the presence of the deceased testator, hence doing likewise. The apposite testification, in consonance with the statutory ingredients, borne in Section 63 of the Indian Succession Act, was, however, rendered by one Ram Kumar, who as aforestated, is specifically designated therein, the role of only an identifier, of, the deceased testator. Nonetheless, in his testification, comprised, in his examination-in-chief, he has rendered a testification of Ex.PW2/A being scribed by one Ravinder Kumar Mahajan, and thereafter, contents thereof being explained, to the deceased testator, and, upon his comprehending, all the recitals borne in eX.PW2/A, the deceased testator in his presence, scribing his signatures thereon, whereafter, he, and subsequent thereto one Anup Singh, and, one Karam Singh, all, in the presence of the deceased testator, hence, proceeding to append their respective signatures thereon. He, in his examination-in-chief, has testified, of his being the marginal witness to the making, of, Ex.PW2/A. Further, he testified vis-a-vis the sound disposing state of mind, of the deceased testator, and, has proceeded, to echo of on 7.4.1998, Ex.PW2/A, being presented before the Sub Registrar, Indora for registration, and, the latter, after querying the deceased testator, about veracity(ies), of, all contents, borne in Ex.PW2/A, also after the Sub Registrar concerned, reading, and, explaining vis-a-vis the deceased testator, all the recitals, borne in Ex.PW2/A, (i) thereafter, the deceased testator, in the presence of Sub Registrar, hence, appending his signatures on Ex.PW2/A, specifically, underneath the relevant signatured endorsement existing on Ex.PW2/A, and, Anup Singh, one of the marginal witness thereto also before the Sub Registrar, appending his signature(s), thereon. The aforesaid testification, occurring, in examination-in-chief, of, PW Ram Kumar, specifically designated, in Ex.PW2/A to be an identifier, of the deceased testator, was not concerned to be belied, by the learned counsel for the defendant(s), while subjecting him, to an ordeal, of, a rigorous, and, scathing cross-examination. Consequently, the afore referred echoings, borne, in the examination-in-chief of PW Ram Kumar, wherein, he ascribes vis-a-vis himself, the role of a marginal witness to Ex.PW2/A, (a) dehors, his being designated therein, as an identifier of the deceased testator, besides when even after the afore referred testification, standing rendered, by one Ram Kumar, the learned counsel for the defendants, not motioning, the learned trial Court, for, re-summoning the plaintiff or PW Ram Kumar, for his endeavouring to from both, hence, elicit, qua (b) the omission of the plaintiff, to lead into the witness box, the designated marginal witnesses, vis-a-vis Ex.PW2/A, namely, one Anup Singh, and, one Karam Singh, (c) especially given both being specifically designated therein, the role of marginal witnesses thereto, (d) AND rather his leading into the witness box, one Ram Kumar, designated specifically in Ex.PW2/A, to be an identifier, of the deceased testator, rather being actuated by collusion inter se him, and, the plaintiff. Even otherwise, the defendants, did not seek adduction of best evidence, comprised in the report, of the handwriting expert, for belying, the existence of signatures, of, the deceased testator on Ex.PW2/A, as stood, appended thereon, both, at the pre-registration stage, and, also stood appended thereon, at the stage of its being presented, for registration by the deceased, (e)

whereupon the testification, of, PW-2 one Ram Kumar, that, in the presence of the registering officer, the deceased testator, after, being enabled to comprehend, its contents, his scribing his signatures thereon, hence, for lack of all aforesaid concerts, being made, by the counsel for the defendants, rather does coax a conclusion of the deceased testator, hence, appending his authentic signatures, on Ex.PW2/A, both at the pre-registration stage, and, at the state of its being presented, for registration, before, the registering authority concerned. The sound disposing state of mind possessed by the deceased testator, at the stage of his executing Ex.PW2/A, is testified by PW Ram Kumar, testification whereof has remained uneroded, thereupon, it is concluded, of, dehors his being specifically designated, in Ex.PW2/A, as an identifier of the deceased testator, his rather being hence acquiesced, by the defendant, as a marginal witness thereto, and nor his being estopped to adduce proof vis-a-vis satiation(s) being meted, qua the imperative statutory para meters, enshrined, in Section 63, of, the Indian Succession Act.

9. Be that as it may, the learned counsel appearing, for the defendants/respondents herein, with vigour contended, that with the testification of Ram Kumar, specifically designated, in Ex.PW2/A, as identifier of the deceased testator, thereupon, his scribed, designated capacity, rendered him disabled, to be capacitated, to depose, as marginal witness thereto nor hence he possessed, the requisite animus attestendi, to render any deposition qua the trite factum, of, valid execution of Ex.PW2/A. In making the aforesaid submission, the learned counsel, for the defendants/respondents, relied, upon para 26, of, a judgment rendered by the Hon'ble Apex Court, in a case titled as ***N. Kamalam (dead) and another vs. Ayyasamy and another***, reported in ***(2001)7 SCC 503,*** relevant portion of paragraph No.26 whereof stand extracted hereinafter:

> **"26.** The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of same status as that of the attesting witnesses. The signature of the attesting witness as noticed above on a document, required attestation (admittedly in the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of the scribe. The Full Bench judgment of the Madras High Court in H. Venkata Sastri and Sons and others v. Rahilna Bi and others (AIR 1962 Madras 111) wherein Ramachandra Iyer, J. speaking for the full bench in his inimitable style and upon reliance on Lord Cambells observation in Burdett v. Spilsbury has the following to state pertaining to the meaning to be attributed to the word "attestation" (air PP.113-14, para 3-4):
>
> "(3)....The definition of the term attested which is almost identical with that contained in S.63 (c)of the Indian Succession Act, has been the result of an amendment introduced by Act 27 of 1926.Prior to that amendment it was held by this court that the word attested was used only in the narrow sense of the attesting witness being present at the time of execution. In Shamu Pattar v. Abdul Kadir ILR 35 Mad 607 (PC), the Privy Council accepted the view of this court that attestation of a mortgage deed must be made by the witnesses signing his name after seeing the actual execution of the deed and that a mere acknowledgement of his signature by the executant to the attesting witness would not be sufficient. The amending Act 27 of 1926 modified the definition of the term in the Transfer of property Act so as to make a person who merely obtains an acknowledgment of execution and affixed his signature to the document as a witness, an attestor. It will be noticed that although S.3 purports to define the word attested it has not really done so. The effect of the definition is only to give an extended meaning of the term for the purpose of the Act; the word attest is used as a part of the definition itself. It is, therefore, necessary first to ascertain the meaning of the word attest independent of the statute and adopt it in the light of the extended or qualified meaning given therein. The word attest means, according to the Shorter Oxford Dictionary to bear witness to, to affirm

the truth or genuineness of, testify, certify. In Burdet v. Spilsbury, (1842-43) 10 Cl and F 340, Lord Cambell observed at page 417,

'What is the meaning of an attesting witnessto a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness.'

The Lord Chancellor stated,

'the party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness.'

The ordinary meaning of the word would show that an attesting witness should be present and see the document signed by the executant, as he could then alone vouch for the execution of the document. In other words, the attesting witness must see the execution and sign. Further, attestation being an act of a witness, i.e., to testify to the genuineness of the signature of the executant, it is obvious that he should have the necessary intention to vouch it. The ordinary meaning of the word is thus in conformity with the definition thereof under the Transfer of Property Act before it was amended by Act 27 of 1926. Before that amendment, admission of execution by the executant to a witness who thereupon puts his signature cannot make him an attestor properly so called, as he not being present at the execution, cannot bear witness to it; a mere mental satisfaction that the deed was executed cannot mean that he bore witness to execution.

(4) After the amendment of S.3 by Act 27 of 1926, a person can be said to have validly attested an instrument, if he has actually seen the executant sign, and in a case where he had not personally witnessed execution, if he has received from the executant a personal, acknowledgment of his signature, mark etc. Thus of the two significant requirements of the term attest, namely (1) that the attestor should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the execution by subscribing his name as a witness; which implies a consciousness and an intention to attest, the Amending Act modified only the first; the result is that a person can be an attesting witness, even if he had not witnessed the actual execution, by merely receiving personal acknowledgment from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the latter requirement, namely, certifying execution which implies that the attesting witness had the animus to attest."

Wherein the Hon'ble Apex Court, has, expostulated, of the scribe of the Will, being incapacitated, to occupy the status, and, capacity of a marginal witness, to the relevant testamentary disposition. The learned counsel appearing for the defendants/respondents, for lending strength to the aforesaid espousal, has also placed reliance, upon, a judgment of the Hon'ble Apex Court, rendered, in a case titled as ***S.R. Srinivasa and others vs. Padmavathamma***, reported in ***(2010)5 SCC 274***, the relevant paragraph No.38 and 41 whereof stand extracted hereinafter:-

"38. In the case of H. Venkatachal a Iyengar v. B.N. Thimmajamma, [1959 Supp (1) SCR 426] Gajendragadkar J. stated the true legal position in the matter of proof of Wills. The aforesaid statement of law was further clarified by Chandrachud J. in the case of Jaswant Kaur v Amrit Kaur [(1977)1 SCC 369] as follows:

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution,

if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

Applying the aforesaid principles to this case, it would become evident that the Will has not been duly proved.

39. As noticed earlier in this case, none of the attesting witnesses have been examined. The scribe, who was examined as DW.2, has not stated that he had signed the Will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the witnesses to the Will. In such circumstances, the observations made by this Court in the case of M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons , [(1969)1SCC 573], become relevant. Considering the question as to whether a scribe could also be an at testing witness, it is observed as follows:

"7. .....It is essential that the witness should have put his signature animo attestandi , that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to

> certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."
>
> 40. In our opinion, the aforesaid test has not been satisfied by DW.2 the scribe. The situation herein is rather similar to the circumstances considered by this Court in the case of N. Kamalam v. Ayyasamy, [(2001)7 SCC 503]. Considering the effect of the signature of scribe on a Will, this Court observed as follows:
>
> "26.The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses.....
>
> 27. ...The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself — this is again, however, not the situation existing presently in the matter under consideration."
>
> 41. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a Will can be held to have been proved when the statutory requirements for proving the Will are satisfied. The High Court has however held that proof of the Will was not necessary as the execution of the Will has been admitted in the pleadings in O.S.No.2 33 of 1998 , and in the evidence of P.W.1.
>
> (pp. 286-288)

wherein likewise the Hon'ble Apex Court, has, not invested vis-a-vis, the scribe of "the Will", the status, of, marginal witness thereto. This Court agrees with the aforesaid legal expostulations borne, in the afore referred verdicts rendered by the Hon'ble Apex Court. However, the aforesaid expostulations, are, confined to the incapacity, of, a scribe to testify as a marginal witness vis-a-vis the valid execution, of the apposite testamentary disposition. However, hereat, one Ram Kumar, who, rather, in his testification, borne in his examination-in-chief, has hence, unequivocally, and, unprotestedly echoed therein, of his being a marginal witness to Ex.PW2/A, and, has further testified, vis-a-vis satiations, being meted, vis-a-vis all the imperative statutory ingredients, (i) specifically of the deceased testator, scribing his signatures, in his presence, whereafter, his, in the presence of the deceased testator also appending his signatures thereon, (ii) and, subsequent thereto, both the marginal witnesses thereto, also, in the presence of the deceased testator hence embossing their respective signatures thereon. Nowat, with the efficacy(ies), of, aforesaid deposition, remaining unconcerted to be shattered by the counsel for the defendants, during, the ordeal of his subjecting him, to, a rigorous cross-examination, (iii) thereupon, he is to be construed, to holding the requisite animus attestendi. As aforestated, with, after recording of the depositions, of the plaintiff, and, of one Ram Kumar, the learned counsel for the defendants, not seeking recall, of the aforesaid witnesses, for eliciting from both qua theirs holding inter se collusion, (iv) whereupon, hence the plaintiff was inclined to lead, only PW-2 Ram Kumar, into the witness box, whereas was required to lead into the witness box, the designated marginal witnesses thereto, (v) thereupon, with this Court hence concluding, of one Ram Kumar rendering, an unblemished testimony vis-a-vis his holding, the apposite animus attestendi, (vi) besides the signatures of deceased testator, borne in Ex.PW2/A, being concluded, to, remain unbelied, for, want, of, adduction of best evidence nor the signatures of one Anup Singh, and, one Karam Singh standing belied, (vi) rather, when one of the apposite marginal witness, also accompanied Ram Kumar, and, the deceased testator, to the office of Sub Registrar concerned, for enabling the deceased testator, to ensure its registration, (vii) whereat also PW-2 Ram Kumar testifies, of, after the Sub Registrar, ensuring the deceased testator, being enabled to

comprehend, all the recitals borne in Ex.PW2/A, whereafter, his making the deceased testator, to, append his signature underneath the relevant endorsement(s), also the sub registrar concerned, signing, the relevant endorsements, (viii) obviously, constitute evidentiary material, in personification vis-a-vis valid proof, of, execution of Ex.PW2/A, by the deceased testator, and, also proof thereof, hence, assuredly, falling within the domain of Section 63, of the Indian Succession Act, also, reiteratedly hence, cogent proof, by, PW-2 being adduced vis-a-vis the valid, and, due execution of Ex.PW2/A, by the deceased testator.

10. The learned counsel, for the defendants /respondents herein, has further contended that even, though, the judgments supra appertain, to an interdiction being cast, against, a scribe being construable to be not holding the requisite animus attestendi also his being debarred, to depose as marginal witness, to the apposite testamentary disposition. Nonetheless, he contends, that the ratio decidendi thereof, is comprised (a) in the designated scribed capacity, of any person vis-a-vis the testamentary disposition, per se hence debarring him, to depose as a marginal witness, to the relevant testamentary disposition, (b) hence, with Ram Kumar holding a specific designated capacity of an identifier, vis-a-vis PW-2/A, hence, his not holding the capacity, to depose, as a marginal witness, in proof of valid execution of, the testamentary disposition. However, the aforesaid submission, for the reasons aforestated, is, outrightly rejected, (c) significantly when he has testified, of, his holding the requisite animus attestendi, testification whereof reiteratedly stands acquiesced, and, with there being no rigid statutory bar, engrafted in Section 63, of, the Indian Succession Act, against, only two marginal witness being associated vis-a-vis the execution, of, the apt testamentary disposition. (d) thereupon, even if, Ram Kumar is described in Ex.PW2/A, to be an identifier, of deceased testator, hence, he is rather to be construed to be the 3rd marginal witness to Ex.PW2/A, and, also when he unlike the expostulation borne in judgments supra, rendered by the Hon'ble Apex Court, wherein, the scribe alone is debarred to render any testification, in purported proof, vis-a-vis the imperative statutory ingredients, enshrined, in Section 63 of the Indian Succession Act, and, his testification, if, rendered being discardable, and, his being also construed to be not holding the requisite animus attestendi, (e) whereas, in contradistinction thereof, with PW Ram Kumar, formidably, loudly, and, candidly in his examination-in-chief, making acquiesced bespeakings, of his holding, the requisite animus attestandi also his being associated as marginal witness thereto, testification whereof remains unshattered, (f) thereupon, they hence acquire an aura of veracity, whereupon, he is to be concluded qua his being a marginal witness to Ex.PW2/A, besides, hence the ratio decidendi propounded in judgments supra, rendered by the Hon'ble Apex Court, against, persons described, in “the Will” to be holding a specified capacity, being per se baulked, to depose as marginal witness thereto, obviously remaining unattracted hereat.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Substantial questions of law No.1 answered in favour of the the appellant and against the respondents.

12. In view of above discussion, the instant appeal is allowed. In sequel, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 53-I/XIII-2009 is set aside, whereas, the judgment and decree rendered by the learned Civil Judge (Junior Division) Indora in Civil Suit No. 602/04 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Hukam Chand & another .....Appellants.
Versus
Churamani & others .....Respondents.

FAO No. 37 of 2018.
Reserved on : 20.04.2018.
Decided on : 26th April, 2018.

Motor Vehicles Act, 1988- Section 166- Grant of Compensation – Assessment of income of deceased – Claims Tribunal assessing income of deceased, aged 21 years, notionally at Rs. 6,000/- per month and granting compensation on that basis to his legal representatives after applying multiplier of '15' – Appeal against – Legal representatives contending before High Court that Claims Tribunal did not take into consideration income of deceased @ Rs. 1 lac per month from horticultural pursuits- High Court found that there was no documentary proof of income of deceased from horticulture – After taking notional income of deceased at Rs. 6,000/- per month, granting 40% increase towards future prospects (6000 + 2400 = 8400), deducting ½ towards personal living expenses and applying multiplier of '18' instead of 15, High Court reassessed compensation on that basis - Compensation under conventional heads is given as per **National Insurance Company Limited Vs. Pranay Sethi and others, AIR 2017 SC 5157** - Appeal allowed – Award modified. (Paras-4 to 9)

Cases referred:
Sarla Verma vs. DTC, (2009)6 SCC 121,
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant: Ms. Ashma Gupta, Advocate vice to Mr. Vijay Arora, Advocate.
For Respondents No.1 & 2: Mr. N.K. Bhardwaj, Advocate.
For Respondent No.3: Mr. P. S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the award rendered by the Learned Motor Accidents Claims Tribunal-1, Kullu in M.A.C. Petition No. 29 of 2015, whereby, the learned Tribunal adjudged compensation vis-a-vis, the LRs of deceased Jagdev. A perusal of the postmortem report Ex.PW1/A, makes a visible disclosure, of the deceased suffering his demise, on account of hemorrhage, hemorrhage whereof, is ascribed to a motor vehicle accident.

2. The trite grounds raised by the appellants herein, for striving, to beget enhancement, of, apposite computation of compensation amount vis-a-vis them, is, grooved in the factum of the learned tribunal, untenably scoring off, the testification of PW-4, wherein, he voices (a) of the deceased rearing an income of Rs.1 lac per mensem, from agricultural pursuits, (b) wherefrom, the counsel for the appellants, espouses, that the learned tribunal hence has grossly erred in assessing the per mensem income, of the deceased, only, in a sum of Rs.6000/-, whereafter, the counsel contends, that it has resulted in gross under assessment, of, compensation amount vis-a-vis the claimants.

3. The aforesaid contention meted before this Court by the counsel for the appellants, obviously, has to suffer outright rejection, for the reasons (a), the bald testification of PW-4 unaccompanied by any receipts, making disclosures vis-a-vis the apposite sale proceeds

accruing to the deceased, hence, being obviously unworthwhile nor warranting any imputation of any credence thereto. The learned tribunal had thereafter computed the notional per mensem income of the deceased, in a sum of Rs.6000/-, in computation(s) whereof, apparently hence there appears no gross infirmity, especially when there is no specific precise evidence vis-a-vis the precise income reared, by the deceased, from, his agricultural pursuits.

4. Nowat, the legality of the learned tribunal rather applying upon the apposite annual dependency, a multiplier of 15, is to be adjudged. In making an adjudication with respect to the applicability of a multiplier of 15, by the learned tribunal vis-a-vis the apposite annual dependency, of, the deceased, an allusion to paragraph No.21, occurring in a judgment of the Hon'ble Apex Court, rendered in case tilted as **Sarla Verma vs. DTC**, reported in ***(2009)6 SCC 121***, is imperative, paragraph No.21 whereof is extracted hereinafter:-

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

A reading of the apposite hereinabove extracted para 21 of Sarla Verma's case (supra), discloses, that upon a deceased, evidently falling within the age groups of 15 to 21 years, and, 21 to 25 years, thereupon multiplier of 18 being applicable vis-a-vis the figure of annual dependency, (i) and, when hereat at the stage contemporaneous to the accident, deceased Jagdev, as revealed by his postmortem report, was aged 21 years, hence a multiplier of 18, was enjoined, to be applied by the learned tribunal, upon, the figure of annual dependency, as aptly computed by it. Consequently, the non applying, by the learned tribunal, of the apposite multiplier of 18 vis-a-vis the figure, of annual dependency aptly computed by it, has resulted in under assessment of compensation vis-a-vis the claimants.

5. The deceased, is, in the postmortem report, reflected to be aged 21 years, at the relevant time. The learned counsel appearing, for the objectors/claimants, submits that, with the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.59 extracted hereinafter:

> "59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in

> service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life,etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable." (p.2721-2722)

expostulating (i) that where the deceased concerned, hence, evidently rendered employment, in non government organization(s) or was self employed, as, is the deceased hereat, (a) thereupon, hikes or accretions, on anvil of future prospects vis-a-vis the apposite income drawn by him, at the time contemporaneous to the ill fated mishap, from his avocation, being also meteable thereto. However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report reflects, the deceased being aged 21 years, at the relevant time, hence with the afore extracted paragraph, mandating, of, accretions, towards, future incremental prospects vis-a-vis the income drawn by the deceased, being pegged upto 40% thereof, also being tenably meteable vis-a-vis the apposite hereat notional income assessed in a sum of Rs.6,000/-. Consequently, after meteing 40% increase(s) vis-a-vis the apt notional assessed income, thereupon, the relevant last per mensem income of the deceased, is recoknable to be borne in a sum of Rs.8400/- [Rs.6000/-(notionally assessed per mensem income of the deceased)+Rs.2400/-(40% of the notionally assessed per mensem income of the deceased). Significantly, the deceased was a bachelor, hence, ½ deduction is to be visited upon a sum of Rs.8400/-, deducted amount whereof, is calculated at Rs.4200/- per mensem. Consequently, the annual dependency, including the incremental hikes, towards, future prospects, is, worked out, now at Rs.8400–Rs.4200= Rs.4200/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.4200x12= Rs.50,400/-. Thereupon, applying the apposite multiplier of 18, the total compensation amount, is assessed in a sum of Rs.50,400x 18=Rs.9,07,200/- (Rs. Nine lakhs, seven thousands and two hundred only).

6. However, the quantification, of compensation under other heads by the learned Tribunal vis-a-vis the claimants is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its erroneously determining compensation, under, the aforesaid heads vis-a-vis the claimants. Accordingly, in addition to the aforesaid amount of Rs.9,07,200/-, the appellants, are, entitled

under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the appellants are entitled comes to Rs.09,07,200/- + 15,000/- + 40,000/- + 15,000/-= Rs.9,77,200/-(Rs. Nine lakhs, seventy seven thousands, two hundred only only).

7. For the foregoing reasons, the instant appeal is allowed and the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners/appellants, are, held entitled to a total compensation of Rs.9,77,000/-, along with pending and future interest @7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants/appellants No.1 and 2 in the ratio 40:60. All pending applications also stand disposed of. Records be sent back forthwith.

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

Narinder & Ors .....Appellants/defendants.

Versus

Ramesh Chand & Ors. ....Respondents/Plaintiffs.

RSA No. 129 of 2006.
Reserved on : 18th April, 2018.
Decided on : 26th April, 2018.

Hindu Adoption and Maintenance Act, 1956- Sections 11 and 12- Adoption – Essential requirements – Effect of non-compliance - Plaintiffs filing suit for declaration to the effect that 'A' was given in adoption by their common ancestor 'J' to one 'R' in 1938 – Therefore, 'A' was not entitled to succeed to estate of 'J', who died in 1956 – Also pleading that mutation of inheritance of 'J' in favour of 'A' attested in 1956 as well as subsequent revenue record showing contesting defendants (D1 to D3), successors-in-interest of 'A' as co-owners in land of 'J', are wrong – Plaintiffs further claiming succession alongwith proforma defendants to this land, being estate of 'J' – Suit dismissed by trial court but in appeal, the First Appellate Court, allowed appeal and decreed suit of plaintiffs – RSA by defendants No.1 to 3- High Court found that (i) there was no evidence of performance of ceremonies of Datta Homum regarding adoption of 'A' by 'R' (ii) 'A' was found residing separately from 'R' during his life time – Held – Adoption of 'A' by 'R' does not stand proved on record – Being so, A was entitled to succeed to estate of 'J'- Appeal allowed – Judgment and decree of First Appellate Court set aside and of trial court restored. (Paras-10 and 11)

Limitation Act, 1963- Article 100- Mutation order – Challenge thereto – Period of limitation - Accrual of cause of action – Determination – Defendants contending that mutation of inheritance being challenged by plaintiffs was attested in favour of 'A' in 1956, whereas suit challenging such mutation was filed in 1999 – Since, suit was not filed within three years from date of attestation of mutation, suit is barred by limitation – Held, Mere attestation of mutation does not give cause of action to file suit- Cause of action arises only when plaintiff's rights are threatened by virtue of such revenue entries – Period of limitation will start from that date – As per plaint, plaintiffs were threatened to be dispossessed from land by defendants in 1999- Suit thus not barred by limitation. (Para-8)

For the Appellants: Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate.

For Respondent No.1, 2 and 4: Mr. Sanjeev Kuthiala, Advocate.
Respondent No.3 and 6 to 9 already ex-parte.
Name of respondent No.5 deleted.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for declaration, stood dismissed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the plaintiffs/respondents herein, the latter Court allowed their appeal besides obviously reversed the trial Court's judgment and decree, hence, the instant appeal.

2. Briefly stated the facts of the case are that the plaintiffs filed a suit for declaration and permanent prohibitory injunction against the defendants. It is pleaded by the plaintiffs that they are residents and Khewatdars of village Dhar, Pargana Nawan Nagar, Tehsil, Nalagarh, District Solan, H.P. Late Shri Asha Ram son of Jiwanu was having 1/7th share in total land measuring 7 bighas 7 biswas, comprised in Khewat/Khatauni No.5/5, bearing khasra Nos. 4, 11, 42, 86, 97 and 103, situated at village Panseta Hadbast No.272, Pargana Nawan Nagar, Tehsil Nalagarh, District Solan, H.P. Similary he had also 1/6 share in total land measuring 34 bighas, 16 biswas, comprised in Khewat/Khatauni No.9/12, bearing Khasra Nos. 10,44,66,69,81,133,160,162, 257, 263, 289, 298, 308, 335, 340, 355, 376 and 433 kita 18 situated at Village Dhr, Hadbast No.274, Pargana Nawn Nagar, Tehsil Nalagarh, District Solan, H.P. Further that he was also having 1/6 share in total land measuring 46 bighas 1 biswas, comprised in Khewat/Khatauni No.10/13, bearing khasra No.3,25, 48, 132, 150, 163, 354, 361 kita 8, situated at village Dhr. Hadbast No.274, Pargana Nawan Nagar, Tehsil Nalagarh, District Solan, H.P. The Proforma defendants No.7 and 8 are not available at the time of filing the suit, therefore, they have been arrayed as proforma defendants. The plaintiffs have also no adverse interest qua the proforma defendants No.4 to 13 and they being co-sharers of suit land have also been made proforma defendants. It is further pleaded that one Shri Jiwanu, the common ancestor of the parties had eight sons and two daughters and disputed property was once owned and possessed by said Jiwanu during his life time. It is averred that Asa Ram, the predecessor-in-interest of defendants No.1 to 3 being son of late Jiwanu was given in adoption to one Shri Ram Lal, son of Shri Tilak Raj, resident of village Gusana, Tehsil Kharar, District Ropar, when he was about 14 years old because late Ram Lal son of Shri Tilak Raj was issueless, who was serving in the Indian Railway at Kalka. Lateron late Shri Asha Ram was also employed in the Indian Railway and retired as Khalasi on 30.6.1982 from Railway Service at Kalka and he settled at Kalka with his family members defendants No.1 to 3. Deceased Asa Ram had severed his ties from the family of his natural father Shri Jiwanu after said adoption which took place in the year 1938. Further that common ancestor of parties late Shri Jiwanu died in the year 1956 and his entire estate including the disputed property was inherited by is all sons except late Asa Ram in equal shares. But the mutation of inheritance NO.46 of 20.12.1956 was wrongly attested in favour of late Asa Ram because he had already been given in adoption to late Shri Ram Lal and he had o right, title or interest to inherit the property of his natural father deceased Jiwanu. That the disputed land to the extent of the share of said Asa Ram was inherited by other sons of late Shri Jiwanu. Hence plaintiff and proforma defendants No.7 and 8 are entitled to inherit the same in equal share. But the present defendants No.1 to 3 are also wrongly shown as co-owners in joint possession of the land being legal heirs of deceased late Asa Ram which entries are incorrect and liable to be set aside, who on the basis of these wrong revenue entries have sought partition before Revenue Court. Hence the suit.

3. The suit was contested by defendants No.1 to 3 only and they have filed written statement, wherein, they have taken preliminary objections of maintainability, estoppel, limitation etc. On merits, it is asserted by them that late Sh. Asa Ram always treated as son by his natural

father Sh. Jiwanu and the plaintiffs had earlier filed Civil Suit No.323/1 of 1996, titled as Bhag Singh and others vs. Asa Ram etc., in which late Asa Ram was admitted as son of late Jiwanu. Therefore, the plaintiffs are estopped to deny the status of late Sh. Asa Ram. They also alleged that the mutation of inheritance qua suit property after the death of late Sh. Jiwanu has rightly been attested in the year 1956 in favour of late Sh. Asa Ram along with others which was not challenged by the plaintiffs till date. Therefore, the suit of the plaintiffs, at this belated stage is hopelessly time barred. They emphatically denied that late Sh. Asa Ram was given in adoption to Sh. Ram Lal as alleged by the plaintiffs.

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

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

1. Whether Asha Ram was given in adoption to Ram Lal as per customs at the age of 14 years?OPP.
2. Whether, if issue No.1 is proved in the affirmative, whether said Asha Ram is not entitled for the estate of Jiwanoo? OPD.
3. Whether the plaintiff and proforma defendants No.7 and 8 are co-owners and co-sharers in joint possession to the extent of 5/7th share in the land 14 bighas 10 biswas?OPP.
4. Whether the plaintiffs are entitled for relief of declaration, as prayed for? OPP.
5. Whether the suit is not maintainable? OPD.
6. Whether the plaintiffs are estopped from filing the present suit on account of act and conduct? OPD.
7. Whether this suit is barred by limitation? OPD.
8. Whether the suit is barred by provisions of Order 2, Rule 2 of the CPC?OPD.
9. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom, by the plaintiffs/respondents herein, before the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail the findings recorded, in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 8.5.2008 and on 3.7.2017, this Court, admitted the appeal instituted by the defendants/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the learned lower appelat eCourt was right in not considring the entire oral as well as documentary evidence as required of it in view of the law laid down by the Hon'ble Apex Court reported in 2000(5) SCC 653?

b) Whether the learned lower appellate Court was right in not dismissing the suit of the respondents/plaintiffs on point of limitation, who have challenged the mutation dated 20.12.1956 in the year 1999?

c) Whether the learned appellate court was right in not considering the admission made by none else than the plaintiff himself who admitted the status of predecessor-in-interest of the appellants to be one of the sons of late Jiwanu, whose inheritance was in dispute?

d) Whether the learned lower appellate Court was right in reversing the categorical findings given by the learned trial Court without giving cogent reasons?

e) Whether the learned lower appellate Court was right in holding that late Asa Ram was given in adoption more particularly when there was neither any oral nor documentary evidence proving such adoption in accordance with law?

f) Whether the learned lower appellate Court was right in holding Ex.P-2 mutation dated 20.12.1956 to be null, illegal and void?

Substantial questions of Law No.4:

8. The apposite mutation No.46, whereunder, the estate of one Jiwanu, was, mutated vis-a-vis deceased Asha Ram along with other legal heirs, of, one Jiwanu, was attested on 20.12.1956, whereas, the instant suit challenging the aforesaid mutation, was, instituted on 13.05.1999, by the plaintiffs/respondents herein. The learned counsel appearing for the appellants has contended with vigour (i) that with the apposite period of limitation warranting attraction hereat, for hence the declaratory suit of the plaintiffs, wherein, they espouse rendition, of, a decree qua all contested entries/orders, being quashed and set aside, (ii) for hence being construable, to fall, within the apposite statutorily enjoined period of limitation, rather, standing comprised, in the provisions borne, in, Article 100 of the Limitation Act, wherein, a period of three years, rather stands prescribed, (iii) and, with period thereof, hence, commencing, since, the attestation of mutation No.46, in the year 1956, qua the suit land, upon, the defendants/appellants, along with, other legal heirs of Jiwanu, , (iv) whereas, with the suit of the plaintiffs/respondents herein, rather standing instituted inordinately, therefrom, hence, much beyond the aforesaid apposite prescribed period of limitation, thereupon, the suit of the plaintiffs/respondents herein rather being barred by limitation. However, the aforesaid submission addressed before this Court, by the learned counsel appearing for the appellants rather lacks vigour, (v) as evidently the apposite mutation qua conferment of inheritance rights, upon, the defendants along with other legal heirs of one Jiwanu, qua the suit land, though stood attested much prior to the filing of the suit or say in the year 1956, (vi) yet the mere factum of its making, and, existence thereat, would not thereat per se engender any cause of action, vis-a-vis the aggrieved plaintiffs/respondents herein, nor thereupon the belatedly therefrom, instituted suit of the aggrieved plaintiffs, attracts the bar of limitation nor hence the date of attestation of the relevant mutations, comprise(s) the commencement, of accruals of cause of action vis-a-vis the aggrieved, (vii) rather the commencement, of, the apposite period of limitation prescribed therein, stands engendered "on" occurrences, of, or rearing(s) of cause of action(s) vis-a-vis the aggrieved plaintiffs, (viii) "occurrences whereof", taking place in contemporaneity of meteings, of, evident apposite threatenings, for hence dispossessing the plaintiffs from the suit land, especially when thereupon hence they concerted to enforce the apposite orders. Moreover, the period qua limitation rather commences when the right to sue accrues, nowat, in the instant case the said right to sue, evidently accrued to the plaintiffs, in the year 1999, whereat the defendants threatened, to forcibly dispossess them from the suit land, (ix) also hence concerted to enforce the contentious orders, on accruals whereof, rather hence the plaintiffs promptly instituting the suit, against, the defendants, renders it to fall within limitation. Accordingly, substantial question of law No.4 is decided in favour of the respondents, and, against the appellants.

Substantial questions of Law No.1, 2, 3, 5 & 6:

9. Through the extant suit, the plaintiffs, sought a declaratory decree, for setting aside mutation No.46, of 20.12.1956, whereunder the estate of one Jiwanu, was mutated vis-a-vis deceased Asha Ram, along with other legal heirs, of one Jiwanu. The plaintiffs had made an attempt to reverse the aforesaid mutation, on anvil, of Asha Ram being adopted by one Ram Lal, (I) thereupon, his being divested to seek bestowment of any right, title or interest vis-a-vis the estate, of, his putative father one Jiwanu.

10. For facilitating any adjudication vis-a-vis the validity, of, adoption of Asha Ram, by, one Ram Lal, direct and forthright evidence, was enjoined to emanate, from, those witnesses,

who had ocularly seen, the performance of the apt ceremonies of "Datta Homum". Since, the adoption of Asha Ram by Ram Lal, his adoptive father, (i) purportedly occurred in the year 1938, and, when hence at the stage of recording of evidence, no direct proof rather emanated qua the factum of performance, of the apt ceremonies of "Datta Homum", in the year 1938, whereat Asha Ram was purportedly adopted, as his son, by one Ram Lal. (ii) Nonetheless, even if the aforesaid direct evidence is amiss, yet, this Court is enjoined to assess the evidentiary worth, of indirect evidence, (iii) wherefrom, apt inferences may be drawn, for making a pronouncement vis-a-vis, the legality of any purported adoption, of, one Asha Ram by his adoptive father, one Ram Lal. (iv) The learned Appellate Court had relied upon the testimony of Ramesh Kumar (PW-2), wherein, he testified, of his deceased father one Kanihya Ram, making vis-a-vis him revelations of his father, one Jiwanu (grand father of plaintiff), giving in adoption, his natural son one Asha Ram, to Ram Lal, in the year 1938. The aforesaid implicit reliance placed, upon, the interested testimony of the plaintiff, is per se, not worthy of any imputation of any credence thereon, as, it ex-facie comprises, hear say evidence, and, hence is discardable besides is also discountable, on account of it being permeated with a stain of interestedness. The learned first appellate Court also relied upon the testification, of, the widow of deceased Asha Ram, namely, one Janaki Devi(DW-1), in testification whereof, as, occurring in her cross-examination, she made echoings, of her deceased husband, referring to Ram Lal as his father, and, except him, his not addressing any other person, as his father. However, any imputation of any credence thereon, by the learned first appellate Court, especially, with its occurring at the fag end, of, the cross-examination of Janki Devi, widow of Asha Ram, is rather inapt, (v) given hers omitting to, in her examination-in-chief, hence voice, of deceased Ram Lal, staying in the homestead of Asha Ram, and the latter hence obviously taking care, of, him as his father. Contrarily, she in her examination-in-chief, merely testifies of Ram Lal being their neighbour, and, her deceased husband one Asha Ram, taking care of him. The effect of the aforesaid testification, occurring, in the examination-in-chief of Janki Devi, the widow of deceased Asha Ram, of the purported adoptive father of her deceased husband Asha Ram, namely, Ram Lal hence not staying in the homestead of one Asha Ram, (vi) re-emphasisingly bolsters an inference qua thereupon per se it being not formidably concludable, of dehors, hers at the fag end of her cross-examination, rendering an echoing of her husband addressing Ram Lal as his father, and, except him, his is not addressing any other person as his father, (vii) qua hence, the testification of Janaki Devi paving way for errection, of, any firm conclusion, of the plaintiffs, hence, firmly proving, through, Janki Devi, of her deceased husband being purportedly adopted by Ram Lal. Of course, in case Ram had adopted deceased Asha Ram, the latter would surely be living with him in his homestead. Evident lack of any,of, aforesaid affirmative echoings, in the testification of Janki Devi, widow of Asha Ram, rather hers testifying qua one Ram Lal being their neighbour, (iii) obviously, rips apart any endeavour, of the counsel, for the plaintiffs/respondents, to, on anvil of an echoing, occurring at the fag end of the cross-examination of Janki Devi, hence galvanize any inference of Asha Ram being adopted by Ram Lal, more so, when no direct evidence in respect of performance of apt ceremonies, of "Datta Homum", exists on record.

11. Be that as it may, the learned first Appellate Court, had relied upon an entry existing in the apposite service book, of Asha Ram, borne in Ex.P-1, wherein, the aforesaid is reflected to be the son of Ram Lal. However, Ex.P-1 is a self serving proclamation, by Asha Ram, and would acquire vigour, only when rather direct forthright evidence, stood adduced, comprised in a mutation, vis-a-vis the estate, of, one Ram Lal, evidently being, on the latter's demise hence attested vis-a-vis Asha Ram. Adduction of the aforesaid documentary evidence, rather comprised, the best evidence, to make apt clinching findings, dehors non adduction of direct evidence vis-a-vis performance, of apt ceremonies of "Datta Homum". Contrarily, non adduction thereof, hence, constrains a conclusion of the self serving proclamation in Ex.P-1, exhibit whereof comprises the extract of service book of Asha Ram, with revelations occurring therein, of his being fathered by one Ram Lal, rather carrying no weight, and, also being not amenable, for, rearing any firm conclusion qua the relevant purpose.

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

13. In view of above discussion, the instant appeal is allowed and in sequel, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 30-NL/13 of 2003 is set aside, whereas, the judgment and decree rendered by the learned trial Court in Civil Suit No. 145/1 of 1999 is affirmed and maintained. Decree sheet be prepared accordingly. No order as to the costs. All pending applications also stand disposed of. Records be sent back forthwith.

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

Raj Kumar ...Petitioner
Versus
Indu Rani ...Respondent

Cr. MMO No. 157 of 2015
Decided on: 26th April, 2018

Protection of Women from Domestic Violence Act, 2005- Section 31- Breach of order – Procedure to be followed – On complaint of wife having been filed under Section 12 of Act, Magistrate directing husband to pay medical expenses incurred by her on son's treatment and also to provide her rented accommodation in village Ustehar or nearby vicinity but subject to her vacating possession in the old house of husband – Appeal of husband dismissed by Additional Sessions Judge – However, wife filing revision petition in High Court against judgment of Additional Sessions Judge and submitting that rooms ought to have been given to her in the shared household – Petition of wife was dismissed by High Court – Wife then filing an application under Section 31 of Act for breach of initial order directing husband to provide her residential accommodation in village Ustehar or nearby vicinity – Magistrate dismissing application of wife by observing that she was to vacate her possession in the old house of husband as a condition precedent before she could be provided rented accommodation- In appeal, Additional Sessions Judge setting aside order of Magistrate by observing that procedure as contemplated under Section 31 of Act was not followed – Petition against – Held, Procedure provided in Section 31 of Act is to be followed only when there is breach of the order – Wife never wanted to vacate her possession in old house of her husband and this fact was never considered by the Additional Sessions Judge - Petition allowed - High Court set aside order of Additional Sessions Judge.

(Paras-13 to 15)

For the petitioner: Petitioner in person with Mr. Dheeraj K. Vashisth, Advocate.
For the respondent: Respondent in person with Mr. Jagdish Thakur, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. Order dated 24.03.2015 passed by learned Additional Sessions Judge (III) Kangra at Dharamshala in Criminal Revision No. 3-B/X/14 (Annexure P-10), whereby order dated 23.12.2013, passed by learned Judicial Magistrate 1st Class, Baijnath, District Kangra, H.P., in

an application filed for implementation of order dated 3.10.2007 (Annexure P-1) passed by the same Court in an application under Sections 12, 19, 20 and 22 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the 'Act' in short) has been quashed, is under challenge in this petition.

3. This case has a chequered history. The parties are husband and wife. They were married to each other on 27.04.1990 at village Molichak Tehsil Palampur, District Kangra, H.P. Out of this wedlock a daughter and son are born to them. The respondent-wife after 12 years of marriage made allegations of her maltreatment and harassment by the petitioner. According to her, he had been leveling false allegations against her on one pretext or the other. It is in the year 2002, she was turned out of the matrimonial home. It is with such allegations a complaint under Sections 12, 19, 20 and 22 of the Act came to be filed by her against the petitioner in the Court of Judicial Magistrate 1st Class, Baijnath, District Kangra. Learned Magistrate after affording the parties an opportunity of being heard has ultimately allowed the complaint and the respondent was directed to pay Rs. 10,000/- towards expenditure she incurred upon the treatment of their son Vijay Kumar and also to provide her suitable rented accommodation either at village Ustehar or in nearby vicinity. The rent thereof was to be paid by the petitioner-husband. Learned Magistrate keeping in view the allegations leveled by the parties against each other coupled with the on going litigation had observed further that a direction to the petitioner to provide a room to her in the shared house would not be fruitful.

4. The petitioner-husband has assailed the order, Annexure P-1 in an appeal filed under Section 29 of the Act. The appeal, however, was dismissed by learned Additional Sessions Judge (I) Kangra at Dharamshala vide judgment dated 08.03.2013 (Annexure P-2). The respondent has preferred a petition in this Court under Section 482 of the Code of Criminal Procedure with a prayer that order, Annexure P-1 passed by learned Judicial Magistrate 1st Class, Baijnath, District Kangra in her complaint under Sections 12, 19, 20 and 22 of the Act and order dated 8.3.2013, Annexure P-2 may be modified and a direction to her husband to allow her to live in the shared house passed. The petition so preferred came to be registered as Criminal Revision No. 4033 of 2013. The same was dismissed by a Co-ordinate Bench of this Court vide judgment dated 7.1.2014, Annexure P-4. The relevant portion of this judgment reads as follows:-

> "13. There is merit in the contention of Mr. Ajay Kumar, learned Senior Advocate, that in case his client is forced to permit the petitioner to live in the shared accommodation, it will vitiate atmosphere of the house, taking into consideration the litigation going on between the parties. It has come on record that the respondent has also filed divorce petition against the petitioner. Petitioner has also made a complaint at Police Station Baijnath and Women's Commission at Shimla. There is allegation of adulterous life being lived by the petitioner. The petitioner has left the matrimonial house in the year 2001 and the complaint under the Act has been filed on 12.9.2007. She has never complained about the accommodation already given to her by the respondent for six long years. It is in these circumstances that the learned trial court has ordered the respondent to provide some suitable rented accommodation to the petitioner at Ustehar or in the vicinity. There is no perversity or any illegality in the impugned order dated 3.10.2007 rendered by the learned Judicial Magistrate, 1st Class, Baijnath, District Kangra in Criminal Complaint No.35-III/2007 and upheld by the learned Additional Sessions Judge-I, Kangra at Dharamshala in Criminal Appeal No.34-B/2007 vide judgment dated 8.3.2013."

5. This backdrop makes it crystal clear that in the proceedings instituted by the respondent against her husband under the Act, besides the medical expenses to the tune of Rs. 10,000/-, she borne on the treatment of her son Vijay Kumar, a direction was also issued to him to provide her suitable accommodation either at village Ustehar or in the nearby vicinity as per her choice. The judgment, Annexure P-4 has, however, been further assailed by the respondent in the Hon'ble Apex Court and the matter is still pending disposal there.

6. The respondent in the meanwhile has preferred another application, Annexure P-5 for seeking implementation of the order dated 3.10.2007, Annexure P-1 passed in the complaint she had instituted against her husband under the provisions of the Act. The petitioner had preferred objections, Annexure P-6 thereto, whereas, the respondent filed reply, Annexure P-7 to the objections so preferred. Learned trial Court on hearing the parties on both sides has dismissed the application vide order dated 23.12.2013, Annexure P-8 with the observations that the respondent is not entitled to the arrears to the tune of Rs. 72,000/- on account of rent she allegedly paid from November, 2007 to December, 2011 for the reason that her husband had to hire suitable accommodation subject to her handing over the vacant possession of his old house, in which she was residing. The relevant portion of this order reads as follows:-

> ".....In this context, it is relevant to mention that the perusal of the order dated 3.10.07, para No.12, goes to reveals that the relief as granted in favour of the petitioner was the direction to the respondent to provide some suitable accommodation to the petitioner on rent basis either at Ustehar or in the vicinity where the applicant will desire. The rent of the premises shall be paid entirely by the respondent. This order will be subjected to the condition that the applicant prior to the same, will had over the possession of the old house in favour of the respondent. However, the liability of the respondent will arise only in case the petitioner hands over the possession of the old house in favour of the respondent, but the reply as filed by the petitioner to the objections taken by the respondent, goes to show that she is still in possession of the house belonging to the respondent and at the same time she is claiming the rent of the rented accommodation. However, the objections as taken by the respondent are duly accompanied by the certificate of G.P. Ustehar which goes to show that the petitioner is still occupying the old house of the respondent. However, it has not been specifically denied by the petitioner that she did not hand over the respondent's house. More over, there is no mention as to the date and time and how the possession was handed over to the respondent. This implies that the objections as taken by the respondent are tenable and at the same time, the applicant intends to take undue benefit of the order thereby claiming rent to the tune of Rs. 72,000/- even without vacating the old house in favour of the respondent. Since, the order dated 3.10.07 passed by this Court was the conditional order and the condition precedent is not fulfilled which has taken away the right of the petitioner to seek the payment of rent. The petitioner can not blow hot and cold at the same time thereby placing the respondent in a awkward position thereby leaving no option of election for him. Therefore, no such relief can be granted in favour of the petitioner who did not approach the court with clean hands and is mis-using the contention thereof. Hence, the petition as filed by the application is dismissed with no order as to costs. File after completion be consigned to record room."

7. The respondent aggrieved by the order, Annexure P-8 has preferred a revision petition, which has been decided by learned Additional Sessions Judge (III), Kangra at Dharamshala vide order dated 24.03.2015, Annexure P-10. Learned Additional Sessions Judge while taking note of the provisions contained under Section 31 of the Act has concluded that the application filed for implementation of order, Annexure P-1 was to be tried summarily and the order passed after framing charge and affording opportunity of being heard to the parties. It is this order, which is under challenge in this petition on the grounds inter-alia that learned Additional Sessions Judge has wrongly exercised the revisional jurisdiction for the reason that the material available on record was suggestive of that it was a conditional order and as the respondent had not complied with it her husband, the petitioner was not at any fault. She had been in possession of four room accommodation in village Ustehar. There was no evidence produced by her to show that she had taken on rent the accommodation from Balbir Singh of Banoori. The story to this effect was fabricated. The impugned order, as such, being arbitrary,

harsh, unjust, oppressive and legally unsustainable has been sought to be quashed and set aside.

8. This petition presently is at the stage of admission because in the nature of the dispute involved, it is deemed appropriate to dispose of the same at this stage itself. On hearing the matter for some time on 24.08.2017, the following order came to be passed on that day:-

> "On having heard this matter for some time and going through the record, prima facie the respondent is not residing in rented accommodation hired by her husband, the petitioner herein, consequent upon the judgment, **Annexure P-1**, in complaint under Sections 12, 19, 20 and 22 of the Protection of Women From Domestic Violence Act, 2005, passed by learned Judicial Magistrate, 1st Class, Baijnath, District Kangra, H.P. and affirmed by learned Additional Sessions Judge-I, Kangra at Dharamshala, vide judgment **Annexure P-2.** Although on the strength of the agreement, **Annexure P-14** and the rent receipts **Ext.P-15 to Ext.P-18**, learned counsel representing the petitioner-husband, has argued that consequent upon the judgment **Annexure P-1**, the accommodation was hired through one Desh Raj of Village and Post Office Banuri, Tehsil Palampur, District Kangra, for being occupied by the respondent, however, in view of the submissions that she did not occupy the same, the fact remains that the respondents is not residing in any rented accommodation. Whether respondent is residing in the old house of the petitioner-husband, is again a disputed fact because according to learned counsel for the petitioner, she is residing in old house of the petitioner-husband. The respondent Indu Rani, who is present in person, however, submits that presently she is residing in her parental house. Any how, for the present, no accommodation is hired by the petitioner for being occupied by the respondent, therefore, a direction to petitioner-husband to take on rent accommodation at Village Ustehar or nearby vicinity, would serve the ends of justice. The petitioner-husband, as such, is directed to hire accommodation for being occupied by the respondent either at Village Ustehar or nearby vicinity within two weeks from today and handover the possession thereof to her. The affidavit in compliance be filed on the next date when both parties shall also remain present in person.
>
> List on **6th October, 2017."**

9. Irrespective of the agreement, Annexure P-14 and the receipts Annexure P-15 to Annexure P-18 to this petition produced by the petitioner-husband to show that accommodation, consequent upon the order, Annexure P-1 was hired in the house of one Desh Raj at village and post office Banoori, Tehsil Palampur, District Kangra, H.P., a direction was issued to him to hire accommodation for her either at village Ustehar or in the nearby vicinity within two weeks from that day. Any how, accommodation could not be hired and on the next date i.e., 13.09.2017, an application registered as Cr.M.P No. 1090 of 2017 came to be filed for seeking extension of time. The application was allowed and four weeks time was extended for the purpose. At the same time, the opportunity was given to respondent-wife also to search suitable accommodation of her choice in that area and inform her husband so that rent etc. could be settled. This order reads as follows:-

> **Cr.MP No. 1090/2017**
>
> "The application for the reasons stated therein is allowed. Consequently, the time for hiring accommodation either at village Ustehar or nearby vicinity by the petitioner/husband for respondent/wife is extended by four weeks further. The respondent/wife, if so advised, may also search for suitable accommodation for her in the abovesaid area and inform her husband in this regard so that rent etc. could be settled. List on ***1st November, 2017***.
>
> The affidavit in compliance be filed on the date fixed. The application is accordingly disposed of."

10. The matter then came to be listed before this Court on 1st November, 2017. On that day, affidavit in compliance was filed by the petitioner-husband stating therein that he had taken on rent the accommodation for the respondent at village Ustehar in the house of Suresh Kumar. Since the complaint of respondent-wife was that said Suresh Kumar was not handing over keys to her, therefore, the petitioner was directed to produce the landlord Suresh Kumar in this Court. The order passed on that day, reads as follows:-

> "Affidavit in compliance of the previous orders, stands filed. The same reveals that the petitioner-husband has hired two rooms accommodation from one Suresh Kumar of Village Ustehar. The rent agreement is annexed with the affidavit. The respondent-wife, who is present in person, submits that the landlord has refused to hand-over the possession of such accommodation to her. She further states that as per his version the petitioner-husband has taken the same for being required by him till he completes his own construction work. Also that it is not possible for him to rent-out the said accommodation for her residential purposes. In such a situation, there shall be a direction to the petitioner-husband to produce aforesaid Suresh Kumar, the owner of the said accommodation, on the next date. List on **24th November, 2017."**

11. The matter was again taken up for consideration on 1st December, 2017. Taking into consideration the allegations and counter-allegations qua hiring of accommodation at Village Ustehar, as directed by this Court, the Secretary, District Legal Services Authority, Kangra at Dharamshala was directed to visit village Ustehar and inspect the rented accommodation in the building of Suresh Kumar in the presence of the parties and that of Suresh Kumar and sort out as to whether the accommodation so hired is suitable for residential purpose by the respondent or not. Also that, whether Suresh Kumar is willing to hand over the possession thereof to the respondent or not. This order also reads as follows:-

> "Parties are present in person. Shri Suresh Kumar in whose house at village Ustehar, Tehsl Baijnath, District Kangra the petitioner had hired the accommodation on rent for his wife, the respondent herein is not present. Learned Counsel on instructions submits that he is not willing to get himself involved in any legal process and that in case the accommodation hired from him is required, he is still ready and willing to put the respondent in possession thereof. It is seen that vide order Annexure P-1 dated 3.10.2007 passed in a complaint under Sections 12, 19, 20 and 22 of the Protection of Women from Domestic Violence Act, learned Judicial Magistrate has directed the petitioner-husband to provide rent free suitable accommodation to the respondent-wife either at Ustehar or in the vicinity where she intend to reside. On 24.8.2017 following order was passed and the petitioner-husband directed to hire accommodation at village Ustehar or in nearby vicinity for the respondent:
>
> > "On having heard this matter for some time and going through the record, prima facie the respondent is not residing in rented accommodation hired by her husband, the petitioner herein, consequent upon the judgment, Annexure P-1, in complaint under Sections 12, 19, 20 and 22 of the Protection of Women From Domestic Violence Act, 2005, passed by learned Judicial Magistrate, 1st Class, Baijnath, District Kangra, H.P. and affirmed by learned Additional Sessions Judge-I, Kangra at Dharamshala, vide judgment Annexure P-2. Although on the strength of the agreement, Annexure P-14 and the rent receipts Ext.P-15 to Ext.P-18, learned counsel representing the petitioner-husband, has argued that consequent upon the judgment Annexure P-1, the accommodation was hired through one Desh Raj of Village and Post Office Banuri, Tehsil Palampur, District Kangra, for being occupied by the respondent, however, in view of the submissions that she did not occupy the same, the fact remains that the respondents is not residing in

> any rented accommodation. Whether respondent is residing in the old house of the petitioner-husband, is again a disputed fact because according to learned counsel for the petitioner, she is residing in old house of the petitioner-husband. The respondent Indu Rani, who is present in person, however, submits that presently she is residing in her parental house. Any how, for the present, no accommodation is hired by the petitioner for being occupied by the respondent, therefore, a direction to petitioner-husband to take on rent accommodation at Village Ustehar or nearby vicinity, would serve the ends of justice. The petitioner-husband, as such, is directed to hire accommodation for being occupied by the respondent either at Village Ustehar or nearby vicinity within two weeks from today and handover the possession thereof to her. The affidavit in compliance be filed on the next date when both parties shall also remain present in person. List on 6th October, 2017."

2. While granting extension in his favour vide order 13.9.2017 passed in Cr.MP No. 1090 of 2017 for hiring such accommodation the liberty was also granted to the respondent-wife to search suitable accommodation for her residential purposes in village Ustehar or nearby vicinity. The order passed on that day read as follows:

> "Cr.MP No. 1090 of 2017
>
> The application for the reasons stated therein is allowed. Consequently, the time for hiring accommodation either at village Ustehar or nearby vicinity by the petitioner/husband for respondent/wife is extended by four weeks further. The respondent/wife, if so advised, may also search for suitable accommodation for her in the abovesaid area and inform her husband in this regard so that rent etc. could be settled. List on 1st November, 2017.
>
> The affidavit in compliance be filed on the date fixed. The application is accordingly disposed of."

3. Consequently, this Court was informed on the next date i.e. 1.11.2017 that suitable accommodation has been hired on rent for being occupied by the respondent as her residence in the house of one Suresh Kumar at Ustehar. She, however, informed that said Suresh Kumar refused to hand over the possession of the said accommodation to her at the pretext that he has agreed to rent out the premises to the petitioner-husband and it is not possible for him to rent out the said accommodation for her residential purposes. This order also reads as follow:

> "Affidavit in compliance of the previous orders, stands filed. The same reveals that the petitioner-husband has hired two rooms accommodation from one Suresh Kumar of Village Ustehar. The rent agreement is annexed with the affidavit. The respondent-wife, who is present in person, submits that the landlord has refused to hand-over the possession of such accommodation to her. She further states that as per his version the petitioner-husband has taken the same for being required by him till he completes his own construction work. Also that it is not possible for him to rent-out the said accommodation for her residential purposes. In such a situation, there shall be a direction to the petitioner-husband to produce aforesaid Suresh Kumar, the owner of the said accommodation, on the next date. List on 24th November, 2017."

4. As pointed out at the outset, the petitioner expressed his inability to produce Suresh Kumar aforesaid in this Court. If need so arise, the Court may resort to coercive steps to ensure his appearance. Anyhow, at this stage it is deemed

appropriate that the Secretary, District Legal Services Authority, Kangra at Dharamshala shall visit village Ustehar on second Saturday i.e. 9th December, 2017 at 11:00 a.m. in the presence of the parties and aforesaid Suresh Kumar and sort out the controversy as to whether the accommodation hired by the petitioner for respondent in the house of Suresh Kumar aforesaid is suitable for residential purposes by the respondent and also that said Suresh Kumar is willing to hand over the possession thereof to the respondent or not. If not, the reasons therefor. Learned Secretary, if so required, may also record the statement of said Suresh Kumar. In the event of the accommodation is found suitable and the owner is ready and willing to rent out the same to the petitioner for being provided residential accommodation to the respondent, learned Secretary shall ensure that the possession thereof is delivered to the respondent. The petitioner shall pay the Secretary a sum of Rs.10,000/- to defray the expenses likely to be incurred upon by her towards transportation and other miscellaneous charges.

5. List on 28th December, 2017. The report in compliance by the Secretary be sent to the Registry of this Court well before the date fixed.

6. Before parting, it is directed that the petitioner-husband shall pay Rs.3000/- to the respondent to meet out the expenses she incurred upon to attend this Court on the previous date and today also.

7. An authenticated copy of this order be supplied to learned Counsel on both sides for compliance."

12. Now the Secretary District Legal Services Authority, Kangra at Dharamshala has submitted the report. The relevant portion of the same reads as follows:

"On dt. 10.02.2018, at about 12.00 noon, I visited the house of Suresh Kumar and all the persons referred above were also present there. They apprised about the order dt. 01.12.2017 passed by Hon'ble High Court of H.P. in Cr.MMO No. 157 of 2015. The original rent agreement dt. 29.09.2017 executed between Sh. Suresh Kumar and Sh. Raj Kumar was produced before me (copy enclosed as XA). I perused the same and then inspected the accommodation hired by Sh. Raj Kumar for his wife Smt. Indu Ran. It comprises of two rooms which are spacious, one kitchen and one bathroom cum toilet (photographs of accommodation enclosed). The electricity and water supply was also checked and found to be in order. The aforesaid accommodation is on the first floor. Sh. Suresh Kumar is working in District Mandi and his children are studying outside. After inspecting the accommodation, I found it to be suitable for residential purpose of Smt. Indu Rani.

Thereafter, I asked Sh. Suresh Kumar as to whether he was willing to hand over the possession of accommodation referred above to Smt. Indu Rani to which he replied in affirmative. The statement of Sh. Suresh Kumar was recorded separately. After Sh. Suresh Kumar expressed his willingness to hand over the possession thereof, I handed over the possession of aforesaid accommodation (keys were given) to Smt. Indu Rani in presence of Sh. Suresh Kumar, Sh. Raj Kumar and Smt. Kanta Devi. The statements of aforesaid persons were recorded to this effect and photographs were also taken (all original statements and photographs enclosed). I also received an amount of Rs. 10,000/- from Sh. Raj Kumar and issued receipt in his favour....."

13. It is, therefore, apparent from the report that the rented accommodation now hired by the petitioner in the building of Suresh Kumar is suitable for being used as residence by the respondent and the owner said Suresh Kumar handed over the possession of the accommodation to the respondent by giving her keys thereof. The report of learned Secretary is supported by the statement of Raj Kumar (petitioner) Smt. Indu Rani (respondent) and that of

Suresh Kumar, owner of the building. The rent agreement is also annexed to the report. The respondent in her statement recorded by the Secretary Legal Services Authority Kangra at Dharamshala has admitted the accommodation taken on rent by her husband, the petitioner for her, the execution of the rent agreement and also that possession of accommodation so taken on rent was handed over to her. However, according to her, she is not interested to reside in the accommodation so hired.

14. It is in this backdrop, parties on both sides have been heard at length. Mr. Jagdish Thakur, learned counsel representing the respondent-wife has pointed out during the course of arguments that she being the wife of a Class-I Gazetted Officer, the petitioner is not expected to live in a two rooms rented accommodation. On analyzing the rival submissions and also the material available on record and the orders passed by this Court in this petition from time to time, the order Annexure P-1 passed by learned trial Court and affirmed by learned Additional Sessions Judge (I), Kangra at Dharamshala vide judgment, Annexure P-2 and by this Court vide judgment, Annexure P-4, the respondent-wife has to be provided suitable accommodation at village Ustehar or in the nearby vicinity of her choice, of course subject to vacation of old house of the petitioner-husband occupied by her. The documents Annexure P-14 to Annexure P-18 reveal that the earlier accommodation for her residential purpose was hired in the house of one Desh Raj at village Banoori, Tehsil Palampur, District Kangra, H.P. The said accommodation was not occupied by her. In the meantime, she filed an application, copy whereof is Annexure P-5 for implementation of order, Annexure P-1. Learned trial Magistrate has dismissed the application for the reasons as already detailed in para supra. Learned Additional Sessions Judge while exercising the revisional jurisdiction has, however, quashed the order, Annexure P-8 passed by learned Magistrate. The revisional Authority wants learned trial Court to decide the application filed for implementation of order, Annexure P-1 summarily by treating the same criminal proceedings. True it is that Section 31 provides that in the event of breach of protection order, it will be an offence under the Act and punishable with imprisonment of either description of a term which may extend to one year, or with fine which may extend to twenty thousand, or with both. An action brought to the Court to be tried by a Magistrate who has passed the protection order after framing the charge. However, in the present case, there is no breach of order of protection, Annexure P-1 at the instance of the petitioner-husband for the reason that the respondent has failed to bring on record any material suggesting that she had vacated the old house of the petitioner. On the other hand, a petition registered as Cr.MMO No. 4033 of 2013, she had preferred for seeking modification of the protection order, Annexure P-1 and the order passed by learned trial Court, Annexure P-2 reveals that she is not willing to vacate the old house of the petitioner. A co-ordinate Bench of this Court, however, taking note of the situation that in the event of she is allowed to share the accommodation with the petitioner and the nature of allegations leveled against him as well as on going litigation between them, the atmosphere of the house is likely to be vitiated, has not inclined to the prayer for modification of order, Annexure P-1, she made and dismissed the petition vide judgment, Annexure P-4. Learned Additional Sessions Judge while passing the impugned order, Annexure P-10 has miserably failed to take note of such factual aspect. The Magistrate should have tried the application summarily as per the provisions contained under Section 31 of the Act, had there been any breach of protection order at the instance of the petitioner-husband. The impugned order, as such, is neither legally nor factually sustainable.

15. Now if coming to the suitability of the accommodation rented out by the petitioner in the house of one Suresh Kumar at village Ustehar, the report of the Secretary, District Legal Services Authority, a Judge in the cadre of Senior Civil Judge amply demonstrates that the same is suitable for residential purpose of the respondent. Not only this, as per report and also the own statement of respondent, the possession of such accommodation has been delivered to her. In her statement recorded by learned Secretary, Legal Services Authority, she has not uttered even a single word qua the suitability of the accommodation so taken on rent by her husband, the petitioner but according to her, she is not desirous of residing there. It is best known to her as to why she did not want to occupy and reside in that accommodation. It is

significant to note that this Court had allowed her to search suitable accommodation for her in village Ustehar or nearby vicinity as find recorded in the order dated 13.09.2017 reproduced supra. She, however, has not responded to this order also. Therefore, in the totality of the circumstances, no fault can be attributed to the petitioner-husband. The possession of the rented out accommodation is lying with her, if so advised she starts residing there and the rent will be paid by the petitioner. True it is that the matter qua arranging her to live in the shared accommodation is pending disposal in the Hon'ble Apex Court, however, pending decision of the same, the petitioner while complying with the order, Annexure P-1 has taken on rent the accommodation in the house of one Suresh Kumar at village Ustehar and the petitioner is free to start residing in the said accommodation. On being persuaded by this Court, the petitioner-husband even is ready and willing today also to pay the rent of the accommodation of her own choice if hired by her at village Ustehar or in the nearby vicinity. Therefore, this option is also available to her. However, so far as the impugned order is concerned, as already pointed out, the same is neither legally nor factually sustainable hence quashed and set aside.

16. Consequently, this petition succeeds and the same is accordingly allowed. Pending application(s), if any, shall also stand disposed of.

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

Bhanu Sood .....Appellant.
Versus
Jeetendera Malhotra and others .....Respondent.

RSA No. 175 of 2005
Reserved on: 17.04.2018
Decided on: 01.05.2018

Indian Partnership Act, 1932- Section 69(1)- Suit by or against partners of Unregistered Firm – Effect of non-registration – Maintainability of suit – Plaintiffs including 'B' and contesting defendants entered into a partnership for transaction of business of liquor – Partnership however was unregistered – On arising of dispute, 'B' issuing notice to partners and then filing suit for rendition of accounts – Held- Suit was by a partner against other partners of an unregistered firm – It was not maintainable in view of mandate of Section 69(1) of Act. (Para-10)

Indian Partnership Act, 1932- Sections 43 and 69 (3)- Unregistered firm- Dissolution thereof - When to take place ? - Held – Section 69(3) is an exception to Section 69(1) and (2) of Act – A partner of an unregistered firm can file suit for its dissolution or rendition of accounts of a dissolved firm or realization of any property of dissolved unregistered firm- Plaintiffs submitting that they had dis-associated themselves with business of firm on and w.e.f. 31.3.1991 and this amounted to 'dissolution' – Contesting defendants refuting this fact – High Court found that Clause 12 of the partnership deed required of giving one month advance notice in writing by a partner to others, if he intended to resign – No such notice was ever given by plaintiffs- Further held, Partnership was not dissolved merely by disassociating with business of firm- Suit was not for rendition of accounts of a 'dissolved firm' under Section 69(3) of Act – Suit itself was not maintainable – Regular Second Appeal dismissed and judgments and decrees of lower courts upheld. (Paras-11, 12 and 20)

For the appellant: Mr. Sumeet Raj Sharma, Advocate.
For respondents No. 1 to 3: Mr. Deepak Bhasin, Advocate.
For respondents No. 4 & 5: Nemo.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellant, who was one of the plaintiffs before the learned Trial Court (hereinafter referred to "the plaintiff"), laying challenge to the judgment and decree, dated 29.12.2004, passed by the learned Additional District Judge, Fast Track Court, Shimla, District Shimla, H.P., in Civil Appeal No. 68-S/13 of 2004/99, whereby the appeal filed by the plaintiff against the judgment and decree, dated 10.11.1998, passed by the learned Senior sub Judge, Shimla, District Shimla, H.P., was dismissed and the findings of the learned Trial Court, whereby Civil Suit No. 199/1 of 1997 of 1993 was dismissed, were upheld.

2. The key facts of the case can tersely be summarized as under:

The plaintiff alongwith other plaintiffs, who are proforma respondents herein, entered into partnership business with the respondents/defendants (hereinafter referred to as "the defendants") and partnership deed, dated 02.04.1990 was executed in the name and style of M/s Kamal Enterprises and the same was formed for carrying the business of wholesale Vendee of Indian Made Foreign Liquor as L-1 licencees of H.P. and allied businesses etc.. The plaintiffs further contended that the partnership business was deemed to be effective from 01.04.1990. The business was to be carried out at Tara Devi, Shimla, and capital for the same was to be originated from the contributions made by its partners in proportion to their share in profits and loss. All the partners, except Smt. Bhanu Sood, plaintiff No. 3 (appellant herein), contributed capital to the extent of 17% and remaining 15% was to be contributed by plaintiff No. 3. The partnership firm was required to maintain all the records, viz., books of account etc. Defendants No. 1 and 2 were Manager and Officer Incharge, respectively and plaintiffs No. 1 and 2 and defendant No. 3 were Co-Managers of the partnership firm. It was further contended that the accounts of the firm was required to be audited by a Chartered Accountant, who was to be appointed with prior consent of all the partners of the firm. Since inception, the defendants started mis-managing the affairs of the business, so the plaintiffs agitated for rendition of account of business. The defendants, yielding to persistent agitation, submitted some details on 01.04.1991 qua the balance sheet, which was alleged to be worked out upto 31.03.1991. The balance sheet, so submitted by the defendants, was not found correct and the accounts were found to be manipulated and forged. Thus, the plaintiffs openly declared themselves disassociated with the said partnership firm on and w.e.f. 01.04.1991. Since then plaintiffs disassociated with all affairs of the partnership firm for all intents and purposes. The plaintiffs further contended that as per them partnership stood dissolved on and w.e.f. 31.03.1991. The defendants, through notice dated 15.01.1993, were asked to render the account, but they failed to do so. Lastly, the plaintiffs filed a suit seeking relief for rendition of account.

3. The defendants, by way of filing written statement, contested and resisted the suit of the plaintiffs. They raised preliminary objections, viz., maintainability, estoppel, jurisdiction and cause of action. On merits, the defendants contended that the plaintiffs have concealed material facts with ulterior motive, as the parties to the suit were unregistered partners of unregistered firm, so the suit is not maintainable under Section 69 of The Indian Partnership Act, 1932 (hereinafter referred to as "the Act"). As per the defendants, the accounts of the firm were being managed and maintained properly by defendants No. 1 and 2 and plaintiff No. 3. The plaintiffs conduct became untrustworthy, when the defendants asked about the irregularities. Thus, the relations between the parties became strained and despite repeated requests the plaintiffs did not get the accounts audited by the Chartered Accountant. The dissolution of firm by the plaintiffs was denied by the defendants and it was contended that due to continuous loss and unavailability of funds the firm could not function. Due to the *mala fide* acts, deeds and conduct of the plaintiffs, the partnership firm suffered huge loss. As per the defendants, true statement of accounts was submitted to them, however, they stayed away and signed the record with ulterior motive, as such they are liable to pay their share of loss. The defendants, by filing a

counter claim, sought recovery of the amount of loss suffered by them form during the period 1990-91, 1991-92 and 1992-93 to the extent of Rs.35,000/-, Rs.35,000/- and Rs.75,000/-, respectively. Lastly, the defendants contended that the suit of the plaintiffs be dismissed.

4. The learned Trial Court on 05.08.1994 framed the following issues for determination and adjudication:

"1. Whether the plaintiffs are entitled to rendition of accounts? OPP

2. Whether the suit is not maintainable? OPD

3. Whether the plaintiffs are estopped from filing the suit? OPD

4. Whether the plaintiffs have no cause of action? OPD

5. Relief."

5. After deciding issue No. 1 in favour of the plaintiffs, issue No. 2 in favour of the defendants, issue No. 3 against the defendants, issue No. 4 was not pressed, the suit of the plaintiffs was dismissed. Subsequently, the plaintiffs preferred an appeal before the learned Lower Appellate Court, which was also dismissed, vide impugned judgment dated 29.12.2004, hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

"1. Whether the dissociation by the partner from the partnership to the knowledge of other partners amounts to dissolution of the firm and the appellant is entitled for the rendition of accounts as per Section 69 (3) (a) of the Partnership Act?

2. Whether the demand of accounts by the partner by serving notice amounts to dissolution of the firm and consequent the right can be exercise for seeking rendition of accounts?

3. Whether the Court below has wrongly held that the finding of Ld. Sub Judge, Nalagarh in judgment and decree dt. 26.04.1999 in CS No. 246/1 of 1994 thereby holding no liability of the appellant qua the partnership liability has no consequence to the relief claimed in the suit?

4. Whether the Court below has wrongly disallowed the application under Order 41 Rule 27 CPC for placing on record the judgment and decree dt. 26.04.1999 in CS No. 246/1 of 1994 passed by the learned Sub Judge, Nalagarh?

5. What is effect of not deciding the application under order 7 Rule 14(3) CPC thereby not considering the additional documents sought to be placed on the record?

6. Whether filing a suit of rendition of accounts, thereby serving summons amounts to dissolution of the firm, there by entitled the partner to seek the rendition of account?"

6. I have heard the learned Counsel for the appellant and the learned Counsel for respondents No. 1 to 3.

7. The learned Counsel for the appellant has argued that the learned Courts below have failed to take into consideration the fact that there was implied notice on behalf of the appellant to resign from the partnership firm. He has further argued that even if it is taken that there was no resignation in writing then the legal notice issued to the other partners is definitely a notice to resign. He has argued that the learned Courts below have not properly considered the ambit of Sections 32, 40 and 69 of the Act. To support his arguments he has relied upon the following judicial pronouncements:

1. Kaniram Ganpatrai vs. Commissioner of Income Tax, AIR 1953 Patna 271;

2. Navinchandra Jethabhai and another vs. Moolehand Sadaram Gindodiya, AIR 1966 Bombay 111 (V53 C16);

3. Basantlal Jalan vs. Chiranjilal Sarawgi and others, AIR 1968 Patna 96 (V 55 C 33) &

4. Vishnu Chandra vs. Chandrika Prasad Agarwal and others, AIR 1983 Supreme Court 523;

Conversely, the learned Counsel for respondents No. 1 to 3 has argued that the appellant has no case and the findings arrived at by the learned Courts below are reasoned and after appreciating the facts, which have come on record. He has referred to notice, Ex. PW-1/B, which was issued in the year 1993 and it was not a notice to resign. He has argued that as the appellant never resigned from the partnership firm in writing, as she was required to do in case she intended to resign, as per the agreement, so the partnership continued. He has argued that the learned Courts below have rightly held that a partner cannot maintain a suit against the other partners in an unregistered firm. Lastly, he has argued that the appeal is without merits and the same be dismissed.

8. In rebuttal, the learned counsel for the appellant has argued that the appellant has resigned from the partnership firm and the suit should have been decreed by the learned Trial Court and now the appeal be allowed by setting aside the judgments and decrees of the learned Courts below.

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

10. The controversy in the case in hand mainly depends upon the ambit of Section 69 of the Indian Partnership Act (hereinafter referred to as "the Act"). At the very outset the same is extracted hereunder:

69. Effect of non-registration.—

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-section (1) (2) shall apply also to a claim of set off or other proceedings to enforce a right arising from a contract, but shall not affect-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or court under the Presidency-towns Insolvency act, 1909 (3 of 1909) or the property of an insolvent partner."

PW-1 Shri Rajeev Sood, who was one of the plaintiff (proforma respondent No. 5 in the present appeal) and DW-1, Shri Jitendera Malhotra, unequivocally deposed that partnership firm was unregistered and the parties were its unregistered partners. In the wake of depositions of these two witnesses coupled with what has been provided in Section 69 of the Act (supra), no partner of an unregistered firm can maintain a suit against other partners. As there is clear statutory

embargo provided in the Act, the suit was not maintainable, as unregistered partners of an unregistered firm cannot maintain a suit against other partners. Sub Section (3) of Section 69 of the Act certainly provides exception that sub Section (1) and (2) shall have no effect for enforcement of any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realize the property of a dissolved firm. Now, the only point which needs determination is that whether the partnership firm stood dissolved or not.

11. PW-1, Shri Rajeev Sood (one of the plaintiff in the learned Trial Court) deposed that plaintiffs disassociated with the business of the firm on and w.e.f. 31.03.1991. As per the plaintiffs, the partnership firm stood dissolved on 31.03.1991, but as per the deposition of DW-1, Shri Jitendera Malhotra, the partnership firm was not dissolved. Partnership deed, Ex. PW-1/A, manifests that the firm came into existence on 01.04.1990 and Clause 7 of the deed further provides that partners or their survivors will remain its partners for a period of 10 years from the said date, subject to the provisions as contained in it. Under Clause 12 of the deed it is provided that if a partner intended to retire from the partnership firm he was required to give a month's notice, in writing, expressing his intention and after expiration of such notice, the partnership, qua that partner shall stand dissolved. Thus, it is clear that merely by disassociating business from the partnership firm, the partnership firm did not dissolve.

12. Section 40 of the Act mandates that a partner can disassociate from the partnership by giving notice of disassociation. For ready reference Section 43 of the Act is extracted hereunder:

> ***"43. Dissolution by notice of partnership at will.-***
>
> ***(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.***
>
> ***(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."***

Thus, in view of Section 43 of the Act, a partner can always disassociate from a firm by giving notice in writing, but in the case in hand no such notice was given by the plaintiffs expressing willingness to disassociate from the partnership firm in question. Admittedly, notice, Ex. Pw-1/B, was given by the plaintiffs to the defendants, but that was for rendition of account and not for disassociation from the partnership firm. Therefore, the partnership firm existed and it was not dissolved, as pleaded by the plaintiffs, so the suit, as filed by the plaintiffs for rendition of account was not maintainable under Section 69 of the Act.

13. Undisputedly, the parties to the suit were unregistered partners of an unregistered partnership firm, as the same stands fully proved through the plaint, so filed by the plaintiffs, and the depositions of PW-1, Shri Rajeev Sood and DW-1 Shri Jitendera Malhotra. Therefore, as discussed above, a partner of an unregistered firm cannot maintain a suit against other partner of that unregistered partnership firm. True it is that Section 69(3)(a) of the Act provides that a partner of an unregistered firm can file a suit for enforcement of any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realize the property of a dissolved firm, but the same can only be done for the dissolution of firm and for accounts of dissolved firm. In the case in hand the partnership firm did not stand dissolved, as pleaded by the plaintiffs, so the suit is not maintainable for rendition of accounts. Moreover, a perusal of partnership deed, Ex. PW-1/A, clearly shows that the partner, if at all wanted to disassociate/resign from the firm, he was required to give a notice, in writing, of one month, as mentioned in para 8 of the deed, but the plaintiffs did not give any such notice, so the partnership firm was still in existing and was not dissolved, as pleaded by the plaintiffs.

14. Section 40 of the Act provides as under:

> ***"40. Dissolution by agreement.-A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners."***

Thus, as per the mandate of Section 40 of the Act, the partnership can be dissolved with the consent of all the partners in accordance with a contract between the partners. Now, admittedly the plaintiffs and defendants executed partnership deed, Ex. PW-1/A, and it specifically provided terms for a partner to disassociate from the firm. PW-1, Shri Rajeev Sood (one of the plaintiffs) deposed that partnership firm stood dissolved on and w.e.f. 31.03.1991, as the plaintiffs disassociated themselves from its affairs, however he has admitted that as per Ex. PW-1/A, the partnership firm could have been dissolved. It clearly demonstrates that he was aware and having knowledge that partnership firm can only be dissolved as per the procedure contained in Ex. PW-1/A and not by simply disassociating themselves from its affairs.

15. The learned Counsel for the appellant has placed reliance on a judgment of Hon'ble Patna High Court rendered in ***Kaniram Ganpatrai vs. Commissioner of Income Tax, AIR 19534 Patna 271,*** wherein in para 3 it has been held as under:

> ***"3. On behalf of the assessee, Mr. Dutt presented the argument that upon the facts found the Income tax Appellate Tribunal should have held that there was succession to the assessee firm within the meaning of Sec. 25 (4) , Income-tax Act. Learned counsel referred to the important finding of the Appellate Tribunal that the stock in trade and most of the debts and liabilities of the assessee firm were transferred to the new firm Kaniram Jankidas. In their order dated 13-4-1951 the Appellate Tribunal states that the new firm took over the assets and liabilities of the old firm and continued the business without cessation. The Tribunal has observed:"in this state of affairs, on 28-10-1943 Ramniranjan Kejriwal was admitted to the partnership on Kartik Sudi 1, S. Y. 200, and the business was carried on as heretofore with the change in the firm name from Kaniram Ganpatrai to Kaniram Jankidas. . . . . and business went humming as before without break". The facts suggest that the whole business of the assessee firm had devolved upon the successor firm Kaniram Jankidas, The identity and continuity of the business has also been substantially preserved for the successor firm Kaniram Jankidas took over the same lines of business from the assessee firm and carried on business at Daltonganj and its various branches. But the question at issue is whether the successor firm of Kaniram Jankidas is a 'different person' within the meaning of Sec. 25 (4) , Income tax Act. On this point the Appellate Tribunal has said that there was no succession"as Inderchand continued to be a partner of the old as well as new partnership and Sec. 25 (4) contemplated a complete change of personnel and not a mere change of the ownership of the business. "in my opinion the Appellate Tribunal has proceeded on a misconception of law in holding that there was no succession to the firm of Kaniram Ganpatrai. It is true that Inderchand Kejriwal was a partner of the old firm and was also a partner of the new firm. But that is not a material consideration in deciding whether there was succession within the meaning of Sec. 25 (4). In the present case, there are circumstances which suggest that the old firm of Kaniram Ganpatrai had been dissolved with effect from 27-10-1943. The Appellate Assistant Commissioner has stated that Mahadeo Lal Jwalaprasad retired from partnership on this date and the whole business came into the hands of Inderchand. The Appellate Tribunal has affirmed this finding and further stated that most of the assets and liabilities were transferred to the new firm of Kaniram Jankidas who carried on tile business of grain, cloth and lac as before without a break. 'these facts suggest the inference that the old partnership of Kaniram Ganpatrai had been dissolved by agreement. Under Sec. 40, Partnership Act, a partnership may be dissolved by the agreement of the partners. It is not***

necessary in every case that the fact of dissolution should be evidenced by a document but the dissolution of the partnership may be inferred from the circumstances of the case and the conduct of the parties (See Joopoody Sarayya v. Lakshmanaswamy', 36 Mad 185 (A)). According to the finding of the Appellate Tribunal the new firm of Kaniram Jankidas was formed on 28-10-1943 with Inderchand Kejriwal having 12 annas share and Kamniranjan Kejriwal having four annas share. The new firm was registered on 21-9-1946 but the deed of partnership recites that the new firm had carried on the business with effect from 23-10-1943. The Appellate Tribunal has held that there was no succession of the assessee firm"since Inderchand continued to be a partner of the old as well as the new partnership, and Sec. 25 (4) contemplates a complete change of personnel and not a mere change in the ownership of the business. "in my opinion, the Appellate Tribunal has proceeded on a mistaken view of the law. It is true enough to state that a partnership is not in English law or in Indian law a single juristic per-son and a firm as such has no legal personality or existence. But for the purpose of the Income tax Act, a firm is regarded as having a separate existence apart from the partners who carry on the business. The question has recently been discussed by a Bench' of this Court in -'jittanram Nirmalram v. Commissioner of Income-tax', AIR 1953 Pat 257 (B) , where the authorities on the point have been reviewed. It was held in that case that a new partnership of three persons was different legal entity from an old partnership of four persons, though three of the partners were common. The same principle is laid down in -'income-Tax Commissioners v. Gibbs', (1942) A. C. 402 (C) , in which the question arose whether a partnership of four stock brokers who took in a fifth partner ceased to carry on business and was succeeded by the partnership of five within the meaning of Sub-rule 1 of Rule 9, Schedule D to the Income Tax Act, 1918, which provided that if a person charged under Schedule D ceased within the year of assessment to carry on the trade in respect of which the assessment was made and was succeeded by another person, the commissioner shall adjust the assessment as directed. It was held by the House of Lords reversing the decision of the Court of Appeal that though in the English law a partnership was not a single juristic person, the scheme of the Income-tax legislation treated the partnership as a legal entity for the purpose of assessing revenue and there was succession to the business within the meaning of Rule 9, Sub-rules 1 and 2. Applying the principle of these authorities, it is clear that in the present case there has been a succession to the partnership within the meaning of Sec. 25 (4) , Income-tax Act and that the finding of the Appellate Tribunal on this point is erroneous and should be overruled."

However, the judgment (supra) is with respect to Income Tax Act and the Hon'ble High Court of Patna has held that the regular second appeal is maintainable, though on substantial question of law only. The Income Tax Act is a special Act and the facts of the present case are totally different, so the judgment (supra) is not applicable.

16. The learned Counsel for the appellant has also relied upon on a judgment of Hon'ble Bombay High Court rendered in ***Navinchandra Jethabhai and another vs. Moolehand Sadaram Gindodiya, AIR 1966 Bombay 111 (V 53 C16),*** wherein in para 18 it has been held as under:

"18. The next question is whether the suit is barred by reason of S. 69 of the India partnership Act. It is an admitted position that the partnership between the plaintiff and the defendants was not registered under the Partnership Act and therefore, S. 69 of the Act must govern the

cases. The section is divided into four sub - sections. Sub - section (10 prevents a persons from suing as partner is a firm either the firm or a person who is alleged in the to be a partners in the firm, in respect to any rights arising out of the contract of the partnership or any other rights conferred by the Act, unless the firm if registered. Sub - section (2) prevents of the similar suit against a third party in respect of any contract by the firm unless it is registered and it shown that the persons suing on the behalf of the firm are partners that the in the firm. Sub - section (3) provided that sub - section (1) and (2) would also apply to a claim of set - off fro the proceedings to enforce a rights arising fro ma contract, but is proceeds to case out - (a) the enforcement's of any rights to sue for the dissolution of the firm or for accounts of a dissolved relished the property of a dissolved firm, and (b) the powers or courts under the two Insolvency of the act for relations of the property of an insolvent of partner. The exceptions, to the section created by sub -section (4) have no application to the present case, and we need not consider them. Clauses (a) and (b) of the sub - section (3) which provide exceptions clearly enable to asset of the accounts of the dissolution of the firm of the for accounts oft dissolved firm or for realization of the property of the dissolved firm. An arguments was made of the last portion of clauses (a) applied only to a suit against a third person. But then it is extremely defeat to hold that the provisions which is made as an exception to both the sub = section (1) and (2) should be split up in such a way that one portion of it should up in such a to sub = section (1) and the other potion of sub = section (2) , with out even addition the words "respectively" by the legislature. To do so would appears to the be adding the word are not to be found in found in the clauses or re - drafting the statute. If the legislature really intended to create an exception in this limited from, then to each of the sub =section a proviso could have been added - making an exception only to that sub - section. Giving a natural meaning to the provisions of clauses case in the our view, a suit for the accounts of the dissolved firm or for relations of the property of dissolved firm for m any proviso, whether he be a partner or not can be filed. This view was taken in the case of Sheo Dutt v. Pushi Ram, AIR 1947 All 229, and it was subsequently followed in the case of Daitari Mohapatra v. Brundaban Matia, AIR 1959 Orissa 110. Mr. Abhyankar relied on the observations of Sir John Beaumeont of the case of Appayya Nijlinagappa v. Subrao Babaji reported in 39 Bom LR 1214, (AIR 1938 Bom 108) where the learned chief Justice appeared to be of the view that the first sentence of sub - clauses (a) should be read as creating exception from sub - section (1) , the exceptions being enforcement of the right of the sue for dissolution of accounts of the dissolved firm, and the last sentence of that sub = clauses should be read as creating an exception to sub =section (2) in respect of suit to enforce any right to the realize of suit of the enforce any right to realize property of a dissolved firm. The question arose in a suit be the plaintiff who were partners of the defendants for the recovery of an amounts due to the partnership by the defendants after the partnership by the defendants after the partnership was dissolved. Now , if was really the learned chide justice has laid down the rules purposed to the have been formulated b him, the suit old have been dismissed. In that case, the trial court had dismissal in the suit of the decreed the plaintiffs claim. The learned Chief Justice held that the suit in question fell within the exception and therefore setting aside the decree it is obvious from the reasoning of the learned chief justice that the did not limited the exception to suits against third parties only , and if

this is so with respect, it would seem it does not matter whether the exception is to there fore is really not against the conclusion at which we have arrived."

After carefully considering the judgment (supra) in detail, it is found that the judgment relates to a firm, which stood dissolved. In the case in hand, there is nothing on record to demonstrate that the firm was dissolved. The case of the appellant is that by her conduct the firm was dissolved, but there is specific provision in the agreement that the firm will remain for ten years and any partner can only disassociate from it by giving a month's notice. So, the facts of the present case are totally different from the judgment (supra), hence the judgment is not applicable to the facts of the present case.

17. The learned Counsel for the appellant has also placed reliance on another judgment of Hon'ble High Court of Patna rendered in ***Basantlal Jalan vs. Chiranjilal Sarawgi and others, AIR 1968 Patna 96 (V 55 C 33),*** wherein in para 9 it has been held as under:

"9. Learned Counsel for the appellant next submitted that the suit is barred under Section 69 (1) of the Partnership Act, inasmuch as the partnership was not registered. Developing his argument, the learned Counsel further submitted that the suit being a suit for specific sum of money, it was not saved under Section 69(3)(a) of the Partnership Act. There does not appear to be any substance in this submission of the learned Counsel either. The argument clearly overlooks Sub-clause (a) of Clause (3) of Section 69 of the Partnership Act. Clauses (1) and (2) of Section 69, no doubt, bar a suit by or on behalf of an unregistered partnership. Clause (1) bars a right of a person suing as a partner in a firm to enforce certain rights arising against the firm or against any person alleged to be or to have been a partner in the firm. Clause (2) of the said section bars the enforcing of a claim by a firm against a third party. Clause (3) of Section 69 provides certain exceptions to the bars created by the earlier two clauses of this Section. Sub-clause (a) of Clause (3), which is relevant in the instant case, is quoted below:--

(3) The provisions of Sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of dissolved firm, or any right or power to realise the property of a dissolved firm."

Reading the aforesaid clause, it is apparent that apart from suing for dissolution of a firm or for accounts of a dissolved firm, an exception has been made also in case of any right or power to realise the property of a dissolved firm. Mr. Chatterjee, however, next contended that the latter portion of the aforesaid Sub-clause (a) of Clause (3) of Section 69 was an exception to Clause (2) of Section 69 and would only apply if the suit was filed against a third party. Mr. Lal Narayan Sinha. appearing for the respondent, in reply, has submitted that this argument clearly overlooks the opening lines of Clause (3), which clearly provides that the exception is applicable to both Clauses (1) and (2) of Section 69 and there is no scope for making any artificial division of the said exception between Clauses (1) and (2). Mr. Sinha also relied upon a Bench decision of the Allahabad High Court in the case of Sheo Dutt v. Pushi Ram, AIR 1947 All 229, that, "any right or power to realise

the property of a dissolved firm under Section 69 (3) (a) includes the right to recover from third party as well as from one of the partners." In my view, the submission made by Mr. Sinha is well-founded and must be accepted. I would accordingly hold that, in any view of the matter, the suit is not barred under Section 69 (1) of the Partnership Act."

As there is nothing on record to show that the partnership firm stood dissolved, the judgment (supra) is also not applicable to the facts of the present case.

18. Lastly, the learned Counsel for the appellant has placed reliance on a judgment of Hon'ble Supreme Court rendered in ***Vishynu Chandra vs. Chandrika Prasad Agarwal and others, AIR 1983 Supreme Court 523,*** the Hon'ble Supreme Court in para 5 has held as under:

"5. The second contention is whether the plaintiff is entitled to retire from the partnership. To begin with it would be advantageous to refer to clause 18 of the instrument of partnership. It reads as under :-

"18. That if any partner wants to dissociate from the partnership business then he can dissociate after serving one month notice to remaining partners, but in that event the partnership business will not come to an end. If the majority of the partners do not agree to work with other partner then in that event the majority partners will have the right to seek explanation from that partner and, if think fit and justifiable, may expell him from the partnership business." Before proceeding further it is also advantageous to note that in the concluding portion of para 20 of the instrument of partnership it was provided that no partner will separate from the partnership business till one year from the beginning of the business, and if he will dissociate then his capital will not be given till the end of one year. These two clauses leave no room for doubt that a partner can dissociate from the firm. Section 32 (1) provides, inter alia, that a partner may retire ... (b) in accordance with an express agreement by the partners. A partnership business is run in accordance with the terms of the contract of partnership. The terms, inter alia, envisage a situation that a partner can retire from partnership. The expression used in clause 18 that a partner may dissociate from the partnership envisages a situation where a partner wants to retire from business. The contract of partnership also envisages a situation where a partner may be expelled from the partnership. But that situation need not he examined. The only point on which the parties are at variance is whether a partner can retire from the partnership and the expression, 'that if any partner wants to dissociate from the partnership business,' comprehends a situation where a partner wants to retire from the partnership. Therefore, it does appear that the contract of partnership permits a partner to retire from the partnership. Unfortunately the High Court examined the contention from an angle impermissible in that while examining the second contention the High Court proceeded to appreciate the contention put forward on behalf of the plaintiff appellant whether there was a breach of the contract of partnership. Nowhere while examining the contention whether it is open to the partner to retire from partnership, the absolute right to dissociate from business as conferred by clause 18 has been gone into by the High Court. The High Court negatived the contention observing that non-payment of Rs. 250/- p.m. to the plaintiff and non-supply of 1/4 production to him could not be an adequate

ground for dissolution of partnership under Section 44 of the Indian Partnership Act 1932 ('Act' for short). Maybe, the High Court may be right in that if dissolution is sought under Section 44 of the Act alleging that there has been a breach of the contract of partnership. That is not the plaintiff's contention when he prayed for a decree on the ground that he may be permitted to retire from the partnership. The High Court fell into error in not examining the contention whether the plaintiff appellant is entitled to retire from the partnership without dissolving the firm. Clause 18 of the contract of partnership clearly comprehends a situation where a partner may retire from an ongoing partnership after giving one month's notice. That is what is clearly intended by the expression that in the event of retirement of a partner the partnership business will not come to an end. Clause 18 provides for two independent contingencies. The first part of it confers a right on the partner to retire from partnership as envisaged by Section 32 (1) (b) of the Act. The second part of clause 18 provides for the consequence of such retirement by providing that even on such retirement the partnership will neither be dissolved nor the business will come to an end. In other words, without dissolving the firm and continuing the ongoing business, a partner may retire from the partnership, a situation clearly comprehended by Section 32 and incorporated as a term of contract of the partnership between the parties to the contract. With great respect, the High Court did not examine the matter from this angle and fell into an error in believing that the plaintiff sought dissolution on two grounds : (i) that the partnership is a partnership at will; and (ii) that dissolution is sought under Section 44. The implication of Section 32 of the Act completely escaped the notice of the High Court and that is why we are constrained to interefere in this matter."

In the judgment (supra) the Hon'ble Supreme Court has held that one of the partners may disassociate from the partnership when he wants to retire from the business. In the case in hand, there is specific agreement that a partner may disassociate from the partnership subject to the conditions otherwise mentioned in the agreement alongwith that there should be one month's notice in advance, which in the present case is missing, so the judgment (supra) is also not applicable to the facts of the present case.

19. In view of what has been discussed hereinabove, this Court finds that the findings arrived at by the learned Courts below are reasoned, after appreciating the evidence, which has come on record, to its true and correct perspective and the documentary evidence has also been correctly interpreted. So the substantial question of law No. 1 is answered holding that there is no proof of disassociation of the plaintiffs from the partnership firm as per the partnership deed, Ex. PW-1/A, so it cannot be said that there is dissolution of the firm. Thus the suit is not maintainable.

20. Similarly, the suit is not maintainable without the firm is dissolved. The learned Court below has rightly and in accordance with law has disallowed the application under Order 41, Rule 27 CPC, so there is no illegality. Thus, substantial questions of law No. 2 and 3 answered accordingly.

21. As the additional documents were neither necessary nor required by the learned Court below for adjudication of the case, so non-consideration of the additional documents call for no interference, as the judgment of the learned Courts below is on the basis of the record. So, substantial questions of law No. 4 and 5 are answered accordingly.

22. As discussed hereinabove partnership deed, Ex. PW-1/A, specifically contained that any partner can only disassociate from the firm by giving notice of one month in writing, thus the summonses served upon the defendants in the suit filed by the plaintiffs for rendition of accounts has nothing to do with dissolution of the firm. Therefore, the substantial question of law No. 6 is answered accordingly.

23. The net result of the above discussion is that the appeal, which sans merits, deserves dismissal and is accordingly dismissed. However, taking into consideration the facts and circumstances of the case, the parties are left to bear their own costs.

24. In view of the disposal of the appeal, pending application(s), if any, shall also stand(s) disposed of.

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

Greenko Him Kailash Power Project Limited ..... Petitioner
Versus
Sub Divisional Magistrate, Chamba & Anr. ..... Respondents

CMPMO No.489 of 2017
Date of Decision No.1.5.2018

Constitution of India, 1950- Article 227- **Himachal Pradesh Tenancy and Land Reforms Act, 1972–** Section 118- Petitioner-Company constructed a water channel for its power project after purchasing land from one 'N' – During inquiry conducted on complaint of 'N' addressed to Collector Chamba, water channel was actually found to be over other land of 'N', which was never purchased by company – Collector imposing fine of Rs. 4 lacs on company for encroaching land of 'N' and also directing that land 'actually purchased' by it as having been vested in State of H.P., since it was not used within statutory period for purpose, sanction of Government was obtained – Challenge thereto – Held – Collector had no jurisdiction whatsoever to impose fine on a company, even if, it was found to have encroached upon land of 'N' – Petition allowed – Order of Collector set aside more in view of fact that a compromise had already been effected between 'N' and petitioner - And 'N' stood duly compensated by Company. (Paras-11 to 13)

For the Petitioner: Mr. K.D.Shreedhar, Senior Advocate, with Mr. Sameer Thakur, Advocate.
For the respondents: Mr. Dinesh Thaur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General, for respondent No.1.
Ms. Shama Khan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with the impugned order dated 24.5.2017 ***(Annexure P-13***), passed by the Sub Divisional Magistrate, Chamba, District Chamba, Himachal Pradesh ***(for short 'SDM'),*** whereby learned 'SDM' while dealing with the application having been filed by respondent No.2, ordered petitioner-Company to engage respondent No.2 against any vacant post within a period of 10 days from the date of passing of the order, petitioner-Company has approached this Court by way of instant proceedings filed under Section 227 of the Constitution of India, praying therein to set-aside and quash the impugned order passed by the learned 'SDM'.

2. Necessary facts, as emerge from the record are that respondent No.2, filed an application before the learned 'SDM' Chamba, District Chamba, Himachal Pradesh on 31.3.2015, seeking therein, directions to the petitioner-Company to provide him employment in lieu of the land acquired by the petitioner-Company for the construction of power project. Learned 'SDM' having taken note of the averments contained in the application, directed the petitioner-Company to offer appointment to the applicant against any vacant post. In the aforesaid background, petitioner-Company has approached this Court.

3. Mr. K.D.Shreedhar, learned Senior Advocate, duly assisted by the Mr. Sameer Thakur, Advocate, representing the petitioner-Company, while inviting attention of this Court to Memorandum of Understanding/ implementation agreement ***(Annexure P-2),*** arrived *inter se* petitioner-Company and State of Himachal Pradesh, contended that in terms of clause 10.2, of the agreement, Company is/was under obligation to provide employment to one member of each of the displaced families or adversely affected persons on account of the acquisition of land for the construction of project. He further stated that after completion of the construction of project, petitioner-Company in terms of clause 10.2, is/was only required to give preference in employment to members of displaced families for operation and maintenance of the project and not to the persons or families whose some part of the land was acquired and they were not wholly displaced. It would be profitable to reproduce clause 10.2 of the agreement hereinbelow:-

> ***" The Company shall provide employment to one member of each of the displaced families or adversely affected as a result of the acquisition of land for the project, as covered in the Rehabilitation Plan referred to in paragraph 10.1 above, during the construction of the Project. During the Operation & Maintenance stage the Company shall give preference in employment to members of displaced families."***

4. Mr. Shreedhar, further contended that learned 'SDM' had no authority, whatsoever to entertain the application made by respondent No.2, because in terms of Memorandum of Understanding/ Implementation Agreement **(Annexure P-2)**, learned 'SDM' has no authority to adjudicate/decide the contravene, if any, of the terms and conditions by either of the parties, rather in this regard matter is required to be referred to the Arbitration in terms of clause 19.1 of the Memorandum of Understanding/ Implementation Agreement. It would be profitable to reproduce clause 19.1 hereinbelow:-

> ***" Any dispute or difference whatsoever arising between the parties to the agreement out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity of the breach thereof shall be settled by arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the award thereunder shall be final and binding upon the parties, subject to legal remedies available under the law."***

5. Mr. K.D.Shreedhar, further submitted that as per clause 12 of the Memorandum of Understanding/ Implementation Agreement, employment is required to be offered to Himachalis subject to availability and suitability and at present majority of staff is from Himachal, as is evident from Proforma for Inspection of Hydro Electric Project and Industrial Unit (available at page 58). Mr. Shreedhar, further contended that findings/observations made by learned 'SDM' that no record was made available is contrary to the factual position because entire record suggestive of the fact that only Himachalis are being employed in the project was made available to the learned 'SDM' during the proceedings initiated at the behest of respondent No.2. While inviting attention of this Court to communication, dated 20.11.2007 ***(Annexure P-5),*** Mr. Shreedhar, contended that the applicant/respondent No.2 was offered appointment on account of acquisition of his land and he was discharging his duties till commissioning of project in the year, 2008 and as such, findings to the contrary recorded by the learned 'SDM', is not sustainable and deserves to be quashed and set-aside. While inviting attention of this Court to the material placed on record, Mr. Shreedhar, contended that as per periodical report submitted by the authority

concerned, it is quite apparent that conditions contained in clause 12.1 of the implementation agreement, employment is being given to Himachalis not to the outsiders.

6. Ms. Shama Khan, learned counsel representing respondent No.2, while refuting aforesaid submissions having been made by learned counsel representing the petitioner-Company, contended that the petitioner-Company taking undue advantage of ignorance of respondent No.2, exploited him by not giving him appointment in terms of Memorandum of Understanding. She further contended that respondent No.2 is a poor man and has a family to support and in case he is not provided employment, great prejudice would be caused to him. She further contended that it is apparent from the order, passed by the learned 'SDM' that terms and conditions contained in Memorandum of Understanding, are being flouted with all impunity and outsiders are being given preference in the employment by the petitioner-Company and as such, there is no illegality and infirmity in the impugned order passed by the learned 'SDM'.

7. Having heard learned counsel for the parties and perused the record, this Court finds from the record that clause 10.2 i.e. Rehabilitation/Resettlement provides for offering employment to one member of each of the displaced families or adversely affected on account of the acquisition of land for the project, but careful perusal of clause 10.2, which is reproduced hereinabove, suggests that such employment shall be provided during the construction of the project, whereafter during operation and maintenance stage Company shall give preference in employment to the members of wholly displaced families. Bare reading of clause 10.2, suggests that members of displaced families or adversely affected on account of acquisition of land would be provided work/employment during the construction of project not beyond that. Clause 10.2 further suggests that during operation and maintenance, Company is only under obligation to give preference to the members of the displaced families. In the case at hand, as is evident from the record, land measuring 00-14-00 biswa of respondent No.2 came to be acquired for construction of power project. It is not in dispute that respondent No.2 received compensation on account of acquisition of his aforesaid land. Mr. Shreedhar, stated that in case entire land of respondent No.2 is/was acquired, recommendation from the Deputy Commissioner for offering him permanent employment is required, but in the case at hand, no such recommendation ever came from Deputy Commissioner, meaning thereby, his total land was not acquired, rather partial land came to be acquired for construction of project. Material available on record i.e. jamabandi filed by the respondent No.2 alongwith the reply further suggest that some land had come to the share of father of respondent No.2, but that may not be sufficient to conclude that entire land belonging to respondent No.2 or his father was acquired by the petitioner for construction of power project, making petitioner eligible for permanent employment in terms of clause 10.2 of Memorandum of Understanding.

8. Another question which needs to be determined in the instant proceedings is whether learned 'SDM', Chamba in terms of Memorandum of Understanding arrived *inter se* the petitioner and State of Himachal Pradesh, is/was competent to order/direct the Company to engage the applicant against any vacant post or not? Though, there is no specific authority defined/prescribed under the Implementation agreement, where the aggrieved party can lodge/initiate complaint for violation of the conditions, especially clause 10, but if agreement is read in its entirety it can be concluded that complaint, if any, for violation of the terms and conditions contained in the implementation agreement can be made to State of Himachal Pradesh or Him Urja, who can refer the matter to arbitration in terms of clause 19.1 of implementation agreement. In the case at hand, 'SDM' simply having received complaint proceeded to issue directions to the petitioner Company to offer appointment to respondent No.2, who admittedly remained on the rolls of the petitioner-Company till the commissioning of the project. It is not understood that on what basis learned 'SDM' arrived at a conclusion that petitioner Company has violated the terms and conditions of 'MOU' by not providing 70% employment to Himachalis because as has been taken not above, periodical inspection report placed on record suggests that more than 90% employees of the petitioner Company are from Himachal Pradesh.

9. Consequently, in view of the detailed discussion made hereinabove, this court has no hesitation to conclude that learned 'SDM' by entertaining the application filed on behalf of respondent No.2 not only exceeded its jurisdiction, rather without any authority issued directions to the petitioner-Company to offer appointment to respondent No.2, who in fact was provided employment, as is evident from the record in terms of clause 10.2, which only talks about employment during the construction work. Had learned 'SDM' bothered to peruse the implementation agreement in its entirety, probably he would not proceeded to pass the impugned order. Accordingly, the impugned order is quashed and set-aside.

10. Before parting, this Court wish to observe that in case any post is lying vacant in the petitioner Company, first preference shall be given to respondent No.2.

Accordingly, the present petition stands disposed of alongwith pending application(s), if any.

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

Greenko Him Kailash Power Project Ltd. .....Petitioner

Versus

Collector, Sub-Division Chamba and Anr. .....Respondents

CMPMO No. 427 of 2017
Decided on 1.5.2018

Constitution of India, 1950- Articles 226 and 227- Direction by Sub Divisional Magistrate (SDM) to company to employ person in lieu of acquisition of his land – Legality- Terms of Memorandum of Undertaking between Company and Government provided giving preference to those persons in employment after completion of project, who were displaced on account of acquisition of their land – SDM directed company to employ respondent No.2 in lieu of acquisition of his land – However, construction of project was found complete – Respondent No.2 was not 'displaced' on account of acquisition of his land as only part of his holding was acquired – Held, respondent No.2 was not entitled for any preferential treatment after completion of project – Order of SDM set aside – Petition disposed of. (Paras-7 and 8)

For the petitioner	:	Mr. K.D. Shreedhar, Senior Advocate, with Mr. Sameer Thakur, Advocate.
For the respondents	:	Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General, for respondent No.1. Mr. Nitin Thakur, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dis-satisfied with order dated 24.5.2017, passed by the learned Collector Sub-Division Chamba, District Chamba, H.P., in case No. nil dated 7.2.2014, titled Nazir Muhaamod v. Sh. Surjeet Singh (now deceased) G.M. Him Kailash Project Pvt. Ltd., petitioner-company has approached this Court in the instant proceedings filed under Article 227 of constitution of India.

2. For having bird's eye view, facts as emerge from the record are that the petitioner-company purchased a land comprised in khata khatauni No. 140/161, khasra No. 727/550/512/396, area measuring 00-06-00 biswas from respondent No.2 (Nazir Mohd.) for

construction of water channel for generating power. It also emerges from the record that the petitioner-company paid an amount of Rs. 36,000/- as sale consideration vide sale deed dated 29.1.2005 (Annexure P-4). Subsequent to aforesaid sale made by respondent No.2, civil construction work was completed in the year, 2007, whereafter the project came to be commissioned on 19.3.2008.

3. On 7.2.2014, respondent No.2 made an application to the Collector Sub-division Chamba, H.P., alleging therein that the petitioner-company has encroached upon his land by constructing water channel forcibly without paying him adequate compensation. The Collector, after having conducted inquiry passed impugned order dated 24.5.2017, whereby he held the present petitioner liable to pay fine of Rs. 4 lac, on account of unlawful grabbing made by it of the land owned and possessed by respondent No.2. Apart from above, Collector having perused the record came to conclusion that land purchased by the petitioner-company for construction of water channel from respondent No.2, was not put to use well within the specified period and as such, land purchased by it, after having obtained permission under Section 118 of Tenancy and Land Reforms Act, 1972 (in short "the Act"), needs to be resumed/vested in the State of HP. The Collector, not only ordered for vesting of land purchased by the petitioner from respondent No.2, but also imposed fine to the tune of Rs. 4 lac on the petitioner-company.

4. Mr. K.D. Shreedhar, learned Senior Advocate, duly assisted by Mr. Sameer Thakur, Advocate, representing the petitioner-company, while referring to the impugned order vehemently argued that the impugned order is not sustainable in the eye of law and as such, same deserves to be quashed and set-aside. Mr. Shreedhar, contended that learned Collector had no authority, if any, to pass impugned order, especially imposition of penalty/fine. He further stated that it is not understood that under what provision of law, the Collector, proceeded to impose fine to the tune of Rs. 4 lac. Mr. Shreedhar , while fairly admitting the fact that water channel has been constructed on the land other than land purchased by it from respondent No.2, contended that an amount of Rs. 36,000/- was paid to respondent No.2 as a sale consideration and as such, Collector has wrongly arrived at conclusion that the petitioner unlawfully grabbed the land of respondent No.2. While inviting attention of this Court to the agreement arrived inter-se petitioner and respondent No.2 prior to the commencement of proceedings before learned SDM (page 30), Mr. Shreedhar, contended that an additional amount of Rs. 5 lac stands already paid to the petitioner on account of various disputes raised by respondent No.2 and as such, it cannot be said that injustice was caused to respondent No.2.

5. Mr. Nithin Thakur, learned Advocate, representing respondent No.2 was unable to dispute the factum with regard to the compromise arrived at *inter-se* the petitioner and respondent No.2, whereby admittedly respondent No. 2 received an amount of Rs. 5 lac on account of his various claims in addition to sale consideration of Rs. 36,000/-. Mr. Nitin Thakur, was unable to dispute that in terms of compromise referred herein above, respondent No.2 had agreed at the time of execution of agreement that on the receipt of aforesaid amount i.e. Rs. 5 lac, he shall withdraw all cases and shall have no claim in future, qua the land allegedly used by the petitioner for the construction of water channel.

6. Having heard learned counsel for the parties and perused the record adduced on record, this Court is persuaded to agree with contention of learned Senior counsel that Collector Sub-Division Chamba, had no authority, if any, to impose fine and to recommend vestment of land admittedly purchased by the petitioner from respondent No.2 by way of sale agreement. At this stage, it would be profitable to take note of relevant provisions contained in Section 118 of the Act, which read as under:-

> ***"Section 118 (h): a non-agriculturist with the permission of the State Government for the purposes that may be prescribed:***
>
> > ***Provided that that a person who is non-agriculturist but purchases land either under [clause (dd) or clause (g)] or with the permission granted under clause (h) of this sub-section shall, irrespective of such***

purchase of land, continue to non-agriculturist for the purposes of this Act:

Provided further that a non-agriculturist [who purchases land under clause (dd) or,] in whose case permission to purchase land is granted under clause (h) of this sub-section shall put the land to such use for which the permission has been granted within a period of two years or a further such period not exceeding one year, as may be allowed by the State Government for reasons to be recorded in writing, to be counted from the day on which the sale deed of land is registered and if he fails to do so or diverts, without the permission of the State Government, the said use for any other purpose or transfer by way of sale, gift or otherwise, the land so purchased by him shall, in the prescribed manner, vest in the State Government free from all encumbrances;"

Section 118 (3A) (b)

(b) a Revenue Officer either on an application made to him or on receipt of any information from any source comes to know or has reason to believe that any land has been transferred or is being transferred in contravention of the provisions of sub-section (1); such Sub-Registrar, the Registrar or the Revenue Officer, as the case may be, shall make reference to the Collector of the District, in which land or any part thereof is situate, and the Collector, on receipt of such reference or where the Revenue Officer happens to be the Collector of the District himself, he either on an application made to him or on receipt of any information from any source comes to know or has reason to believe that any land has been transferred or is being transferred in contravention of the provisions of sub-section (1), shall after affording to the persons who are parties to the transfer, a reasonable opportunity of being heard and holding an enquiry, determine whether the transfer of land is or, is not in contravention of sub-section (1) and he shall, within six months from the date of receipt of reference made to him or such longer period as the Divisional Commissioner may allow for reasons to be recorded in writing record his decision thereon and intimate the findings to the Registrar, Sub-Registrar or the Revenue Officer concerned.

7. Perusal of Section 118 (h) suggests that a non-agriculturist with the permission of the State Government, for the purpose that may be prescribed, can purchase land. In the case at hand, it is not in dispute that land was purchased by the petitioner-company for the construction of water channel from respondent No.2 after having obtained permission under Section 118 of the Act. Proviso to Section 118(h) further suggests that in case land purchased after having obtained permission is not put to use, for which it is purchased, within a period of two years, land purchased, shall in the prescribed manner, vest in the State free from any encumbrance. Further perusal of Section 118 (3A) (b) suggests that Sub-Registrar, Registrar or the Revenue Officer, shall make reference to the Collector of the District, in which land or any part thereof is situate and Collector, on receipt of such reference or where the Revenue Officer happens to be Collector of the District himself, either he on a application or on receipt of information from any source, shall after affording to the persons, who are parties to the transfer, a reasonable opportunity of being heard and holding an enquiry, determine whether the transfer of land is/was not in contravention of Section 118. Aforesaid provision further provides that Collector while carrying out aforesaid exercise shall, within 90 days from receipt of reference made to him, record his decision in writing and intimate the findings to the Registrar, Sub-Registrar or Revenue Officer concerned.

8. Similarly, careful perusal of Section 38 of the Act, suggests that an application for ejectment on account of contravention of provision contained in the Act is to be made to the Revenue Officer.

9. In the case at hand, close scrutiny of impugned order passed by the Collector Chamba, though suggests that Collector Sub Division, Chamba, while taking note of application made by respondent No.2 has made reference to District Collector Chamba, for initiation of a case against the petitioner for contravention of Section 118 of the Act, but having perused reasoning/finding recorded in the said order, this court finds considerable force in the submission of Mr. Shreedhar, learned Senior Counsel that Collector has not merely made reference, rather has recorded finding that property in question needs to be vested in State Government on account of violation of provisions contained under Section 118 of the Act.

10. As has been discussed herein above, the Collector Sub Division Chamba, after having received complaint, could only make reference to Collector for initiation of proceedings, if any, for contravention of provisions contained in Section 118 of the Act and definitely, he is/ was not competent to record finding or recommend vestment of property in question, but in the instant case, tone and tanner of impugned order, suggests otherwise. Collector Sub Division Chamba, has not only made reference, rather he has arrived at definite conclusion that since petitioner has contravened the provisions contained under Section 118 of the Act, property in question needs to be vested in State Government.

11. Leaving everything aside, it is not understood that under what provision, Collector Sub Division Chamba, could impose fine of Rs. 4 lac and this Court has no hesitation to conclude that Collector Sub Division Chamba, has exceeded his jurisdiction, rather he has travelled beyond the prayer made in the application, wherein respondent No.2 had only alleged that his land has been encroached upon by the petitioner-company without paying him adequate compensation. Had the petitioner encroached upon the government land, Collector could proceed under Section 163 of HP Land Revenue Act against the petitioner for ejectment, but Collector had no authority to intervene or pass any order in the instant case where encroachment, if any, is/was made on the private land of respondent No.2.

12. Consequently, in view of the discussion made herein above, this Court finds impugned order dated 24.5.2017, passed by the learned Collector, to be without jurisdiction and as such, same is quashed and set-aside. Similarly, the Collector had no authority whatsoever, to impose fine, as has been held herein above, order made in this regard is also quashed and set-aside. As is quite evident from material available on record that since respondent No.2 has already received an additional amount of Rs. 5 lac in the year, 2012, over and above the sale consideration of Rs. 36,000/-, there appears to be no force in the argument of Mr. Nitin Thakur, that great prejudice has been caused to respondent No.2.

13. At this stage, Mr. Shreedhar, stated that though sufficient amount stands already paid to the respondent No.2 on account of land allegedly used for construction of water channel, but even that petitioner-company is ready and willing to suitably compensate respondent No. 2 qua the land other than purchased by it for construction of water channel. He further stated that land which was initially purchased by the petitioner company for construction of water channel is already in possession of respondent No.2 and the petitioner is ready and willing to surrender that in lieu of land used by it for construction of water channel in addition to reasonable amount/market price.

14. In view of the aforesaid, respondent No.2 is directed to make a written request to the petitioner-company for additional compensation at the rate of market price qua the land used for construction of water channel, which shall be considered and decided by the petitioner-company sympathetically as has been fairly stated by the learned senior counsel. Accordingly, present petition stands disposed of, so also pending applications, if any.

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

Jai Lal ....Petitioner
Versus
State of H.P. ....Respondents.

Cr. Revision No. 4077 of 2013
Date of Decision: 1.5.2018

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- Transportation of country liquor without permit – Police intercepting a truck driven by 'T' and recovering huge quantity of country liquor from it – No permit to transport liquor was produced – 'M' was in the cabin, whereas 'V' and 'J' were allegedly on roof of aforesaid truck – Trial court convicting only 'J' and acquitting others of offence under Section 61(1)(a) of Act – Additional Sessions Judge upholding conviction and sentence – Revision by 'J' – 'J' pleading that link evidence was missing and findings of Lower Courts were wrong – On facts, High Court found that no identifying seal was affixed on seized cartons containing liquor – Further, only six bottles were sent to chemical examiner for analysis – Six bottles when distributed amongst four accused/occupants of vehicle, then it was permissible for them to carry six bottles without permit – Appeal allowed – Conviction and sentence set aside – Accused 'J' also acquitted of said offence. (Paras-12 and 13)

For the petitioner: Mr. Tek Chand Sharma, Advocate.
For the Respondents: Mr. Hemant Vaid, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed, against, the judgment rendered on 31.7.2013, by the learned Judicial Magistrate 1st Class, Barsar, District Hamirpur, in criminal case No.5-III-2007, whereby, he convicted, the accused for his allegedly committing an offence punishable under Section 61(i)(a) of Punjab Excise Act as applicable to the State of H.P. (hereinafter referred to as the Act) and sentenced him to undergo rigorous imprisonment for a period of two years each and to pay a fine of Rs. 10,000/ each and in default of payment of fine, to further undergo simple imprisonment for a terms of six months.

2. The facts relevant to decide the instant case are that on intervening night of 23rd and 24th June, 2006, accused persons along with other co-accused (acquitted by trial Court) were apprehended transporting 95 carton boxes of country liquor Una No. 1, each carton containing 12 bottles and each bottle measuring 750 ml each along with 65 carton boxes of country liquor Lal Quila, each carton containing 12 bottles and each bottle measuring 750 ml. The truck No. HR-38E-5871, being driven by accused Jai Lal was intercepted by a joint team of Police and Excise officials at about 11:15 PM at village Riyala near Sidh Chano Temple on Bhota-Una National Highway. A police party headed by Sohan Lal SHO, Police Station, Barsar, District Hamirpur along with other police officials i.e. HC Purshotam Dass No. 41 HHC Baldev Raj No. 86, Constable Dhanbir Singh No. 218, Constable Rajesh Kumar No. 115 and Constable Piar Chand No. 127 and constable Kewal Singh driver No. 116 were on routine patrole duty on Bhota-Una road in official vehicle No. HP-22-4642. A team of excise officials also reached on the spot. At about 11:40 PM, joint inspection team intercepted truck No. HR-38E-5871 coming from Lathiani side in a high speed. The truck was stopped for routine checking by the police officials. The vehicle was being driven by Jai Lal, whereas other occupant of the cabin disclosed his name as Mehar Singh. The two persons sitting on the roof top in the tool box managed to escape under the cover of darkness. However,the identity of those two persons was established as Vishal and Jeet. The vehicle was checked jointly by the Police and Excise officials during which they recovered 95

carton boxes of country liquor Una No. 1 and 65 carton boxes of country liquor Lal Quila. The police and excise officials recovered 1140 bottles of country liquor Una No. 1 and 780 bottles of country liquor Lal Quilla. Total 1920 bottles of country liquor were recovered. The accused persons could not produce permit or license for the transportation of liquor in huge quantity. Pursuant to the recovery of country liquor, three sample bottles of each brand were separated from separate carton boxes for the purpose of chemical analysis. The sample bottles were duly sealed and were taken into possession along with case property with separate seizure memo. SI Sohan Lal after completing search and seizure formalities, scribed Ruka and sent the same through Constable Rajesh Kumar No. 115 to Police Station, Barsar, District Hamirpur, on whichcase FIR No. 116 of 2006 dated 24.6.2006 was registered against the accused persons under Section 61(1)(a) of the Punjab Excise Act, 1914 (as applicable to the State of H.P.).The Police managed to apprehend the other co-accused and after completing investigation, the challan was filed against accused persons Jai Lal, Mehar Singh, Vijay Kaushal and Surjit Singh

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed before the learned trial Court.

4. The accused stood charged by the learned trial Court for theirs committing offences punishable under Section 61(1)(a) of the Act. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/ appellant herein, for theirs committing offence punishable under Section 61(1)(a) of the Punjab Excise Act, as applicable to the State of H.P. In an appeal preferred therefrom, by the accused herein, before the learned Additional Sessions Judge, Hamirpur, the latter affirmed the finding of conviction, and sentence, recorded in the judgment pronounced by the learned trial Court.

6. The appellant stands aggrieved, by the judgment of conviction recorded against him, by both the Courts below. The learned counsel for the appellant, has concertedly, and, vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based, on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court in the exercise, of its appellate jurisdiction, and, theirs standing replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General, has, with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court rather standing based on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. 95 carton boxes of country liquor Una No. 1, and, 65 carton boxes of country liquor Lal Quila, each carton, containing 12 bottles, and, each bottle measuring 750 ml. were, recovered under memo Ex.PW2/A, from vehicle bearing No. HR-38E- 5871, vehicle whereof, at the relevant time, stood occupied, by four persons, namely accused Jai Lal, Mehar Singh, Vijay Kaushal and Surjit Singh. Since, the accused failed to produce the relevant permit hence in the FIR, offences punishable under Section 61(1)(a) of the Act , stood hence constituted against the accused.

10. In respect of recovery of the aforesaid bottles, memo Ex.PW2/A was prepared, and, from amongst the aforesaid 160 carton boxes, six bottles were segregated, as samples,

sample bottles whereof were sent to CTL, Kandaghat, whereon, the latter pronounced, an affirmative opinion, embodied in Ex. PW9/C.

11. Be that as it may, an ingrained infirmity pervading the prosecution case, is, comprised in the factum of material prosecution witnesses, in their respective testifications, rather making unanimous echoings (i) qua non appending of seals, on any of the boxes containing bottles of liquor, (b) besides they unanimously testify, of, no specific identification mark being embossed, upon, any of the boxes, containing bottles of liquor. The Investigating Officer concerned, though was enjoined, to, on all the boxes holding therewithin bottles of liquor, hence affix thereon specific identification marks besides was enjoined, to, emboss seals thereon, and, was also enjoined to make apposite concurring therewith, reflections, in the relevant seizure memo, Ex.PW2/A, (c) yet neither the seizure memo, carries any recitals, of the Investigating Officer concerned, embossing any specific identification marks vis-a-vis the seized carton boxes, holding therewithin liquor nor also there occurs any echoing therein, of, any seal impression(s), being embodied thereon, (d) wherefrom, it is apt to conclude of the Investigating Officer concerned, failing to ensure, adduction of potent proof, vis-a-vis the trite factum, of, the bottles recovered under memo Ex.PW2/A, being at the time of their production in Court, hence standing pointedly linked vis-a-vis effectuation(s), of, their recovery in the manner disclosed, in the apposite FIR. The further effect thereof (e) is that for lack of occurrence, of, imminent connectivity inter se the purported recovery of 160 boxes, holding therewithin liquor, from, the manner encapsulated in the FIR vis-a-vis the stage of their production in Court, rather hence garnering an inference of the prosecution omitting to assuredly, prove qua all the boxes of liquor, as stood recovered under memo Ex.PW4/F, hence standing squarely connected therewith or vis-à-vis Ext. PW9/C.

12. A further perusal of the record, reveals, that (iv) six bottles were segregated as samples, and, were sent to the CTL Kandaghat, and, of, the latter rendering thereon an affirmative opinion qua contents thereof, opinion whereof is borne in Ex.PW9/C. The learned defence counsel, yet, did not make any effort, for the six bottles sent to CTL, Kandaghat, being ordered to be produced in Court, for his thereafter making, a valid projection before the learned trial Court, that, with thereon also the Investigating Officer, hence, failing to emboss the appropriate seals, nor seals, if any, embossed thereon not bearing any similarity with the recitals carried in the seizure memo, or in the road certificate concerned, whereunder they were dispatched to CTL, Kandaghat (i) whereas, only upon theirs being produced in Court, also theirs, making, revelations in support of the learned defence counsel's espousal, it was befitting to discard the report borne in Ex. PW9/C, reiteratedly, failure aforesaid, of the learned defence counsel, contrarily constrains a conclusion, of the six bottles retrieved, from, amongst 1920 bottles of liquor carried in 160 carton boxes, in the manner disclosed in the FIR, being properly sealed, and, also samples retrieved therefrom, whereon, an affirmative opinion borne, in Ex.PW9/C was pronounced by the CTL concerned, rather enjoying both tenacity as well as evidentiary worth. The further concomitant effect, of the aforesaid inference is hence qua the defence also conceding of six bottles holding therewithin liquor.

13. Be that as it may, even if the aforesaid conclusion is recorded by this Court, its effect stands blunted, by the factum of the opinion of CTL, Kandaghat, borne in Ex.PW9/C, being only pronounced with respect to six bottles, and, when the charge was framed against four accused, thereupon, when vis-a-vis each, from, amongst six bottles, purportedly recovered bottles are distributed inter se all the accused, thereupon, when it is legally permissible, for each of the accused to carry two bottles, without any valid permit or licence issued by any authority, hence, the charge is not made out against them.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned appellate Court suffers from a perversity or absurdity of mis-appreciation and non-appreciation of evidence on record.

15. The appeal is allowed. The impugned judgment is quashed and set aside. The accused is acquitted. Case property be destroyed after the expiry of the period of limitation, for filing an appeal. Fine amount, if deposited by the accused be forthwith refunded to him. Personal and surety bond(s) be forthwith discharged.

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

Nand Lal Sharma and another ...Petitioners

Versus

Yash Pal Goel and others ...Respondents

Arb. Case No. 83 of 2017
Decided on: May 1, 2018

Arbitration & Conciliation Act, 1996- Sections 8 and 11(6A)- Direction to refer parties to arbitratorion – Sections 8 and 11(6A) - Arbitration agreement specifically providing for reference of all disputes arising under Memorandum of Undertaking to an Arbitrator appointed by them by mutual consent - Disputes arising interse could not settled by them – Petitioners approaching High Court for reference of matter to an Arbitrator- Held, after amendment in the Act, Court is required to ascertain the existence of arbitration agreement interse the parties nothing more and nothing less – No other issue is required to be considered at that stage – As arbitration agreement was there, High Court with consent of parties, appointed arbitrator and asked him to enter into reference – Judgment of Apex Court titled Duro Felguera, S.A. v. Gangavaram Port limited, (2017) 9 SCC 729 relied upon. (Paras-9 and 10)

Case referred:
Duro Felguera, S.A. v. Gangavaram Port limited, (2017) 9 SCC 729

For the Petitioners : Mr. Arun Kumar, Advocate.
For the Respondents : Mr. Vir Bahadur Verma, Advocate, for respondents No. 1 to 4.
Mr. Vijay Arora, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge(oral**)**

By way of instant application filed under Order 8 of the Arbitration & Conciliation Act, 1996, prayer has been made to refer the dispute to an arbitrator in terms of Memorandum of Understanding (Annexure A).

2. Necessary facts as emerge from the record are that petitioners constituted a company in the name and style of M/s Curehealth Pharmaceutical Private Ltd. at Village Deothi, Tehsil and District Solan, Himachal Pradesh, however, petitioners being Directors of the company referred to herein above, agreed to transfer the company to respondents No. 2 to 4 in terms of Memorandum of Understanding dated 5.6.2017 (Annexure A). Company detailed herein above alongwith liabilities of the Bank came to be transferred /handed over to new Directors i.e. respondents No.1 to 4. Since new Directors/respondents No. 1 to 3 failed to comply with terms and conditions of the Memorandum of Understanding (MoU) arrived at *inter se* parties, dispute arose between the parties. Petitioners, in terms of MoU issued a notice to the respondents through their counsel, but they were unable to settle the dispute *inter se* them. Petitioners invoked clause 20 i.e. arbitration clause with a prayer to refer the dispute to an arbitrator to be appointed with the mutual consent. Arbitration clause 20 of the MoU provides as under:

> "20. That in case of any dispute, the matter will be referred to a commonly known person who will be nominated by both the parties as an Arbitrator and whose decision shall be final and binding on both the parties."

3. Since both the parties failed to nominate /appoint a commonly known person as an arbitrator in terms of clause 20 of the MoU, Annexure A, petitioners approached this Court in the instant proceedings, praying therein for appointment of an arbitrator.

4. Respondents No.1 to 4 by way of detailed reply filed to the aforesaid petition, refuted the claim of the petitioners and claimed that since petitioner have failed to disclose true facts to this Court, they are not entitled to any relief as prayed for in the present petition. Otherwise also, bare perusal of reply suggests that in terms of MoU arrived *inter se* parties, respondents undertook to take liability of Company, owned and started by petitioners.

5. Mr. Vir Bahadur Verma, learned counsel representing respondents No. 1 to 4, while inviting attention of this Court to the reply filed on behalf of aforesaid respondents, stated that though no cause of action has accrued in favour of the petitioners, however, for proper adjudication of the dispute, if any, *inter se* parties, respondents No.1 to 4 have no objection in case one of the persons, named in the reply to the petition is appointed as an arbitrator.

6. Mr. Vijay Arora, learned counsel representing respondent No. 5 states that at present, petitioners owe an amount more than Rs. 15.00 Crore to the Bank and as such rights of the Bank to recover outstanding amount may also be protected. He further disclosed to this Court that for the recovery of outstanding amount from respondent No.4 Company as well as its Directors, proceedings under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) stand already initiated.

7. Having heard the parties and perused the pleadings and documents adduced on record, this Court has no doubt that matter is required to be referred to arbitration in terms of Clause 20 of the MoU for adjudication of the dispute *inter se* parties. From the pleadings adduced on record by the petitioners and respondents No. 1 to 4, there is no doubt that dispute has arisen *inter se* parties and as such, matter is required to be referred to arbitration. Parties have not been able to nominate a commonly known person with mutual consent, as such, this Court while exercising powers under Section 8 of Arbitration & Conciliation Act, is required to appoint an arbitrator in terms of Clause 20 of the Act. As far as contention raised by Mr. Vijay Arora that rights and interests of the Bank to recover the outstanding amount needs to be protected, this Court need not pass any specific direction in this regard, because admittedly action/proceedings under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) already stand initiated. In the arbitration proceedings, an arbitrator is only required to decide the dispute having arisen *inter se* parties to the MoU and not with third party.

8. Recently Hon'ble Apex Court in **Duro Felguera, S.A.** v. **Gangavaram Port limited,** (2017) 9 SCC 729, while dealing with case filed under Section 11 of the Arbitration & Conciliation Act for appointment of arbitrator has held that after the amendment, all that the court needs to see is that whether an arbitration agreement exists –nothing more, nothing less, because the legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6) (A) ought to be respected. Relevant paras of aforesaid judgment are reproduced herein below:-

> "58. This position was further clarified in National Insurance Company Limited v. Boghara Polyfab Private Limited. To quote: (SCCp.283, para22)
>
> > "22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he

> can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
>
> 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
>
> 22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
>
> (a) Whether the claim is a dead (long-barred) claim or a live claim.
>
> (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.
>
> 22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:
>
> (i) Whether a claim made falls within 43 the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
>
> (ii) Merits or any claim involved in the arbitration."
>
> 59. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6-A) ought to be respected."

9. It is quite apparent from the aforesaid provision of law and law laid down by the Hon'ble apex Court supra, this Court is only required to see whether an agreement exists or not. Necessarily, it is not required to take into consideration all other ancillary issues raised on behalf of the opposite party, who is opposing the appointment of an Arbitrator.

10. Consequently, in view of fair stand adopted by Mr. Vir Bahadur Verma, learned counsel representing respondents No.1 to 4, this Court without going into merits of the case, deems it proper to refer the matter to arbitration in terms of Clause 20 of the MoU. At this stage, learned counsel representing the petitioners and respondent No.5 stated that instead of the persons named in the reply, an advocate from Shimla may be appointed as an arbitrator as it would be convenient to all the parties. Mr. Vir Bahadur Verma, learned counsel representing respondents No.1 to 4 is not averse to aforesaid request of petitioners and respondent No.5.

11. Accordingly, with the consent of parties, present petition is allowed. Mr. **Anand Sharma, Advocate, HP High Court**, who is present in the Court, is appointed as an arbitrator to adjudicate upon the dispute *inter se* parties. His consent/declaration under Section 11 (8) of the Act *ibid* has been obtained and is placed on record. Mr. Anand Sharma has no objection to his appointment as an arbitrator in the present matter. He is requested to enter into reference within a period of two weeks from the date of receipt of a copy of this order. It shall be open for the learned arbitrator to determine his own procedure with the consent of the parties. Otherwise also,

entire procedure with regard to fixing of time limit for filing pleadings or passing of award stands prescribed under Sections 23 and 29A of the Act.

12. Needless to say, award shall be made strictly as per provisions contained in Arbitration & Conciliation Act. A copy of this order shall be made available to the learned arbitrator named above, by the Registry of this court within one week enabling him to take steps for commencement of the arbitration proceedings within stipulated period.

13. The petition is disposed of.

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

Naveen Bura ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 448 of 2018
Decided on May 1, 2018

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs & Psychotropic Substances Act, 1985-** Section 29- Grant of bail- Petitioner was sitting on rear seat, whereas charas weighing over 2 kg. was recovered from one 'K', another occupant of same vehicle – Petitioner implicated in case by virtue of Section 29 of Act - Petitioner seeking bail on ground that independent witnesses 'R' and 'RV' have not supported prosecution case during trial – And that recovery was effected from exclusive possession of 'K' – Also contending that he required surgery imminently – State though admitted bad health of petitioner but submitting that he is already in hospital and amount stood sanctioned for his surgery – Without commenting upon the merits of evidence, High Court granted bail in view of medical status of petitioner who was to be operated on the very next day. (Paras-23 and 30)

Narcotic Drugs & Psychotropic Substances Act, 1985- Section 37- Rigors of - Extent of applicability - Held, Bar is not absolute – If Court is satisfied on basis of material on record that accused is not guilty of such offence, and he is not likely to commit such offence while on bail, he can be enlarged on bail – Restrictions on power to grant bail should not be pushed too far. (Paras-16 and 19)

Cases referred:

Ranjitsingh Brahmajeetsing Sharma v. State of Maharashtra (2005) 5 SCC 294
Ram Narayan v. State 121 (2005) DLT 166
Rahul Saini v. The State 141 (2007) DLT 252
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. R.K.Bawa, Senior Advocate with Mr. Somender Chandel, Advocate.

For the respondent : Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.
ASI Krishna, I/O, Police Station Sadar, Solan, district Solan, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Naveen Bura, who is behind the bars since 26.12.2016, has approached this Court in the instant proceedings filed under Section 439 CrPC, seeking therein regular bail in FIR No. 297 of 2016 dated 26.12.2016, under Sections 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act, registered at Police Station Sadar, District Solan, Himachal Pradesh.

2. Sequel to orders dated 13.4.2018 and 27.4.2018, ASI Krishna, I/O, PS Sadar, Solan, Himachal Pradesh, has come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has placed on record status report prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Careful perusal of record/status report reveals that on 26.12.2016, police party headed by ASI Ashwani Thakur (PW-15), on the basis of secret information, intercepted vehicle bearing registration No. HR-46C-5936 at Saproon, Solan. Three persons including present bail petitioner were sitting in the vehicle referred to herein above and on search, contraband i.e. *Charas* weighing 2.002 kg came to be recovered from the conscious possession of co-accused namely Kapil. Police associated two independent witnesses on the spot namely Rajesh Thakur (PW-1) and Rajesh Verma (PW-2). After completing the codal formalities, police registered FIR detailed herein above and arrested all the three accused including present bail petitioner. Bail petitioner by way of CrMP(M) No. 541 of 2017 approached this Court for grant of bail in the month of May, 2017, however, same was disposed of with the direction to the learned Special Judge-II, Solan to re-hear the bail application No. 11-S/22 of 2017 and decide the same accordingly. While passing aforesaid order, this Court observed that since case stands registered under Section 29 of the Act against the bail petitioner, trial court would consider his case accordingly. Pursuant to aforesaid order passed by this Court, though petitioner had filed fresh bail application but that was not pressed and as such, was disposed of accordingly. Subsequently, on 1.3.2018, present bail petitioner again filed bail application before learned Special Judge, Solan, who vide order dated 3.4.2018, rejected the same. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for grant of regular bail. On 27.4.2018, when ASI Krishna from Police Station, Sadar, Solan, had come present alongwith record, Mr. R.K. Bawa, Senior Advocate duly assisted by Mr. Somender Chandel, Advocate, while inviting attention of this Court to the statements having been made by prosecution witnesses during trial, especially independent witnesses associated by police at the time of recovery i.e. PW-1 Rajesh Thakur and PW-2 Rajesh Verma, strenuously argued that no case, if any, is made out against the present bail petitioner as such, he deserves to be enlarged on bail. This Court, having heard Mr. Bawa, learned Senior Advocate and perused material placed on record in this regard, afforded time to the State to ascertain the correctness of the certified copies of the statements of prosecution witnesses placed on record by petitioner.

4. Today, during the proceedings of the case, Mr. Dinesh Thakur, learned Additional Advocate General, fairly admitted that the copies of statements placed on record by the petitioner are genuine and strictly in conformity with the statements made by these prosecution witnesses before the Court. Otherwise also, copies of statements placed on record are duly certified by the Copying Agency.

5. Mr. R.K. Bawa, learned Senior Advocate vehemently argued that since recovery in the instant case came to be made from the exclusive possession of the co-accused namely Kapil, no case, if any, is made out against bail petitioner, who was admittedly sitting in the rear seat of the vehicle at the time of recovery. He further contended that case under Section 29 of the Act *ibid* stands registered against the bail petitioner and as such, rigours of Section 37 of the Act are not attracted in his case. Mr. Bawa, learned Senior Advocate further contended that though it is quite apparent from the record that the contraband was not recovered from the conscious possession of the petitioner, but otherwise also, evidence adduced on record by the prosecution,

nowhere suggests involvement, if any, of the petitioner, rather, none of the prosecution witnesses examined till date has supported the story of the prosecution with regard to recovery, if any, made from the vehicle, in which bail petitioner was sitting. While specifically inviting attention of this Court to the statements of PW-1 and PW-2, who were associated at the time of recovery by the police, Mr. Bawa, learned Senior Advocate, vehemently argued that both of them were declared hostile and cross-examination conducted upon these witnesses nowhere suggests that the prosecution was able to extract anything contrary to what they stated in their examination-in-chief, as such, story put forth by the prosecution deserves to be rejected outrightly being concocted one. While referring to the statement of PW-3 HHC Kanshi Ram, Mr. Bawa contended that he was not able to disclose the exact date and time of the recovery, if any, made by the police and as such, if his statement is read in conjunction with the statements of PW-1 and PW-2, it creates serious doubt with regard to correctness of the story put forth by the prosecution. Mr. Bawa further contended that remaining witnesses i.e. PW-4, PW-5 and PW-6, who have been examined, have also not supported the case of the prosecution. Mr. Bawa fairly submitted that five witnesses are yet to be examined but their statements may not be relevant as far as recovery, if any, made by the police from the vehicle is concerned. He further contended that since two independent witnesses associated at the time of recovery, have not supported the prosecution case, bail application deserves to be allowed. Mr. Bawa, further brought to the notice of this Court that bail petitioner is not in good health condition, rather, taking note of serious health condition of the bail petitioner, Jail authorities admitted him in IGMC for treatment. He further stated that as per medical documents available on record, bail petitioner is to undergo bye-pass surgery on 2.5.2018, and as such, it may not be proper to let him incarcerate in jail for indefinite period. Mr. Bawa while making this Court to peruse the statements adduced on record till date by the prosecution, made a serous attempt to persuade this Court to agree with his contention that the chances of conviction in the instant case are very bleak and remote, as such, bail petitioner, who has already suffered for more than one and a half years, needs to be enlarged on bail. He further contended that since all the material prosecution witnesses, save and except, official witnesses have been examined, no prejudice would be caused to the prosecution in case, bail petitioner is enlarged on bail, because there is no possibility of petitioner's hampering/influencing official witnesses.

6. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly admitting the factum with regard to illness of the bail petitioner, contended that the bail petitioner is being taken care in the hospital and an amount of Rs. 1.50 Lakh stands sanctioned for his surgery. He further stated that since the bail petitioner is already in hospital and he is to be operated, there is no force in the arguments of Mr. Bawa, learned Senior Advocate that in the event of petitioner's being not released on bail, his health would be adversely affected. While refuting the submissions made by the learned Senior Advocate that none of the witnesses of recovery has supported the prosecution case, Mr. Thakur contended that true it is that both the witnesses of recovery have been declared hostile but if their cross-examination is read in its entirety, it corroborates the version put forth by the police that on the alleged date of incident, bail petitioner was traveling in the vehicle wherein, contraband was recovered. He further contended that both the witnesses of recovery i.e. PW-1 and PW-2 admitted their signatures on the memos, as such, denial, if any, on their part with regard to recovery made in their presence is of no consequence. Mr. Thakur further contended that still five prosecution witnesses are to be examined and as such, it can not be said that chances of conviction are remote and bleak, rather, prosecution with the material at hand, shall be able to prove beyond reasonable doubt that bail petitioner was involved in the commission of offences punishable under Sections 20 and 29 of the Act *ibid*. Lastly, Mr. Thakur, contended that in the event of petitioner's being enlarged on bail, there is every likelihood of his influencing the remaining witnesses, as such, it may not be in the interest of justice to enlarge the bail petitioner on bail.

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

8. Before adverting to the correctness of the submissions made by the learned senior counsel representing the bail petitioner vis-à-vis evidence adduced on record by prosecution till date, it may be noticed that the bail petitioner had approached this Court for grant of bail in May, 2017, as has been noticed herein above, wherein this Court taking note of the fact that contraband came to be recovered from exclusive possession of co-accused Kapil, had directed the court below to consider bail application of the bail petitioner taking into account the fact that case against bail petitioner stands registered under Section 29 of the Act *ibid*.

9. Today, during the proceedings of the case, Mr. Bawa, learned senior counsel strenuously argued that present bail petition has been filed in the changed circumstances because by now, thirteen witnesses have been examined and nothing has emerged against the bail petitioner, as such, bail petitioner, who is in fact under treatment at IGMC Shimla, needs to be enlarged on bail.

10. Having perused the record/status report, this Court finds force in the arguments of Mr. R.K. Bawa, learned senior counsel that investigating agency/police party had prior information with regard to contraband being taken in the vehicle in question and at the time of constituting the raiding party, they failed to associate independent witnesses to prove recovery, if any, against the bail petitioner and other co-accused. In the case at hand, two witnesses of recovery i.e. PW-1 and PW-2 came to be associated at the time of recovery because both the witnesses have stated that they after having seen gathering at Saproon, went to the spot, where they were associated as recovery witnesses by the investigating agency. It is not in dispute that both the aforesaid witnesses have been declared hostile because they failed to support the version put forth by the prosecution. No doubt, these witnesses in their cross-examination have admitted that they had signed the memo of recovery but if their statements are read in their entirety, same suggest that they were made to sign in the Police Station and not on the spot. Otherwise also, though PW-1 admitted that seal after use was handed over to him, but in his cross-examination he stated that the seal was handed over to him today, before recording of the statement in the Court. From the bare perusal of depositions made by both these witnesses, it is clear that they have not supported the prosecution case with regard to recovery effected on the date of alleged incident.

11. Similarly, PW-3 HHC Kanshi Ram, who is an official witness has not been able to point out specific date and time with regard to recovery made at the time of alleged incident. There are other discrepancies with regard to mentioning of recovery in the *Malkhana* register. PW-4 ASI Rakesh Guleria and PW-5 Constable Pawan are not directly related to recovery rather, PW-4 is the person who brought *Rukka* Ext. R-3 issued vide endorsement Ext. PW-4/A. PW-5 Constable Pawan is witness of case property, who stated that on 28.12.2016, MHC *Malkhana* Kanshi Ram handed over a sealed parcel sealed with three seal impressions of seal "A" and "T" each, NCB form in triplicate, seizure memo, copy of FIR and RC. This witness stated that he deposited the case property with FSL Junga on the same date. PW-6 Dy.SP Anil Sharma is witness with regard to handing over of *Pullinda* sealed with three seal impressions of seal "A". PW-7 Sanjeet Singh Criminal Ahlmad stated that order dated 27.12.2016, Ext. PW-7/A and certificate Ext. PW-7/B were signed and issued by Shri Sachin Raghu, CJM Solan and he recognized his signatures, since he was working with him. PW-8 Constable Rakesh Kumar is again a formal witness, who stated that he had gone to Junga in connection with some official work. PW-9 HC Devinder Kumar, who was working with Dy.SP Solan, stated that on 26.12.2016, Constable Amit handed over a report under Section 42 (2) of the Act *ibid* in the office of Dy.SP Solan and the then Dy.SP, after endorsement, handed over the report to him. PW-10 Amit Sharma, who was posted as Dy.SP Leave Reserve, Solan, also corroborated the version put forth by PW-9 that on 28.12.2016, Constable Amit brought report under Section 42 (2) of the Act *ibid*. Lastly, PW-11 Constable Ashwani, has stated that on 26.12.2016, at about 11 am, ASI Ashwani Thakur, HHC Ajay Kumar, HHC Balbeer Singh, HC Rajesh Kanwar and Constable Amit proceeded to Saproon Chowk in connection with patrolling duty in two vehicles. This witness has further stated that at about 11.30 am, Ashwani Thakur received secret information that a vehicle bearing last four digits as 5936 was coming from Solan Bazaar proceeding to Chandigarh, wherein cannabis was

being transported. He categorically admitted in his cross-examination that when vehicle was intercepted, at that time, independent witnesses were available and no independent witness was associated at the time of constituting raiding party. He, in his cross-examination also stated that he does not know from where exhibit P-11 was taken into possession and he could not state at what time, seizure memo was prepared nor he could state at what time, NCB forms were prepared. He also stated that bag was checked within 10 minutes after the vehicle was intercepted. He could not state at what time, seizure memo exhibit PW-1/A was prepared.

12. PW-12 LC Archana No. 194 brought the summoned record.

13. Though aforesaid statements having been made by all these witnesses are to be perused, considered and examined by the learned trial Court at the time of delivering final verdict, but this Court having perused statements made by PW-1 and PW-2, who are material prosecution witnesses, is inclined to agree with Mr. R.K. Bawa, learned senior counsel that nothing strong has emerged against the bail petitioner, rather, recovery, if any, made by prosecution is shrouded by suspicion. No doubt, as on date, five witnesses remain to be examined as per record made available to this Court, but out of five witnesses, two witnesses are witnesses of spot, one is Investigating Officer himself, whereas two other witnesses are formal in nature i.e. Constable Amit Kumar and Balbeer Singh, who are witnesses to compliance of Sections 42 and 57 of the Act *ibid*, whereas Rajesh Kumar HC is witness of spot.

14. Investigating Officer Ashwani Thakur is yet to be examined but since all the remaining witnesses are police officials, this Court sees no force in the argument of Mr. Dinesh Thakur, learned Additional Advocate General that in the event of petitioner being enlarged on bail, he may influence these witnesses.

15. As has been discussed herein above, only two independent witnesses have been associated in the instant case to prove recovery from the vehicle, i.e. PW-1 and PW-2, and further as has been noticed herein above, none of these has supported the prosecution case. No doubt, though PW-1 and PW-2 have admitted their signatures on the recovery memo and PW-1 in his statement has also admitted that seal was handed over to him, but, as has been discussed above, if cross-examination conducted on these witnesses is read in its entirety, it creates suspicion /doubt with regard to correctness of the story put forth by prosecution.

16. Hon'ble Apex Court in **Ranjitsingh Brahmajeetsing Sharma** v. **State of Maharashtra** (2005) 5 SCC 294, while dealing with case registered under Maharashtra Control of Organised Crime Act, 1999 (MCOCA), which also contains stringent provisions, rather, Section 21 of the aforesaid Act is *pari materia* to that of Section 37 of the Narcotic Drugs & Psychotropic Substances Act, has categorically held that if the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. It has been held as under:

> "38. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission,

negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The Court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision."

17. In **Ram Narayan** v. **State** 121 (2005) DLT 166, High Court of Delhi has held as under:

"5. I have considered the arguments advanced by the learned Counsel for the petitioner as well as the learned Counsel for the State. Insofar as the applicability of Section 37 of the NDPS Act is concerned, without going into the question of percentage of the Heroin found in the substance, it may be assumed that the same is applicable in this case. However, the fact that Section 37 of the NDPS act applies to a particular case does not mean that the accused in such a case would not be entitled to bail per se. What is necessary for the Court examining the question of grant of bail where Section 37 applies is that the Court should be satisfied having regard to the material available on record that there are sufficient grounds that the petitioner may not be convicted. If the probabilities are that the petitioner may not be convicted, then the Court can grant bail subject to the further condition being satisfied that the petitioner is not likely to commit any offence while on bail. However, if the Court is satisfied looking at the probabilities of the case that the petitioner is likely to be convicted, then the question of grant of bail would not arise. This is what has been held by the Supreme Court in the case of Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, 2005 AIR SCW 2215 while considering the provisions of Section 21(4) of the Maharashtra Control of Organised Crime Act, 1999. The provisions of Section 21(4) of the latter act are in pari materia with the provisions of Section 37 of the NDPS Act. Para 49 of the said Supreme Court decision reads as under:

> "49. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under section 279 of the indian penal code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The Court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision."

> 6. In the backdrop of the foregoing principles, I find that the differences in the test results of the samples taken from the very same packet cast doubts on the issue as to whether the case property is the same as what is alleged to have been recovered from the petitioner. This is not a definite finding and that would come at the time of trial. However, on the basis of the materials brought on record, there is every likelihood that the petitioner may not be convicted in this case. It is further to be examined as to whether there is any likelihood of the petitioner committing any offence while on bail. In this regard, the Supreme Court in the aforesaid decision, held that the satisfaction of the Court as regards the likelihood of not committing any offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. It further held (in paragraph 55 of the said report) that since it is difficult to predict the future conduct of the accused, the Court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and the manner in which he is alleged to have committed the offence. The present petitioner has no criminal antecedents and nothing has been indicated to show that the petitioner has a propensity to commit any offence under the NDPS Act.
>
> 7. It is, therefore, clear that the mandatory conditions for grant of bail under Section 37 of the NDPS Act (as observed in the case of Union of India v. Ram Samujh, 1999 (3) C.C Cases (SC) 22, para 8) stand satisfied. Accordingly, I direct that the petitioner be released on bail on furnishing a personal bond in the sum of Rs. 1 lakh with one surety of the like amount to the satisfaction of the concerned Court. It, however, goes without saying that the findings recorded by this Court are only tentative in nature and the trial Court is free to decide the case on the basis of evidence adduced at the trial without in any manner being prejudiced by any observations made in this order."

18. In this regard, reliance is also placed upon judgment rendered by High Court of Delhi in **Rahul Saini** v. **The State** 141 (2007) DLT 252.

19. Bare perusal of Section 37 of the Act *ibid*, suggests that bar is not absolute, rather, Section 37 provides that in case court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail, it can grant bail subject to conditions that fair opportunity would be granted to the Public Prosecutor to oppose application for such release. Section 37 of the Act *ibid* is reproduced hereinbelow:

> 1[37. Offences to be cognizable and non-bailable.—
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for 2[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]

20. Otherwise also, as has been noticed herein above, in the judgments passed by Hon'ble Apex Court and High Court of Delhi, a person booked under Narcotic Drugs & Psychotropic Substances Act, can be enlarged on bail, if court having perused material, comes to the conclusion that probability of conviction is bleak and remote. Another condition is that petitioner is not likely to commit the offence while on bail.

21. Hon'ble Apex Court in **Ranjitsing Brahmajeetsing Sharma** (supra) has held that satisfaction of the Court as regards likelihood of accused not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence

22. Having carefully perused the statements of prosecution witnesses made till date, this Court purposely restrains itself from expressing any opinion with regard to culpability, if any, of the bail petitioner, because prosecution, with the examination of remaining two spot witnesses may be able to prove recovery of contraband but, at this stage, this Court having perused exposition of law having been rendered by Hon'ble Apex Court and High Court of Delhi, sees no reason to deny the prayer having been made by the bail petitioner for grant of bail.

23. Leaving everything aside, it is not in dispute that bail petitioner is suffering from serious heart ailment, as has been fairly admitted by Mr. Dinesh Thakur, learned Additional Advocate General. Today, during the proceedings of the case, Mr. Dinesh Thakur, learned Additional Advocate General made available information received from Jail Superintendent, Solan. Otherwise also, perusal of status report clearly suggests that bail petitioner is to undergo bye-pass surgery on priority basis. Since petitioner is to undergo bye-pass surgery, this Court can not lose sight of the fact that he requires lot of post-operation care after surgery, which can only be provided by his family members that too at home and not in jail. This Court has been further informed that the remaining witnesses are to be examined on 28.6.2018, by which date, there is no possibility of petitioner recovering from his ailment and as such, there appears to be no force in the argument of Mr. Dinesh Thakur, learned Additional Advocate General, that in the event of petitioner being enlarged on bail, he may influence the witnesses and tamper with the prosecution evidence.

24. Mr. Bawa learned senior counsel on instructions informed that petitioner is to undergo bye-pass surgery tomorrow i.e. 2.5.2018, as such, this Court taking note of the health condition of bail petitioner has reasons to presume that there is no likelihood of petitioner's indulging in illegal trade of narcotics during the pendency of the trial, which is one of the facts to be borne in mind, while considering prayer for grant during pendency of trial.

25. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his guilt has not been proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society."

26. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

27. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

28. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be

granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

29. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

30. In view of above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing bail bonds in the sum of Rs.5,00,000/- (Rs. Five Lakh) with two local sureties in the like amount, to the satisfaction of the learned trial Court, besides following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

31. It is clarified that if the petitioner misuses the liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

32. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of instant petition alone.

The petition stand accordingly disposed of.

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

State of H.P. ...Appellant
Versus
Ram Narayan and another ...Respondents

Cr. Appeal No. 94 of 2009
Decided on : 1.5.2018

Indian Penal Code, 1860- Sections 279 and 304-A- Rash and negligent driving on public highway – Proof of - Driver (A1) and conductor (A2) of a bus were acquitted by trial court of offences under Sections 279 and 304-A – Appeal against – State arguing that deceased 'D' was allowed by accused to travel on roof top of bus from where he had fallen and died – Their duty was to preclude him from occupying roof top of bus – However, High Court found the evidence regarding deceased travelling on roof top of bus and his falling from there, totally lacking – Appeal dismissed – Acquittal upheld. (Paras-9 to 11)

For the appellant: Mr. Hemant Vaid, Addl.A.G.
For the respondent : Mr. V.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against, the judgment rendered by the learned Chief Judicial Magistrate, upon, criminal case No. 72/2 of 2006, under Sections 279, 304-A of the IPC, whereby he pronounced an order of acquittal, upon, the accused.

2. The facts relevant to decide the instant case are that on 12.7.2006, at about 4:45 p.m. at place Nihog, Solan Nahan road, the accused No. 1 Ram Narayan was driving the bus bearing No. HP-17A-4100 in a manner so rash and negligent as to endanger human life and personal safety of others, as a result of his rash and negligent driving of the said bus by accused No. 1, Ram Narayan acted as such, one passenger namely Dinesh Kumar fell down from the roof of the bus and sustained multiple injuries, who later on while on the way to Z.H. Nahan succumbed to the injuries. Accused No. 2 Bhagwan Singh was conducted in the aforesaid bus. The matter was reported to the police. On receipt of information regarding the accident, ASI Jagdish Chand went to Z.H. Nahan, where one Sat Pardeep got recordedl his statement under Section 154 Cr.P.C. Ext. PW1/A. The said statement was sent to P.S. Nahan on the basis of which FIR Ext. PW9/A was registered against both the accused persons. The post mortem of the deceased was got conducted by the IO and post mortem report is Ext. PW8/A. The IO took into possession a piece of broken glasses near window of the bus bearing No. HP-17A-4100, which was blood stained ,Ext. P1, and was taken into possession after making sealed parcel vide memo Ext. PW3/A and alsot took in possession the pieces of glasses black in colour lying on the spot, in a sealed parcel Ext. P-2 vide memo Ext. PW3/B. The specimen seal impression "A" was taken separately on a piece of cloth by the IO which is Ext. PW9/D. The vehicle was mechanically got examined and mechanical report is Ext. PW10/A. During investigation, IO prepared the site plan Ext. PW9/B on the spot and also recorded the statements of the witnesses as per their versions and also recorded the statement of witness Rishi Thakur Ext. PW9/C. After the completion of the investigation, the IO handed over the case file to SHO Narbir Singh Rathour, who prepared the challan.

3. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed in the Court concerned.

4. The accused was charged by the learned trial Court, for, his committing offence(s) punishable under Section 279, and, Section 304-A of the IPC. The prosecution examined 11 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case. However, no defence evidence was adduced by the accused.

5. On an appraisal of evidence on record, the learned trial Court, recorded findings of acquittal upon the accused persons.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General, has, concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing, not, based on a proper appreciation, by it, of the evidence on record, rather, theirs' standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction, AND, theirs being replaced by findings of conviction.

7. On the other hand, the learned counsel for the respondents/accused has also with considerable force and vigour, contended that the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation, by it, of evidence on record, and, theirs not necessitating interference, rather theirs meriting vindication.

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. Deceased Dinesh Kumar, as unraveled by the apposite post-mortem report, borne in Ext. PW8/A, suffered his demise, owing to the injuries, entailed upon his person, in the incident concerned. The prosecution, had canvassed, before the learned Chief Judicial Magistrate (a) that the aforesaid demise, was a sequel to the deceased being enabled by both the accused, to occupy the roof of the bus, whereas, it was their enjoined duty to preclude him, from occupying the roof of the bus. Omission(s), whereof, are, an evident display, of both the accused, hence not adhering to the standards of due care and caution, hence, theirs' being negligent.

10. The prosecution has depended upon the testification of purported eye witness(es), to, the occurrence. All the eye witness(es) to the occurrence, upon theirs' stepping into witness box, resiled from their previously recorded statement(s) in writing, (a) even upon theirs being subjected to a rigorous cross-examination, by the learned APP concerned, upon theirs being declared hostile, nothing emanated from each of them, for hence sustaining the charge.

11. The learned Additional Advocate General, has drawn the attention of this Court, to the deposition(s), existing in the cross-examination of PW-5, (i) wherein, on his being purveyed by the learned defence counsel, after his, prior thereto, being subjected to cross-examination, by the learned APP, (ii) an affirmative suggestion of some passengers, occupying the roof, of the bus, rather, an affirmative answer thereto emanating, from PW-5, (iii) thereupon, hence it being inferable, of, the defence rather acquiescing vis-à-vis the incriminatory role of the accused. However, the effect of the aforesaid submission, is waned (iv) by the factum, of, rather a wholesome reading of the testification of PW-5, not unveiling, of, the deceased occupying the roof of the bus. For lack of occurrence, of, any firm echoing(s), in the testification, of PW-5, qua the deceased occupying the roof of the bus, thereupon it cannot be concluded, that, amongst the persons, who were occupying the roof of the bus, of the deceased being one of them. The effect of the aforesaid non-existence, of, any firm evidence, vis-à-vis the deceased occupying the roof, of the bus, constrains this Court to conclude, that, hence benefit of doubt thereof being accruable, vis-à-vis the accused.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not

suffer from any gross perversity or absurdity of any mis-appreciation, and, non appreciation of evidence on record.

13. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The Judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

State of H.P. .....Appellant
Versus
Surinder .....Accused/Respondent.

Cr. Appeal No. 84 of 2018
Date of Decision: 01.05.2018

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Rash and Negligent driving – What is ? – Accused, a driver of bus was charged and tried by court on allegations that by his rash and negligent driving, he struck it against 'P' and her son 'R' and caused grievous injuries to them – Trial Court acquitted accused of said offences – Appeal against by State on ground that acquittal is not based on proper appreciation of evidence – On facts, statement of 'P' found not reliable – Site plan totally contrary to what witnesses deposed on oath – Complainant not stating anything from which inference of rash or negligent driving can be drawn – Held – When evidence on record is inconsistent, presumption of rash or negligent driving cannot be drawn by invoking principle of res ipsa loquitur – Accused's acquittal upheld – Appeal dismissed. (Paras- 9, 13 and 19)

Cases referred:
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645
Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406
State of Karnataka v. Satish,"1998 (8) SCC 493
Ravi Kapur versus State of Rajasthan (2012) 9 SCC 285
State of H.P. Vs. Manpreet Singh, Latest HLJ 2008 (HP) 538

For the appellant: Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General.
For the respondent: Mr. D.S. Nainta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Complainant namely Pushpa Devi (PW1) in her statement recorded under Section 154 Cr.PC to the police, alleged that on 28.4.2012, she along with her son namely Rahul, got down from the bus near Victory Tunnel to board the bus for IGMC Shimla. She further alleged that when she was coming towards local bus-stand from victory tunnel and was crossing the road with her son to reach the bus stand, at about 9:15 am, accused driving yellow colored bus No. HP63-3050 banged the driver side of his bus with the complainant and her son, as a consequence of which, they fell unconscious and fell down. Constable Pardeep Kumar PW2 sent both the complainant and her son to IGMC in a Taxi. On the basis of aforesaid statement made under Section 154 Cr.PC, formal FIR Ext.PW9-A, came to be registered against the respondent-accused.

After completion of investigation, police presented challan in the competent Court of law, who on being satisfied that prima-facie case exists against the accused, put notice of accusation to the accused under Sections 279, 337 and 338 of IPC, to which he pleaded not guilty and claimed trial. However, fact remains that he did not lead any evidence in his defence.

2. Learned trial Court on the basis of evidence collected on record by the prosecution held the accused not guilty of having committed offence punishable under Sections 279, 337 and 338 of IPC and accordingly, acquitted him. In the aforesaid background, appellant-State has approached this Court in the instant proceedings, praying therein for conviction of the accused-respondent after setting aside judgment of acquittal recorded by the court below.

3. Mr. Vikrant Chandel, learned Deputy Advocate General, while inviting attention of this Court to the impugned judgment of acquittal recorded by the learned trial Court, vehemently contended that same is not based upon proper appreciation of evidence and as such, same deserves to be quashed and set-aside. While referring to the evidence led on record by the prosecution, Mr. Chandel, strenuously argued that prosecution successfully proved beyond reasonable doubt that on the date of alleged incident, vehicle in question was being driven rashly and negligently by the respondent accused, as a result of which, complainant and her son suffered simple as well as grievous injuries. While terming the impugned judgment to be erroneous, learned Deputy Advocate General contended that all the material prosecution witnesses unequivocally stated before the court below that incident occurred on account of rash and negligent driving of the respondent-accused and as such, there was no scope left for the court below to acquit the respondent accused, rather he was required to be convicted for having committed offence punishable under Sections 279, 337 and 338 of IPC.

4. Per contra, Mr. D.S.Tanta, Advocate, representing the accused-respondent supported the impugned judgment of acquittal recorded by the court below and contended that bare perusal of same suggests that same is based upon proper appreciation of evidence and there is no illegality and infirmity in the same and as such, there is no scope of interference, especially when it clearly emerges from the bare reading of the impugned judgment that court has dealt with each and every aspect of the matter very meticulously. Mr. Tanta, invited attention of this Court to the statements of prosecution witnesses to demonstrate that none of the prosecution witnesses specifically stated something specific with regard to rash and negligent driving of the accused, and as such, learned court below rightly arrived at conclusion that prosecution was not able to prove beyond reasonable doubt that complainant and her son suffered injuries on account of rash and negligent driving of the respondent-accused.

5. Having heard learned counsel for the parties and gone through the record, this Court finds that there is no dispute as far as factum of accident allegedly occurred on 28.4.2012 is concerned and similarly, there is no error in the finding recorded by the court below that on the date of alleged incident, vehicle in question was being driven by the accused respondent. Question which remains to be decided/adjudicated by this court is that whether learned court below rightly arrived at conclusion that vehicle in question was not being driven rashly and negligently by the respondent-accused on the date of alleged incident or not?

6. Needless to say, to prove guilt of the accused, if any, under Section 279 of IPC, it was incumbent upon the prosecution to prove that vehicle was being driven in rash and negligent manner so as to endanger human life or likely to cause injury to other persons. Similarly, Section 337 of IPC provides that to prove commission of offence, it is required to be proved that hurt is caused to any person due to an act done rashly and negligently as to endanger human life or personal safety of others. In the instant case, this Court after having perused evidence led on record by the prosecution finds no such evidence led on record by the prosecution. None of the prosecution witness has stated something specific with regard to rash and negligent driving of the respondent-accused at the time of alleged incident.

7. PW1 in her statement reiterated the story of prosecution that on 28.4.2012, when she was going to IGMC, Shimla along with her son for his checkup, a bus being driven by the

respondent accused hit her and her son from the driver side, as a consequence of which, they fell unconscious and were taken to the hospital. She in a very casual manner stated that accident took place due to rash and negligent driving of the accused but in cross-examination, she admitted that bus from where she got off from the bus at victory tunnel was also going to bus-stand. She also stated that bus was being driven by the driver on the right side and she herself noted down the number of the bus, but it has also come in her cross-examination that there is no bus stoppage near the victory tunnel round about. She also stated that when she had to go to IGMC from Totu by victory tunnel, then there was no requirement of crossing the road.

8. Careful perusal of aforesaid version put forth by PW1 creates doubt with regard to the correctness of story put forth by the prosecution. On the one hand, PW1 claims that after being hit by bus, she fell unconscious and on the other hand, she stated that she herself noted down the number of the bus. Similarly, it has come in her cross-examination that she was going to IGMC for check up of his son and bus in which she was travelling was coming to the old bus stand and as such, it is not understood when she had to go to the old bus stand to catch the bus where was the occasion for her to get down at victory tunnel and go on foot to get the bus from the old bus stand.

9. PW2 Constable Pardeep Sharma, supported the version put forth by PW1 that on 28.4.2012, bus bearing No. HP63-3050, coming from old bus stand from Tutikandi busstand, hit the victim (PW1) and her son, whereupon he stopped one taxi and sent the victims to the IGMC. In his cross examination, he admitted that accident happened 50 meters away from the victory tunnel. He also stated that bus was moving on the right side. Most interestingly, this witness admitted that in the spot map bus is shown in the wrong side, because as per factual position, bus was moving on the other side. This witness also admitted that incident took place in a rush area and there were number of vehicles on the road.

10. PW5 (I.O.) also admitted that there is no bus stoppage at a place, where accident took place. He also admitted that victim was never brought to the spot by the Investigating Officer. PW 7 and PW8, who are witnesses to fard also did not support the version put forth by the prosecution. PW7 has categorically admitted that accident did not take place in his presence and he cannot tell as to how accident took place. PW8, who also happened to be witness to fard, is the driver of taxi, in which victims were taken to IGMC. He admitted that he did not see the accident and cannot tell how the accident took place. He also resiled from his statement being witness to fard. In his cross examination, he has admitted that his statement was recorded by the police and he had signed the fard.

11. Having perused versions put forth by the aforesaid witnesses, it is quite apparent that there are material contradictions and inconsistencies in the statements made by these witnesses, especially spot map Ext.PW5/B, which is totally contrary to the factual position existing on the spot at the time of alleged accident. Moreover, victim was never brought to the spot at the time of preparing spot map. At the time of accident, none was present except PW2 and all the witnesses are the witnesses, who came to be associated at the time of investigation and had no occasion to see the accused. PW2 in his cross-examination categorically admitted that accident took place 50 meters away from the victory tunnel. He also admitted that accident took place in a rush area and there were number of vehicles on the road. It is not understood that when number of vehicles were present at the time of alleged incident, what prevented the police from associating other independent witnesses.

12. In the case at hand, entire story put forth by the prosecution appears to be untrustworthy and full of contradictions. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases

needs to be evaluated on touchstone of consistency. Reliance is also placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)***
>
> > ***"14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."***

13. Leaving everything aside, this Court is unable to lay its hand to any specific statement made by these aforesaid prosecution witnesses with regard to the rash and negligent driving, if any, by the respondent accused at the time of the accident. As has been observed herein above, it is/was incumbent upon the prosecution to prove guilt of the accused under Section 279 IPC that vehicle was being driven in rash and negligent manner as to endanger human life or likely to cause injury to other persons. Similarly, prosecution is/was also required to prove that hurt is caused due to an act done rashly and negligently so as to endanger human life or personal safely of others. But interestingly, in the case at hand, both the conditions as taken note herein above, are missing. Though PW1 in a very casual manner has stated that accident took place due to rash and negligent driving of the respondent-accused, but she has nowhere stated in what manner vehicle was being driven rashly and negligently. She has not stated something specific with regard to the speed of the vehicle. Otherwise also, it has come in the statement of PW2 that accident took place in rush area, meaning thereby, it can be presumed that vehicle was being driven in a normal speed.

14. In the instant case, this Court was unable to lay its hand to specific evidence, if any, led on record by the prosecution suggestive of the fact that vehicle at that relevant time was being driven rashly and negligently. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406**, which reads as under:-

> ***"6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused- appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.***

8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279 IPC is not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."

15. The Hon'ble Apex Court in case titled "***State of Karnataka v. Satish,"1998 (8) SCC 493***, has also observed as under:-

"1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338 and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

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

3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could

be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

16. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur.*

17. The Hon'ble Apex Court in case titled **Ravi Kapur** versus **State of Rajasthan** (2012) 9 SCC 285, has held as under:

"15. The other principle that is pressed in aid by the courts in such cases is the doctrine of res ipsa loquitur. This doctrine serves two purposes – one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. The Act itself contains a provision which concerns with the consequences of driving dangerously alike the provision in the IPC that the vehicle is driven in a manner dangerous to public life. Where a person does such an offence he is punished as per the provisions of Section 184 of the Act. The courts have also taken the concept of 'culpable rashness' and 'culpable negligence' into consideration in cases of road accidents. 'Culpable rashness' is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (luxuria). 'Culpable negligence' is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case the mere fact of accident is prima facie evidence of such negligence. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent

conduct. [Ref. Justice Rajesh Tandon's 'An Exhaustive Commentary on Motor Vehicles Act, 1988' (First Edition, 2010].

20. In light of the above, now we have to examine if negligence in the case of an accident can be gathered from the attendant circumstances. We have already held that the doctrine of res ipsa loquitur is equally applicable to the cases of accident and not merely to the civil jurisprudence. Thus, these principles can equally be extended to criminal cases provided the attendant circumstances and basic facts are proved. It may also be noticed that either the accident must be proved by proper and cogent evidence or it should be an admitted fact before this principle can be applied. This doctrine comes to aid at a subsequent stage where it is not clear as to how and due to whose negligence the accident occurred. The factum of accident having been established, the Court with the aid of proper evidence may take assistance of the attendant circumstances and apply the doctrine of res ipsa loquitur. The mere fact of occurrence of an accident does not necessarily imply that it must be owed to someone's negligence. In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence. Circumstantial evidence consists of facts that necessarily point to negligence as a logical conclusion rather than providing an outright demonstration thereof. Elements of this doctrine may be stated as :

- ***The event would not have occurred but for someone's negligence.***
- ***The evidence on record rules out the possibility that actions of the victim or some third party could be the reason behind the event.***
- ***Accused was negligent and owed a duty of care towards the victim."***

18. Reliance is also placed on judgment rendered by this Court in **State of H.P. Vs. Manpreet Singh**, Latest HLJ 2008 (HP) 538, relevant para whereof is as under:

"4. Legally, in a case of rash and negligent act, if the prosecution is able to prove the essential ingredients of the offence, the onus to disprove it shifts upon the respondent to show that he had taken due care and caution to avoid the accident. It is an admitted fact that said Shri Daya Ram had died in the accident caused by the respondent but still it is incumbent upon the prosecution to prove that it was the rash and negligent act of driving to conclude the rash and negligent driving of the respondent. In other words, it must be proved that the rash or negligent act of the accused was causa causans and not causa sin qua non (cause of the proximate cause). There must be some nexus between the death of a person with rash or negligent act of the accused. According to Rupinder Parkash (PW4) deceased was hit by the motor cycle which was in a high speed but the speed is not criteria to hold the act as rash or negligent. The respondent in his statement under Section 313 of the Code of Criminal Procedure has explained that on seeing the deceased, he had blown the horn and he (deceased) stopped on the road. As soon as he reached near him, he immediately tried to cross the road and got hit. His version has been duly corroborated by Hardeep Singh (DW1) who was a pillion rider with him. Ajay Kumar (PW-1) has admitted this version that the respondent had blown the horn and Daya Ram on hearing it, had stopped for a while. In these circumstances, if a person suddenly crosses the road, without taking note of the approaching vehicle and its driver may not be in a position to save the accident, it will not be possible to hold the Driver

guilty of the offence. In the instant case, the deceased knowing fully well at least the approaching vehicle stopped on hearing the horn while crossing the road but when the motor cycle reached near him, he darted before it and the accident took place. Thus in my opinion the prosecution could not prove the offence charged against the respondent beyond reasonable doubt that the respondent was driving the vehicle rashly or negligently. Therefore, in these circumstances, the learned trial Court had rightly acquitted the respondent of the charges framed against him. As such, no interference in the impugned judgment of acquittal is called for. Accordingly the appeal is dismissed. The respondent is discharged of his bail bounds entered upon by him at any stage of the trial."

19. No doubt, in the case at hand, prosecution has proved on record that in the alleged accident, complainant suffered simple as well as grievous injuries, but as has been noticed above, guilt of the accused for having committed offence punishable under Section 338 of IPC, is required to be proved by the prosecution by proving on record that grievous hurt is caused to any person due to an act done rashly and negligently as to endanger human life or personal safety of others, but unfortunately in the case at hand, no such evidence is led on record.

20. PW4 and PW3 doctors, who medically examined the victim and her son Rahul, no doubt opined that victim suffered simple as well as grievous injury, but that may not be sufficient to hold the respondent-accused guilty of having committed offence punishable under Sections 279, 337 and 338 of the IPC, especially when prosecution has not been able to prove beyond reasonable doubt that victim suffered injuries on account of rash and negligently driving of the respondent-accused.

21. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no reason to differ with the well reasoned judgment passed by the learned court below which appears to be based upon the proper appreciation of evidence adduced on record and the same is accordingly upheld. Accordingly, the appeal is dismissed being devoid of any merits.

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

State of Himachal Pradesh ....Appellant
Versus
Yashpal ....Respondent

Cr. Appeal No. 83 of 2018
Decided on: May 1, 2018

Indian Penal Code, 1860- Sections 323, 325 and 341- **Code of Criminal Procedure, 1973-** Section 378- Appeal against acquittal - After trial, trial court acquitting accused on allegations that on 7.4.2016 he stopped complainant 'G', his wife 'K' and one 'Y' from working on a road and gave beatings to complainant's wife 'K' and 'Y' – Appeal by State on ground that acquittal is based on wrong appreciation of evidence – On facts, it was found that (i) there was enmity between parties on account of land dispute (ii) 'K' had given in writing before Panchayat earlier that she would not fight with accused in future (iii) all victims had attended work on very next day also suggesting absence of any serious injury to them (iv) FIR was belatedly filed for no reasons (v) medical evidence not clearly proving fracture of rib of victim – Held, prosecution case is doubtful – Acquittal upheld – Appeal of state dismissed. (Paras- 7 to 16 and 21)

Case referred:
C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645

For the appellant: Mr. Dinesh Thakur, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.
For the respondent: Mr. Y.P. Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

Appellant-State being aggrieved and dissatisfied with the judgment of acquittal recorded by learned Judicial Magistrate 1st Class, Court No. VII, Shimla, Himachal Pradesh in Police Challan No. 26/2 of 1312, whereby learned Court below on the basis of evidence led on record by prosecution, held the respondent-accused (hereinafter, 'accused') not guilty of having committed offences punishable under Sections 341, 323 and 325 IPC and acquitted him, has approached this Court in the instant proceedings, seeking therein conviction of respondent-accused, after setting aside impugned judgment of acquittal recorded by the court below.

2. Facts as emerge from the record are that complainant namely Ghanshyam vide exhibit PW-1/A got his statement recorded under Section 154 CrPC, on the basis of which formal FIR exhibit PW-10/A came to be registered on 7.4.2016, at Police Station Dhalli, alleging therein that on 29.8.2012, at about 3.30 pm, near Jaghedi Suni, complainant Ghanshyam, his wife and one Yashodha were working under MGNAREGA Scheme on a road, whereupon, accused came there, stopped them from working and started abusing them. Further, the accused slapped Yashodha and kicked Kaushalya, due to which she became unconscious, fell on the road and received injuries. Complainant called one Babu Ram and injured were taken to Ghanahatti dispensary for treatment in the car of one Daleep, being driven by one Tej Ram, from where injured were referred to DDU Hospital Shimla. Complainant, his wife and Yashodha were medically examined. On the basis of aforesaid complaint, FIR detailed herein above, came to be lodged against accused and after completion of investigation, police presented Challan in the competent Court of law, which being satisfied that prima facie case exists against accused, charged him for having committed offences punishable under Sections 341, 323 and 325 IPC, to which accused pleaded not guilty and claimed trial. However, fact remains that he did not lead any evidence in his defence despite sufficient opportunity. Learned trial Court, on the basis of material adduced on record by the prosecution, acquitted the accused of the charges framed against him under Sections 341, 323 and 325 IPC. In the aforesaid background, appellant-State approached this Court in the instant proceedings praying therein for conviction of respondent-accused for having committed offences punishable under Sections 341, 323 and 325 IPC.

3. Mr. Dinesh Thakur, learned Additional Advocate General, vehemently argued that the impugned judgment of acquittal passed by learned Court below is not sustainable in the eye of law as the same is not based upon proper appreciation of evidence and as such, same deserves to be quashed and set aside. While inviting attention of this Court to the impugned judgment of acquittal recorded by the learned Court below, Mr. Thakur, strenuously argued that the learned Court below has failed to appreciate evidence in its right perspective as a consequence of which, erroneous findings have come on record and accused has been let off on flimsy grounds. While making this Court to travel through the statements having been made by material prosecution witnesses, Mr. Thakur made a serious attempt to persuade this Court to agree with his contention that prosecution successfully proved beyond reasonable doubt that on the date of alleged incident, accused gave beatings to the wife of the complainant and another person namely Yashodha, as a result of which they suffered grievous injuries. While referring to the medical evidence led on record, exhibits PW-7/A, PW-7/B, PW-9/A and PW-9/C and statements having been made by PW-5 Dr. Ankur Gupta, PW-7 Dr. Tarun Shastri and PW-9 Dr. Ravinder Mokta, Mr. Thakur contended that it stands duly proved on record that on account of

injuries inflicted on account of beatings given by the respondent-accused, victims suffered simple as well as grievous injuries, as such, there was no scope left for the court below to acquit the accused of the charges framed against him. Lastly, Mr. Thakur, contended that the learned Court below has wrongly drawn adverse inference against the complainant for delay in lodging FIR, whereas, as per record, complainants, who were daily wage workers, on the very first opportunity lodged FIR against the accused.

4. Mr. Y.P. Sood, learned counsel representing the accused supported the judgment of acquittal passed by learned Court below and stated that there is no illegality or infirmity in the judgment, rather same is based upon correct appreciation of evidence adduced on record by the prosecution and as such, same deserves to be upheld. With a view to demonstrate that prosecution miserably failed to prove its case beyond reasonable doubt, Mr. Sood, made this Court to travel through the evidence led on record by prosecution to suggest that none of the prosecution witnesses stated anything specific with respect to motive, if any, for giving beatings to the complainant, his wife and another person namely Yashodha. Mr. Sood, stated that if statements having been made by complainant, PW-1, his wife PW-3 (Kaushalya) and PW-4 Yashodha are read in their entirety, it clearly suggests that there are material contradictions and inconsistencies in the statements with regard to infliction of injury, if any, on the person of wife of the complainant and PW-4 Yashodha. He further stated that though prosecution by way of placing MLC on record, made an attempt to prove that on account of beatings given by accused, PW-3 and PW-4 suffered injuries, but it is quite apparent from the statements having been made by PW-6 Shonk Ram that the victim as well as her husband and Smt. Yashodha came to the site for work on all the days from 29.8.2012 to 31.8.2012 and they were physically fit and had come to work on the next day also as such, it can be safely concluded that no serious injury if any was caused to PW-3 and PW-4 on account of beatings, if any, inflicted by accused. While referring to the statement of PW-9, Dr. Ravinder Mokta, Mr. Sood contended that there was no fracture of 9th rib in the left side of chest and as such, there is no force in the contention of the learned Additional Advocate General that on account of beatings given by accused, wife of complainant suffered grievous injuries, rather, the Doctor categorically admitted in his cross-examination that the injury witnessed on the body of victim can be caused due to fall on hard surface. Lastly, Mr. Sood contended that the alleged incident took place on 29.8.2012, whereas, FIR came to be lodged on 1.9.2012 i.e. after three days and there is no explanation rendered on record with regard to delay in lodging FIR, as such, learned Court below rightly held accused not guilty of having committed offences punishable under Sections 341, 323 and 325 IPC.

5. Before adverting to the rival contentions of the learned counsel representing the parties vis-à-vis impugned judgment of acquittal recorded by learned Court below, it may be noticed that while granting leave to appeal, this Court had called for records of the learned Court below, which has been made available and perused. Having carefully gone through record, made available, especially statements having been made by prosecution witnesses, this court is not inclined to agree with the contention of the learned Additional Advocate General that the court below has misread and mis-interpreted the evidence led on record by prosecution, rather, this Court is convinced and satisfied that the court below while ascertaining guilt of accused has dealt with every aspect of the matter very meticulously. It clearly emerges from the perusal of statements having been made by prosecution witnesses that prosecution failed to prove beyond reasonable doubt that on the date of alleged incident, accused gave beatings to the victims, as a consequence of which they suffered injuries, much less grievous. Needless to say, with a view to prove the guilt of the accused under Sections 341 and 323 IPC, it is/was incumbent upon the prosecution to prove beyond reasonable doubt that the accused voluntarily caused obstruction to prevent eh complainant/victims from proceeding in a direction, in which he/they had a right to proceed and in this process accused caused bodily pain, disease or infirmity to the complainant with the intention of causing hurt or with the knowledge that hurt was likely to be caused. Apart from above, it is/was also incumbent upon the prosecution to prove guilt, if any, of the accused under Section 325 IPC that the accused caused hurt to the victims voluntarily without any grave and sudden provocation by the victims.

6. Having carefully perused the material available on record, this Court finds that though PW-1, PW-3 and PW-4 stated that when they were working on the road, accused stopped them from doing the work, abused them and slapped Yashodha (PW-4) and kicked in the stomach of Kaushalya (PW-3), whereupon she became unconscious and fell on road, but none of the prosecution witnesses stated anything specific with regard to the reason, if any, for aforesaid altercation, which allegedly took place between complainant and accused.

7. PW-1, Ghanshyam, in his cross-examination categorically admitted that he is having 3-4 Bigha land in the village and his father has encroached upon one Biswa land of accused and due to this encroachment there is enmity between both the families. He further stated that prior to the present incident also, earlier accused and his wife/victim had a fight, whereupon matter was brought before the Panchayat and same was resolved. He also admitted that the victim Kaushalya gave in writing to the Panchayat that she will not fight with the accused again. Interestingly, it has come in the statements having been made by these three prosecution witnesses that on the date of alleged incident, they were cleaning the drains on both sides of the road under MGNAREGA scheme and were throwing waste material downwards and as such, it is not understood on what count, accused gave beatings, if any, to PW-3 and PW-4.

8. PW-2 Tej Ram and PW-6 Shonk Ram are the independent witnesses. They stated that accused had given beatings to the wife of complainant and they were taken to Ghanahatti dispensary but in the cross-examination, categorically admitted that incident did not take place in their presence and they had come to the spot after the incident.

9. PW-6 Shonk Ram in his cross-examination admitted that the victim as well as husband and Yashodha came to the spot for work on next day also and they were physically fit.

10. Leaving everything aside, it also emerges from the record that there were 7-8 houses in the vicinity, where alleged incident took place but police neither came to the spot nor victim and complainant were taken/called by police to Police Station, Suni, as admitted by PW-4 Yashodha in her cross-examination. Kaushalya Devi, PW-3, in her cross-examination though denied the suggestion put to her that from 29.8.2012 to 31.8.2012, she had gone to the place and was doing work under MGNAREGA scheme but, as has been taken note herein above PW-6 has categorically stated that on all three days, complainant and victim had come to work and they were physically fit.

11. PW-10 IO ASI Shiv Kumar in his cross-examination admitted that the complainant Ghanshyam came to the Police Station Suni to lodge FIR on 1.9.2012, wherein he reported that the incident took place on 28/29 August 2012. He further stated that he inquired from the complainant with regard to delay in lodging FIR and he was informed that earlier they had talked to accused to bear expenses of treatment but when he refused to do so, they lodged FIR. Interestingly, this witness stated that he had gone to the spot on 2.9.2012 for investigation. He also admitted that both the accused and victim are having strained relations with each other. He also admitted that he has not associated any person from the vicinity for investigation.

12. No doubt, medical evidence led on record i.e. exhibits PW-7/A, PW-7/B, PW-9/A and PW-9/C suggests that PW-3 and PW-4 suffered injuries but that may not be sufficient to conclude that injuries witnessed by the doctor on the person of PW-3 were inflicted by accused because none of the independent witnesses i.e. PW-6, Shonk Ram, Mate and PW-2, Tej Ram, who had taken wife of the complainant and PW-4 to Ghanahatti dispensary, stated that they had an occasion to see the incident with their eyes, rather they categorically admitted that incident did not take place in their presence.

13. True it is, version put forth by interested witnesses in the present case, can not be brushed aside solely on account of their close relationship or prior enmity but by now it is well settled that version the put forth by interested witnesses needs to be examined very carefully, while ascertaining the guilt, if any, of the person against whom allegation is made. In the case at hand, as has been taken note herein above, it has been categorically admitted by all the material

prosecution witnesses i.e. PW-1, PW-3 and PW-4 that father of complainant had a long standing litigation with the father of accused. Moreover, if statement of PW-9 Dr. Ravinder Mokta is perused, he categorically stated that after X-ray examination, he found doubtful fracture of 9th rib in the chest. He further admitted that although there was no fracture but this type of injury can be caused due to fall on hard surface, meaning thereby that fracture, if any, in the 9th rib of chest of victim was not proved and as such, it can not be said that injury suffered on account of beatings given by accused were grievous.

14. Having carefully perused the statements made by victim Kaushalya Devi (PW-3), complainant Ghanshyam (PW-1) and Yashodha (PW-4), it clearly emerges that victim despite having suffered injuries in the alleged incident went to work continuously from 29th to 31st August, 2012 and they were found to be physically fit by PW-6, as such, story with regard to infliction of injury on the persons of victims PW-3 and PW-4 does not appear to be trustworthy rather same is shrouded by suspicion.

15. Apart from above, there is nothing on record either in the examination-in-chief or cross-examination of victim as well as eye witnesses that at any point of time, accused restrained victims from proceeding in a direction, in which they had a right to proceed. Similarly, there is no evidence to show as to how and in what manner, they were restrained as such, learned Court below rightly came to the conclusion that the prosecution miserably failed to prove wrongful restraint on the part of accused.

16. On the top of everything, alleged incident took place on 29.8.2012 at about 3.30 pm near Jaghedi Suni, whereas FIR came to be lodged after three days of incident i.e. 1.9.2012.

17. True it is, that delay in lodging FIR can not be a ground to disbelieve everything put forth by prosecution but certainly, delay in lodging FIR raises doubt with regard to correctness of averments contained in the complaint. It has been repeatedly held by Hon'ble Apex Court as well as this Court that, wherever there is delay in lodging report, it not only gets bereft of its spontaneity but danger also creeps in of coloured version and innocent persons can be roped in and named as culprits through consultation and discussion as such, to avoid these dangers, court always insists for prompt lodging of report with the police.

18. In the case at hand, neither the victim nor the eye witnesses stated anything specific with regard to delay in lodging FIR. In the cross-examination all these material prosecution witnesses admitted that they had all the opportunity to go to the police for lodging FIR but despite that they all went for doing work on the site. PW-1 in his cross-examination categorically stated that FIR was not lodged prior to 1.9.2012 because there was agreement between the parties and accused had agreed to bear the expenses of treatment of the victims. There is no plausible/reasonable explanation rendered on record by the complainant and other material prosecution witnesses for delay in lodging FIR, as such, learned Court below rightly arrived at a conclusion that no cogent reason has been given for delay in lodging FIR, as such, evidence of prosecution can not be taken without a pinch of doubt.

19. Having sifted entire evidence, this Court finds no illegality or infirmity in the judgment of acquittal recorded by the learned Court below especially when there are material contradictions in the statements of the material prosecution witnesses, rendering the whole story put forth by them improbable.

20. By now it is well settled that in a criminal trial evidence of eye-witness requires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that

evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
>
> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

21. In view of above, there is no merit in the present appeal and same is accordingly dismissed. Bail bonds if any furnished by accused are discharged. Pending applications, if any, are disposed of.

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

Dasmi Ram .....Petitioner
Versus
Tilu Devi and Ors. ... .Respondents

CMPMO No. 554 of 2017
Decided on 2.5.2018

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order XXI Rules 89 and 92- Setting aside of auction sale – Held – A judgment debtor can avoid sale validly made by way of public auction (but before its confirmation) by depositing five percent of purchase money plus amount specified in proclamation minus amount got realized by decree holder subsequent to proclamation, with Court – No formal application is required to be filed by judgment debtor – If these two conditions are satisfied, executing court has to set aside auction sale after giving notice to all affected persons. (Paras-7 and 9)

Case referred:
Challamane Huchha Gowda v. M.r. Tirumala and Anr., 2004 (1) SCC 453

For the petitioner : Mr. G.R. Palsra, Advocate.
For the respondent : Mr. Vijay K. Arora, Advocate, for respondent No.1.
Ms. Devyani Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition, challenge has been laid to order dated 14.11.2017, passed by the learned Additional District Judge, Kullu, H.P., in CMP No. 217-VI/2016, affirming the order dated 12.6.2017, passed by the executing court below, whereby it allowed the application having been filed by the respondent No.1 Smt. Tilu Devi (JD No.3 before the executing Court), under order 21 Rule 89 CPC and set aside the sale of land of JD No.3, made in favour of auction purchaser i.e. Dasmi Ram (present petitioner).

2. Facts as emerge from the record are that the land of JD No.3 Tilu Devi was mortgaged with decree holder-Bank i.e. respondent No.2 and same was ordered to be sold on 30.7.2016, in terms of order dated 1.6.2016. After publication of sale on 30.6.2016, executing court below having called report on 17.8.2016, sold the land of JD No.3 in public auction. Present petitioner Dasmi Ram gave the highest bid of Rs. 3,71,000/-. He also deposited the aforesaid amount with the Collector, Kullu, who vide communication dated 16.8.2016, remitted the amount to the executing court by way of draft. Subsequently, on 17.8.2016, JD No.3 filed an application under Order 21 Rule 89 CPC read with Section 151 of CPC, seeking therein permission to deposit a sum of Rs.3,90,000 (i.e. Rs.3,71,000/- sale consideration amount plus Rs.19,000 as 5 % of purchase money before the executing Court. Learned executing Court allowed the application filed under Order 21 Rule 89 and set aside the sale made in favour of the present petitioner in auction proceedings. Learned court below also permitted JD No. 3 to deposit a sum of Rs. 3,90,000/-.

3. Being aggrieved and dis-satisfied with the aforesaid order passed by the executing Court, present petitioner filed an appeal under Order 41 Rule 1 CPC in the Court of learned Additional District Judge, Kullu, H.P., however, fact remains that same was dismissed. In the aforesaid background, present petitioner has approached this Court in the instant proceedings, laying therein challenge to judgment dated 14.11.2017, passed by the learned Additional District Judge as well as order dated 12.6.2017, passed by the learned executing Court.

4. Mr. G.R. Palsra, learned counsel appearing on behalf of the present petitioner, while inviting attention of this Court to the documents placed on record, vehemently contended that respondent No.1 (JDNo.3) did not approach the executing court with clean hands, rather she made an attempt to hoodwink the court by misstating the facts. While referring to the application filed under Order 21 Rule 89 CPC, Mr. Palsra contended that JD No.1 stated before the court below that notice under Order 21 Rule 66 was not received by her till date, whereas record reveals that pursuant to notice issued to her under Order 21 Rule 66 CPC, the counsel namely P.P. Rana, put in appearance on her behalf and repeatedly procured time from the Court to file objections. Since JD No.3 failed to file objection, learned court below rightly ordered for auction of her mortgaged property. Mr. Palsra, further, contended that keeping in view the conduct of JD No.3, court below ought to have dismissed her application filed under order 21 rule 89.

5. Mr. Vijay K. Arora, Advocate, representing respondent No.1 (JD No.3) supported the impugned judgment passed by the court below and contended that Rule 89 of Order 21 is the only mean by which, a judgment debtor can escape from a sale that has been validly carried out. He further contended that application at hand came to be filed on behalf of JD No.3, immediately after sale and as such, there is no illegality and infirmity in the order passed by the court below, whereby court below taking note of the fact that JD No.3 deposited a sum of Rs. 390,000/- in the learned court below, set aside the sale made in favour of the present petitioner in auction proceedings. In support of his aforesaid contention, Mr. Arora, also placed reliance upon judgment passed by the Hon'ble Court Apex Court in ***Challamane Huchha Gowda*** *v.* ***M.r. Tirumala and Anr.,*** 2004 (1) SCC 453.

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

7. It is quite apparent from the record that JD No.3 (respondent No.1) filed an application under Order 21 Rule 89 CPC read with Section 151 of CPC, for setting aside auction sale of the property on 17.8.2016, i.e. one day after confirmation of sale, which was sold on 30.7.2016. Though, JD No.3 in her application claimed that she did not receive any notice under Order 21 Rule 66 CPC, but bare perusal of zimini orders placed on record, suggests that Mr. P.P. Rana, Advocate, not only filed power of attorney on behalf of JD No.3 but he kept on appearing in the Court on her behalf, but once JD No.3 failed to file objections despite repeated opportunities, executing court below proceeded to order for sale of her mortgaged property. Order 21 Rule 89 provides for two conditions; one is depositing of sum equal to five percent of the purchase money to be paid to the purchaser; second is depositing of the amount specified in the proclamation of sales less any amount received by the decree holder since the date of such proclamation, in the Court. If these two conditions are satisfied, the Court can make an order for setting aside the sale under Rule 92(2) of Order 21 of CPC on an application made to it. No doubt in the case at hand JD No.3 was in know of proceedings pending before the executing Court under Order 21 Rule 66 CPC, but that cannot be a ground to set aside the order passed by the executing Court in the application having been filed by JD No.3 under Order 21 Rule 89, especially when two conditions as stated herein above, have been duly satisfied by JD No.3. In this regard, reliance is placed upon the judgment passed by the Hon'ble Court Apex Court in ***Challamane Huchha Gowda*** *v.* ***M.R. Tirumala and Anr.,*** 2004 (1) SCC 453, relevant para whereof, is reproduced herein below:-

> ***"9. Execution is the enforcement, by the process of the Court of its orders and decrees. This is in furtherance of the inherent power of the Court to carry out its orders or decrees. Order 21 of CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order 21 is the only means by which a Judgment Debtor can escape from a sale that has been validly carried out. The object of the rule is to provide a last opportunity to put an end to the dispute at the instance of the Judgment Debtor before the sale is confirmed by the Court and also to save his property from dispossession. Rule 89 postulates two conditions: they are depositing-(l) of sum equal to five percent of the purchase money to be paid to the purchaser, (2) of the amount specified in the proclamation of sales less any amount received by the decree holder since the date of such proclamation, in the Court. If these two conditions are satisfied the Court shall make an order for setting aside the sale under Rule 92(2) or Order 21 CPC on an application made to it. In other words, then there will be compliance of Court's order or decree that is sought to be executed. Because the purpose of the Order 21 is to ensure that carrying out of the orders and decrees of the Court. Once the Judgment Debtor carries out the order or decree of the Court, the execution proceedings will correspondingly come to an end. It is to be noted that the Rule does not provide that the application in a particular form shall be filed to set aside the sale. Even a memo with prayer for setting aside sale is sufficient compliance with the said rule. Therefore, upon the satisfaction of the compliance with conditions as provided under Rule 89, it is mandatory upon the Court to set aside the sale under Rule 92. And the Court shall set aside the sale after giving notice under Rule 92(2) to all affected persons."***

8. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, this Court sees no illegality and infirmity in the order/judgment passed by the courts below and as such, same are upheld. Accordingly, present petition is dismissed being devoid of any merits. Needless to say that in view of the instant order passed by this Court, sale proceeds lying deposited with the executing Court would be released in favour of decree holder

along with proportionate interest, whereas remaining amount shall be remitted in favour of the purchaser-present petitioner.

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

State of H.P. ...Appellant
Versus
Rajinder Kumar ...Respondents

Cr. Appeal No. 410 of 2010
Decided on : 2.5.2018

Indian Penal Code, 1860- Sections 279, 337 and 304-A- Rash and negligent driving on public highway – Proof of - Accused 'R' was tried on allegations that he by his rash and negligent driving struck his truck against goods carrier coming from opposite side and caused death of one 'ID' by such driving – Trial Court acquitting accused for such offence- Appeal against by State – State arguing that acquittal is based on misappreciation of evidence – High Court found that offending vehicle could have drifted towards wrong side of the road on account of sudden breaking of its brake pipe and not because of rash driving – Accident was attributable to mechanical defect which developed suddenly – Allegations of rash driving not proved- Acquittal upheld – Appeal dismissed. (Paras-9 and 10)

For the appellant: Mr. Hemant Vaid, Addl.A.G.
For the respondent : Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against, the judgment rendered by the learned Chief Judicial Magistrate, Solan upon, criminal case No. 31/2 of 2002, under Sections 279, 337 and 304-A of the IPC, whereby he pronounced an order of acquittal upon the accused.

2. The facts relevant to decide the instant case are that on 28.9.2001 , at about 4:45 p.m. near Guru Kirpa, Dhaba, Patte-Ka-Mor, Kumarhatti on National Highway-22, the accused was driving LP Truck bearing No. HP-14-2526 in rash and negligent manner so as to endanger human life and personal safety of others. The accused by his rash and negligent driving stuck the vehicle against Tata-709 Truck No.HP-15-4627 being driven by the complainant Sh. Chanchal Singh coming from opposite side resulting in simple injuries to himself and Sh. Nand Lal and death of Sh. Ishwar Dutt. It is alleged that the accused was driving LPtruck bearing No. HP-14-2565 rashly and negligently and the accident was out come of the same. The offending vehicle being driven by the accused was on its way from Solan towards Parwanoo, whereas the vehicle being drivenby the complainant was coming from the opposite site on its way from Parwanoo to Ani. The accused after hitting the vehicle against Tata-709 truck bearing No. HP-15-4627 lost control over the same and drove the vehicle on the wrong side of the road and struck the same against road side tree. At the time of the accident the accused was driving LP truck bearing No. HP-14-2526, whereas he was accompanying by Sh. Nand Lal and Sh. Ishwar Dutt. The other persons namely Sh. Charan Dass being the cleaner/conductor of Truck No. HP-15-4627 and Sh. Gopal Dass and complainant escaped unhurt. The information regarding the accident was conveyed at about 12:10 a.m. at P.P. Dagshai on which Rapat No. 22 dated 28.9.2001 was entered pursuant to which a police party heaed by HC Dev Ram No. 78 along with

C.Dinesh Kumar and C. Parwinder No. 375 rushed to the accident site. The Police officials on reaching the spot found the body of Sh. Ishwar Dutt lying on the road, whereas the accused and injured Nand Lal had been shifted to CHC Dharampur for medical assistance. The police officials later recorded statement of Chanchal Singh, being driver of Tata 709 Truck bearing No. HP15-4627 under Section 154 Cr. P.C. The medical examination of the injured and the post mortem of the deceased conducted at CHC Dharampur by Dr. A.K. Singh who after examining the injured issued MLC with the opinion that they have sustained injuries. The post mortem report of deceased Ishwar Dutt was also procured separately. Both the vehicles were taken into possession and subjected to chemical examination. The investigation officer visiting the spot prepared spot map and also recorded statements of witnesses under Section 161 Cr.P.C..

3. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed in the Court concerned.

4. The accused was charged by the learned trial Court, for, his committing offence(s) punishable under Sections 279,337 and 304-A of the IPC. The prosecution examined 8 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case. However, no defence evidence was adduced by the accused.

5. On an appraisal of evidence on record, the learned trial Court, recorded findings of acquittal upon the accused.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General, has, concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing, not, based on a proper appreciation, by it, of the evidence on record, rather, theirs' standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction, AND, theirs being replaced by findings of conviction.

7. On the other hand, the learned counsel for the respondents/accused has also with considerable force and vigour, contended that the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation, by it, of evidence on record, and, theirs not necessitating interference, rather theirs meriting vindication.

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

9. In the collision, which occurred interse the offending vehicle, and, truck bearing No. HP-15-4627, the complainant hence suffered injuries, on his person, and, one Ishwar Dutt, succumbed to the injuries, sustained by him, in the relevant incident. The Doctor, who examined the victim/complainant Chanchal Singh, hence prepared the apposite MLC, and, also during the course of recording of his testification, he proved Ext. PW4/B, and, also in course thereof, lent proof, vis-a-vis the post mortem report, prepared by him, in respect of deceased Ishwar Dutt, report whereof is borne in Ext. PW4/E. On strength of the aforesaid cogent proof, adduced by PW-4, and, also on strength of the testification(s), of ocular witnesses, to the occurrence, who, respectively deposed as PW-1, and, as PW-8, hence the learned Additional Advocate General, submits, that the charge against the accused, being cogently proven, (a) conspicuously with the place of occurrence, depicted in site plan, evidently depicting the trite factum, of the offending vehicle, swerving from, the appropriate side of the road, onto the inappropriate side, of the road, therefrom it being also inferable, of, his being perse negligent, in, driving the offending vehicle.

10. Be that as it may, the defence espoused, by the counsel for the accused, of, the offending vehicle, suffering a sudden breakdown vis-à-vis its brake pipe, (a), and, hence the accused loosing control over the offending vehicle, (b) thereupon the aforesaid mechanical

breakdown, besetting the vehicle, at the relevant stage, being obviously perse not significatory, of the accused, not, adhering to the standards of due care and caution, while his driving the offending vehicle, (c) concomitantly, rather his being construable to be not negligent in driving it, hence, also acquires firm strength, and, corroboration, from, the cross-examination, of PW-5, who prepared the apposite mechanical report, (d) and who, during the course of recording, of his testification, tendered the same into evidence, whereat, it stood exhibited as Ext. PW5/A (e) and, also in his cross-examination, hence his making vived echoing(s) in consonance, with, the espousal reared by the learned defence counsel. In aftermath, the findings of acquittal rendered by the learned trial Court, do not warrant any interference, moreso, when the aforesaid rendered testification by PW-5, does not, apparently make any bespeaking of the accused, in, driving the offending vehicle, his not adhering to the standards of due care and caution.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

12. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The Judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

H.P. State Co-operative Marketing and Consumers Federation Ltd. .....Petitioner.

Vs.

Nain Sukh .....Respondent.

CWP No.: 3806 of 2010
Reserved on: 12.04.2018
Date of Decision: 03.05.2018

Industrial Disputes Act, 1947- Section 25F- Termination of services of a workman - Validity – Department terminated services of workman on his refusal to hand over charge of his seat and joining at new place of posting – On reference, Labour Court holding that if employee had disobeyed order of employer, domestic enquiry ought to have been held – Labour Court holding termination as bad and directing reinstatement of employee with seniority but without back wages – Petition against award of Labour Court- High Court found that workman in his claim petition as well as in his cross-examination had admitted of his having not joined at place of posting to which he was transferred – Held, as the transfer order itself had clarified that services of workman would be dispensed with in event of his not joining at place of transfer and he admittedly did not join there, no domestic inquiry was required to be conducted – Employee was rightly terminated for disobedience of order of employer – Award of Labour Court set aside- Petition allowed. (Paras-7 and 8)

For the petitioner Ms. Ranjana Parmar, Senior Advocate, with Ms. Rashmi Parmar, Advocate.

For the respondent: Mr. B.N. Mehta, Advocate, for the respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition, the petitioner has laid challenge to award dated 11.05.2010, passed by the learned Industrial Tribunal-cum-Labour Court in Ref. No. 125 of

2003, vide which, learned Labour Court has answered the Reference in favour of the workman in following terms:

> *"As a sequel to my findings on the aforesaid issues, the claim of the petitioner is allowed and it is ordered that he (petitioner) be reinstated in service, with seniority and continuity but without back wages, from the date of his termination i.e. 21.01.1995. Consequently, the reference stands answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records."*

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

Appropriate Government made a Reference to the learned Labour Court, which reads as under:

> *"Whether the termination of services of Shri Nain Sukh, S/o Shri Sohanu Ram, daily wages peon by the Managing Director, HP State Cooperative Marketing and Consumer Federation Ltd., Shimla w.e.f. 21.1.1995 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what service benefits and relief aggrieved workman is entitled to?"*

3. Case of the workman before the learned Court was that the Managing Director of the employer-Federation (hereinafter referred to as "the Federation") absorbed his services as Peon-cum-Chowkidar against a Class-IV post and transferred him to the office of Area Manager Himfed Nahan vide communication dated 17.02.1992, where he joined on 25.07.1992. Thereafter, he was directed to join duties at Thanadhar vide communication dated 10.08.1992 to assist the Storekeeper, Himfed at Thanadhar. The authorities directed him to take over the charge of Storekeeper at Thanadhar from one Shri Chattar Singh vide communication dated 07.12.1992 and he took the charge on 10.12.1992. Vide communication dated 13.07.1994, he was directed to hand over the charge to Shri Roshan Lal and further directed to join duties at Bottling Plant, Parwanoo by 27.07.1994, with the condition that in the event of his failure to do so, his services were liable to be dispensed with. On account of ill health of his father, he could not join at Parwanoo. His services were accordingly terminated vide communication dated 21.01.1995 without hearing him and without conducting any inquiry. Accordingly, he assailed the order of termination and claimed that he be re-instated in service alongwith back wages from the date of his illegal termination.

4. The claim was resisted by the Federation, which took the stand that the workman was initially engaged on daily wage basis as a Supervisor at World Bank Storage Project and when the Project came to an end, rather than terminating his services, by taking a sympathetic view, he was posted on daily wage basis in the office of Area Manager, Himfed, Nahan. The workman joined his duties at Thanadhar on 12.08.1992 and was transferred to Bottling Plant Parwanoo vide communication dated 02.06.1994. He refused to hand over his charge and join at Parwanoo. When charge was handed over to Shri Pradeep Chauhan, Storekeeper, it was found that workman had committed shortages to the tune of Rs.98,550/- and this led to the initiation of recovery proceedings against him. According to the employer, as the workman had willfully disobeyed the orders of the Management, whereby he was directed to join at Parwanoo, his services were rightly terminated.

5. Learned Labour Court while answering the Reference held that it appeared that the workman had abandoned his job and if that was so, and if he had disobeyed the directions of the employer, then the employer was required to have conducted a domestic inquiry and as no such inquiry was conducted, then obviously the provisions of the Industrial Disputes Act were violated and as the provisions of Section 25F of the Industrial Disputes Act were not complied with, the termination of the workman vide letter dated 21.01.1995 was illegal and unjustified. It was on the basis of said findings that the Reference was answered in favour of the workman in terms already mentioned above.

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

7. It is not in dispute that herein it is not a case where services of the workman were terminated by the workman without any rhyme and reason, in violation of the provisions of the Industrial Disputes Act. It is a matter of record that the workman while serving at Thanadhar, was ordered to be transferred to Parwanoo and he was directed to join at Parwanoo, failing which, he was informed that his services were liable to be terminated. Workman did not abide by the orders so passed by the employer. In other words, he did not comply with the directions of the employer to join services at Parwanoo. It was in this background that when the workman did not abide by the orders so passed by the employer, his services were terminated by the employer. In fact, a perusal of the claim petition itself demonstrates that the workman in paras 5 and 6 thereof has admitted the fact that he did not join the duties at Bottling Plant Parwanoo, as was directed by the employer. In his cross-examination, the workman has admitted it to be correct that he was transferred from Thanadhar to Bottling Plant Parwanoo and that he did not join at Parwanoo.

8. In my considered view, when the workman himself has admitted the factum of his not joining the place where he was ordered to be transferred by the employer, which ultimately led to the termination of his engagement by the employer, I find that the learned Tribunal erred in answering the Reference petition in favour of the workman by holding that the services of the workman could not have been terminated without holding a domestic inquiry. This Court fails to understand as to what kind of a domestic inquiry learned Labour Court wanted the employer to hold when the workman had refused to join the place of posting where he was transferred. Further, this is a case where on the failure of workman to join the place of his transfer, his services were dispensed with. This dispensation cannot be termed to be in violation of the provisions of the Industrial Disputes Act. The award passed by the learned Labour Court is thus a result of mis-reading and mis-appreciation of evidence on record and as there is no perversity in the same, the same is not sustainable in law.

9. In view of the findings returned hereinabove, this writ petition is allowed and the award dated 11.05.2010, passed by the learned Industrial Tribunal-cum-Labour Court in Ref. No. 125 of 2003 is quashed and set aside.

Petition stands disposed of. No order as to costs.

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

Kali Kant Jha ...Petitioner.

Versus

M/s Birla Textile Mills ...Respondent.

CWP No. 2795 of 2008
Reserved on: 03.01.2018
Decided on: 05.05.2018

Industrial Disputes Act, 1947- Section 33(2)- Proviso - Approval of dismissal order – Nature of proceedings before Labour Court – After holding domestic enquiry, employer deciding to dismiss petitioner-employee for his misconduct which involved making of false entries in record and misbehavior with seniors – Employer sending matter to labour court for approval of dismissal order since industrial dispute under General Reference involving petitioner and others was already pending before it – Petitioner pleading before Labour Court gross violation of principles of natural justice during domestic inquiry, like non-supply of documents accompanying chargesheet, non-affording assistance of a person desired by him etc. – However, Labour Court

approving dismissal order of petitioner - Petition against – Held – Authority which is to give approval to action of employer has to examine (i) whether order of dismissal/discharge is bonafide or it is an unfair labour practice and whether conditions contained in proviso to sub section 2 were complied with – If authority refuses to approve dismissal/discharge of employee, he shall be deemed to have continued in service as if no such order had ever been passed by employer – Only on approval of order of employer relationship of employer-employee comes to an end de jure - Labour Court can call for evidence of parties in proceedings filed by employer for approval of dismissal/discharge order – Parties can also lead evidence in support of their claim – Petitioner did not lead any evidence despite grant of opportunity by Labour Court – He also admitted receipt of documents accompanying chargesheet – Therefore, he cannot argue breach of principles of natural justice – Dismissal of petitioner upheld but petition disposed of with direction to employer to pay his gratuity pension and leave encashment etc. if not paid earlier. (Para-22)

Cases referred:

The Board of Trustees of the Port of Bombay versus Dilipkumar Raghavendranath Nadkarni and others, AIR 1983 Supreme Court 109

Cholan Roadways Ltd. versus G. Thirugnanasambandam, (2005) 3 Supreme Court Cases 241

Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. versus Ram Gopal Sharma and others, (2002) 2 Supreme Court Cases 244

Bilaspur Raipur Kshetriya Gramin Bank and another versus Madanlal Tandon, (2015) 8 Supreme Court Cases 461

M/s. Firestone Tyre & Rubber Co. of India (P) Ltd. versus The Workmen Employed represented by Firestone Tyre Employees' Union, AIR 1981 Supreme Court 1626

Jagdish Lal and others versus State of Haryana and others, (1997) 6 Supreme Court Cases 538

Jasmer Singh versus State of Haryana and another, (2015) 4 Supreme Court Cases 458

A.P. SRTC versus Raghuda Siva Sankar Prasad, (2007) 1 Supreme Court Cases 222

Divisional Controller, Karnataka State Road Transport Corporation versus M.G. Vittal Rao, (2012) 1 Supreme Court Cases 442

K.V.S. Ram versus Bangalore Metropolitan Transport Corporation, (2015) 12 Supreme Court Cases 39

Raj Kumar Dixit versus Vijay Kumar Gauri Shanker, Kanpur Nagar, (2015) 9 Supreme Court Cases 345

Divisional Controller, KSRTC (NWKRTC) versus A.T. Mane, (2005) 3 Supreme Court Cases 254

For the petitioner:	Mr. Rajiv Rai, Advocate.
For the respondent:	Mr. R.L. Sood, Senior Advocate, with Mr. Sanjeev Kumar, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Instant petition has been instituted assailing order, dated 7th January, 2008, passed by H.P. Industrial Tribunal-cum-Labour Court, Shimla (for short "Labour Court") whereby Application No. 48 of 2004 preferred by employer-respondent under Section 33 (2) (b) of Industrial Disputes Act, 1947 (for short "ID Act") for approval of dismissal of petitioner herein with effect from 10th June, 2004 after completion of domestic inquiry against him, upholding the findings of management of respondent-Company qua dismissal of the petitioner has been allowed (for short "impugned order").

2. Petitioner had been working as a workman with respondent-Company since 23rd June, 1988. On 23rd February, 2004, he was served with a charge sheet alleging therein that during 4th February, 2004 to 9th February, 2004, he made wrong entries regarding working hours

of tractor engaged for collecting husk resulting into undue benefit to the tractor owner and undue loss of ten hours fifteen minutes to the respondent-Company. It was further alleged that on 21st February, 2004, when Mechanical Engineer and General Manager (Engineer) enquired from him in that regard, he misbehaved with them and when he produced register on their asking, wherein working hours of tractor were recorded, it was found that he had torn entries of relevant period in the said register and it was committed by him to save himself. Lastly, it was alleged that he was in habit of making such entries, in which regard the company was having sufficient proof. Considering the act of petitioner a serious misconduct under Standing Orders, petitioner was suspended with immediate effect during the inquiry with a direction to file response to the charge sheet within 48 hours.

3. Petitioner filed response on 24th February, 2004, refuting the allegations of charge sheet stating therein that charge sheet was without any basis and far from truth. It was further stated that no documents had been supplied alongwith charge sheet, which is against principle of natural justice and it was not possible to submit clarification to the charge sheet for want of relevant documents.

4. On finding reply filed by the petitioner unsatisfactory, on 26th February, 2004, management of respondent-Company decided to conduct domestic inquiry and, thus, appointed Inquiry Officer, who, vide notice, dated 27th February, 2004, asked the petitioner to appear before him on 2nd March, 2004 at 4.00 p.m. in Inquiry Room. Respondent-Company had appointed Shri Vibhor Gupta as Presenting Officer whereas petitioner had asked to permit him to be assisted by Shri Om Chand Sharma, but the Inquiry Officer refused to permit Shri Om Chand Sharma as a representative/assistant of petitioner as it was not permissible to have assistance of outsider under Standing Orders and petitioner was advised to appoint any co-worker as his representative/assistant whereupon petitioner had asked time to think over it.

5. On 11th March, 2004, petitioner filed an application for supply of copy of inquiry proceedings, statements of witnesses and other documents. In view of the said application, recording to statements of witnesses of respondent-Company was deferred and on 15th March, 2004, application of petitioner was disposed of with observation that copies of inquiry proceedings, statements of witnesses and complaint shall be supplied to petitioner. On the same day, copies of inquiry proceedings, dated 2nd March, 2004; 8th March, 2004 and 11th March, 2004 were supplied to petitioner and statement of one witness B. Parsad was recorded, to whom the petitioner refused to cross-examine.

6. On 17th March, 2004, petitioner asked to permit Mahender Singh as his assistant/representative in the inquiry, but his request was declined on 5th April, 2004 informing him that Mahender Singh was also an accused in the same matter and, therefore, he could not be allowed to assist/represent petitioner in present case. Thereafter, statements of witnesses were recorded.

7. During pendency of inquiry, petitioner submitted representation to the management of respondent-Company stating therein that inquiry was not being conducted adhering to principles of natural justice; facts were being recorded by manipulating the statements of workers and entire proceedings were being conducted without supplying copy of Standing Orders. Petitioner had also asked for supply of copy of log book of tractor. Inquiry Officer had refuted the allegations made by the petitioner and it was also informed that concerned pages of log book of tractor were torn by the petitioner and thus, could not be produced. Petitioner cross-examined the witnesses of respondent-Company, but signed under protest without specifying reason for protest. Thereafter, statement of petitioner was recorded and he was also subjected to cross-examination wherein petitioner had admitted that he was on duty with effect from 4th February, 2004 to 7th February, 2004. Petitioner had also admitted his signatures on the entries of working hours of the tractor engaged for collecting husk, however, it was stated that other officers had also signed the same.

8. After going through the statements of witnesses and record, the Inquiry Officer submitted his report admitting the allegations of charge sheet to be true. Inquiry Officer had also informed petitioner vide registered letter, dated 3rd May, 2004 about submission of inquiry report, dated 11th May, 2004. The said report was also received by petitioner on 4th June, 2004 at 8.30 a.m. under his signatures.

9. After receiving the inquiry report, management of respondent-Company decided to dismiss services of the petitioner and sent registered AD to him on 9th June, 2004 with information that as an industrial dispute under general reference was pending before the Labour Court, Shimla in which petitioner was also one of a workman, respondent-Company had been filing an application under Section 33 (2) (b) of the ID Act for approval to dismiss petitioner as a part of the same transaction and one month salary was also sent to petitioner alongwith the notice.

10. In application preferred by respondent-Company before the Labour Court, petitioner was served. After service in application preferred by respondent-Company before the Labour Court, petitioner engaged Mr. Hem Raj, Advocate, to represent him, who, on 18th April, 2006 made a statement that petitioner did not want to file reply. In pursuance to the said statement, right of defence of petitioner was struck off and, thereafter, the case was fixed for recording of evidence of respondent-Company on 11th October, 2006, on which date Presiding Officer of Labour Court was on leave and case was adjourned for 16th December, 2006. Since 16th December, 2006, petitioner was represented by Mr. Niranjan Verma, Advocate. On 5th April, 2007, conciliation between parties failed as petitioner was not willing to settle the dispute. Thereafter, evidence of respondent-Company was taken on record and petitioner was also permitted to lead evidence.

11. After closing evidence, application was heard on the basis of material available on record and the Labour Court approved findings of the management of respondent-Company by upholding the dismissal of petitioner vide impugned order.

12. Present petition has been preferred by the petitioner mainly on the grounds that documents with charge sheet were not supplied, Inquiry Officer was appointed without supplying the papers demanded at the time of filing of reply to charge sheet, comparative chart indicating the difference in recording working hours of the tractor was neither prepared correctly nor supplied before submission of reply by the petitioner. Further, that the petitioner was charged for wrong entries of working hours of tractor with effect from 4th February, 2004 to 9th February, 2004 whereas he was on leave on 8th and 9th February, 2004; working hours of the tractor were not calculated correctly and the Inquiry Officer did not record correct version of witnesses, but noted down statements himself manipulating the same in favour of respondent-Company and also that Standing Orders regarding proceedings of inquiry were not supplied, list of witnesses, statements of witnesses and daily log book of tractor with effect from 4th February, 2004 to 9th February, 2004 were not produced and further, the denial of Inquiry Officer to appoint Om Chand Sharma as assistant/representative of petitioner was also illegal.

13. It is contended on behalf of petitioner that there was no material before Inquiry Officer as well as management of respondent-Company so as to return finding against petitioner and to dismiss him pursuant thereto. Further that petitioner had not been provided relevant documents in time and denied effective and proper assistance of persons, as desired by him, so as to enable him to lead evidence in his support and to place material before the Inquiry Officer enabling him to refute the charge sheet and to prove his defence.

14. Reliance has been placed by the petitioner on pronouncement of apex Court in case titled as **The Board of Trustees of the Port of Bombay versus Dilipkumar Raghavendranath Nadkarni and others,** reported in **AIR 1983 Supreme Court 109,** wherein decision reached by Domestic Tribunal was held to be vitiated for the reason that inquiry was held in violation of the principle of natural justice on the ground that the delinquent was not afforded a reasonable opportunity to defend himself by not allowing the delinquent employee to be

represented by a legal practitioner despite seeking permission to appear through a legal practitioner whereas employer was represented by well qualified expert legal advisor.

15. Plea of petitioner that for want of adequate opportunity to defend his case by leading evidence in support of his contention is not tenable. It is settled position of law that the Labour Court can resort to calling for evidence of parties in an application filed for approval of dismissal in pursuance to domestic inquiry and in such eventuality, parties are free to lead evidence in support of their claim. In present case also, even if it is considered that petitioner was deprived of leading evidence and expert assistance during the inquiry, he was having opportunity to file response and lead evidence in support of his contentions before the Labour Court where, though, he was represented through well qualified Advocate and also appeared as a witness, but, had chosen not to file reply and to lead any evidence corroborating his plea now being taken in the writ petition as well as in response to the charge sheet.

16. In **Dilipkumar Raghavendranath Nadkarni's case (supra)** the decision of Domestic Tribunal was in question and delinquent employee was not having any opportunity thereafter to defend himself, whereas, in present case, after completion of domestic inquiry, an application for approval of dismissal of petitioner was filed by respondent-Company before the Labour Court and during adjudication of the said application, Labour Court had called the parties to file response and to lead evidence in support of their respective contentions without any circumvention. Therefore, in given facts of present case, the ratio of law laid down by the apex Court in **Dilipkumar Raghavendranath Nadkarni's (supra)** is not applicable.

17. Learned counsel for respondent-Company has relied upon judgment of the apex Court in case titled as **Cholan Roadways Ltd. versus G. Thirugnanasambandam,** reported in **(2005) 3 Supreme Court Cases 241,** wherein it has been held that the jurisdiction of Industrial Tribunal under Section 33 (2) (b) of the ID Act is a limited one and cannot be equated with that of Section 10 of ID Act and the principles of Evidence Act have no application in the domestic inquiry.

18. On the basis of this judgment, it has been contended that the Inquiry Officer had conducted inquiry in consonance with provisions of ID Act and the said inquiry cannot be rejected by applying rigours of Evidence Act.

19. In my opinion, this judgment has no relevance in present case as Labour Court, during adjudication of application for approval of dismissal of petitioner filed before it, has given adequate opportunity to parties to represent their case by filing pleadings and leading evidence.

20. It is also argued on behalf of petitioner that in para 8 of its application filed before the Labour Court, respondent-Company itself has referred that there were other references bearing No. 96/2000, 129/2000 and 152/2000 which were pending adjudication before the Labour Court and, therefore, in view of proviso to Section 33 (2) (b) of ID Act, respondent-Company was not entitled to discharge or dismiss the petitioner as respondent-Company had dismissed his services vide order, dated 10th June, 2004 and the application had also been filed on the very same day whereas proviso to Section 33 (2) (b) of ID Act provides that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of action taken by the employer.

21. Relying upon judgment of apex Court in case titled as **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. versus Ram Gopal Sharma and others,** reported in **(2002) 2 Supreme Court Cases 244,** it has been contended that non-compliance of proviso to Section 33 (2) (b) of ID Act has rendered the dismissal of petitioner void and inoperative.

22. There is no dispute with regard to ratio of law laid down by the apex Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.'s case (supra),** wherein it has been held that where an application is made under Section 33 (2) (b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine; whether

the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc.; and if the authority refused to grant approval, obviously it follows that the employee continues to be in service as if the order of discharge or dismissal had never been passed and though, the order of dismissal of discharge passed invoking Section 33 (2) (b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. Further held that in other words, this relationship comes to an end de jure only when the authority grants approval; if approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed and consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. But, in present case, after considering the evidence on record, authority has approved dismissal and the same is operative from the date of order as the application for approval of dismissal and payment of one month's salary, as envisaged in proviso, was made simultaneously.

23. Referring to the judgment of apex Court in case titled as **Bilaspur Raipur Kshetriya Gramin Bank and another versus Madanlal Tandon,** reported in **(2015) 8 Supreme Court Cases 461,** wherein for non-supply of documents with the charge sheet, which were basis for charges labelled against the delinquent employee, and supply of only some of irrelevant documents during departmental inquiry and also non-supply of list of arguments and witnesses produced during the course of inquiry, order of punishment, set aside by the High Court, has been upheld; counsel for the petitioner has canvassed for setting aside of domestic inquiry report and punishment imposed upon the petitioner on the basis of the said report.

24. In para 9 of the judgment, the apex Court has observed that even at the time of arguments, learned counsel appearing for employer was not able to demonstrate the supply of documents even during the course of inquiry, which were basis of inquiry report and for punishment, whereas, in present case, in cross-examination before the Inquiry Officer, the petitioner had categorically admitted supply of documents, though, delayed supply. In any case, all the documents were available with the petitioner while he was contesting the application for approval of his dismissal before the Labour Court, but nothing material was placed to refute the evidence available on record against him.

25. Relying upon **M/s. Firestone Tyre & Rubber Co. of India (P) Ltd. versus The Workmen Employed represented by Firestone Tyre Employees' Union,** reported in **AIR 1981 Supreme Court 1626,** it is contended on behalf of the petitioner that where the charge sheet was vague, it must be held that there is no proper inquiry and when it appears that inquiry conducted by the employer was not fair in the sense that proper charge had not been served on the employee or proper or full opportunity had not been given to the employee to meet the charges or inquiry had been affected by other grave irregularities vitiating it, then position would be that Tribunal would be entitled to deal with the merits of the dispute as to the dismissal of the employee itself and the same result would follow, if no inquiry had been held at all.

26. Further, it is argued that in present case, for the aforesaid reasons, the Labour Court should not have approved the dismissal of petitioner on the basis of irregular domestic inquiry.

27. As discussed hereinabove, petitioner has not filed any response to counter the application or domestic inquiry before the Labour Court and the evidence led by petitioner is also not sufficient to rebut the evidence led by respondent-Company and the findings returned by the Inquiry Officer on the basis of the said evidence.

28. Learned counsel for respondent-Company, while placing reliance on pronouncement of apex Court in case titled as **Jagdish Lal and others versus State of Haryana and others,** reported in **(1997) 6 Supreme Court Cases 538,** has pleaded that present petition deserves to be dismissed for unexplained and inordinate delay and laches as the impugned order

was passed by the Labour Court on 7th January, 2008 and the instant petition was filed in the Court on 6th July, 2008.

29. In response to plea of delay and laches, counsel for petitioner has relied upon judgment of apex Court in case titled as **Jasmer Singh versus State of Haryana and another,** reported in **(2015) 4 Supreme Court Cases 458,** wherein it has been held that provisions of Limitation Act, 1963 are not applicable to the proceedings under the ID Act and relief under it cannot be denied to the workman merely on the ground of delay.

30. In my opinion, this case is not applicable in present case as for deciding the issue of delay and laches, provisions of Limitation Act are not to be made applicable. Issue in this case has been decided with reference to proceedings under ID Act undertaken before the Labour Court and not with regard to invoking of extra ordinary jurisdiction under Article 226 of the Constitution of India for judicial review of decision of Labour Court.

31. However, I am not inclined to dismiss the claim of petitioner on the ground of delay and laches for the reason that the petitioner is a workman and has tried to explain delay caused in filing the instant petition in para 21 of the petitioner. Also, it cannot be ignored that ID Act is a beneficial legislation and proceedings arising out of the said Act, even under Article 226 of the Constitution of India, especially when preferred by a workman, should not ordinarily be disposed of on technical grounds as justice should not only be done but also seems to have been done.

32. Relying upon judgments of the apex Court in **A.P. SRTC versus Raghuda Siva Sankar Prasad,** reported in **(2007) 1 Supreme Court Cases 222;** and **Divisional Controller, Karnataka State Road Transport Corporation versus M.G. Vittal Rao,** reported in **(2012) 1 Supreme Court Cases 442,** it has been canvassed that judicial review under Article 226 of the Constitution of India on findings returned by a Tribunal on the basis of material placed before it is available only in case the Tribunal has ignored the evidence placed before it or the findings returned by Tribunal are totally perverse and contrary to the evidence on record. It is argued that power of judicial review cannot be exercised as a power of appellate Court to re-appreciate the finding of fact based on evidence before the Tribunal.

33. Respondent-Company has also relied upon judgment, dated 27th October, 2015, rendered by a Division Bench of this Court in case titled as **M/s Krishna Paper Board Industries versus Sh. Rakam Singh and another,** being **LPA No. 12 of 2009,** emphasizing upon the limits of judicial review by the Writ Court.

34. Considering ratio of law laid down by the apex Court, as also reiterated in **K.V.S. Ram versus Bangalore Metropolitan Transport Corporation,** reported in **(2015) 12 Supreme Court Cases 39,** it is settled law of land that in exercise of power of judicial review as well as superintendence, High Court can interfere with order of Tribunal only when there is patent perversity in order of Tribunal or where there is a gross and manifest failure of justice or principles of natural justice have been flouted.

35. Judgment of apex Court in case titled as **Raj Kumar Dixit versus Vijay Kumar Gauri Shanker, Kanpur Nagar,** reported in **(2015) 9 Supreme Court Cases 345,** has also been relied upon by respondent-Company to contend that no new pleadings are permissible in a petition under Article 226 of the Constitution of India to contest the order passed by the Labour Court and the judicial review is permissible on the basis of material already placed before the Tribunal.

36. In present case also, petitioner has pleaded certain averments against procedure and practice adopted by the Inquiry Officer during the inquiry but had not placed any material before the Labour Court by filing response to the application or to adduce evidence in support of his claim before the Labour Court despite having opportunity to do so. Therefore, such grounds introduced in the pleadings of present petition cannot be taken into consideration in a judicial review under Article 226 of the Constitution of India.

37. Learned counsel for petitioner has also argued that in any case, punishment imposed in present case does not commensurate to the alleged misconduct, is highly disproportionate and deserves to be interfered with.

38. Per contra, learned counsel for respondent-Company has relied upon pronouncement of apex Court in **Divisional Controller, KSRTC (NWKRTC) versus A.T. Mane,** reported in **(2005) 3 Supreme Court Cases 254,** wherein it has been held that one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment; on the contrary, it is the loss of confidence which is primary factor to be taken into consideration. It has further been held that when a person is found guilty of misappropriating the corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal.

39. Reliance has also been placed on **M.G. Vittal Rao's case (supra),** wherein after considering catena of judgments, the apex Court has held that once the employer has lost the confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed. It has further been held that it is a settled legal proposition that in a case of misconduct of grave nature, like corruption or theft, no punishment other than dismissal may be appropriate.

40. In present case, during domestic inquiry, petitioner had been found guilty of charges of causing loss to the respondent-Company by making wrong entries of working hours of the tractor, the said inquiry report was accepted by the authority and the petitioner has not substantiated his objections by leading sufficient evidence before the Labour Court.

41. For aforesaid discussion and settled law of land, no case to interfere with conclusion returned by the Labour Court and the Inquiry Officer with regard to domestic inquiry is made out.

42. There is another aspect to be looked into necessarily. It is not only the workman who suffers but there are his family members who are also sufferers of any action taken against the workman. Even if the management had lost faith in the petitioner and was considering his presence as a threat to his officers or to the work culture, then also it was not appropriate to deprive him from other benefits of his long service and it would have been appropriate to remove him alongwith terminal benefits.

43. The Court has an obligation to consider as to whether punishment imposed upon a workman is proportionate to his misconduct and at the time of considering the same, other relevant factors are also necessary to be considered.

44. Petitioner was employee of the lowest rank in respondent No. 2-Company and though, alleged in the charge sheet, but, there is nothing on record to establish that except present one, the petitioner was ever served with any notice for misconduct or he had involved in committing any misconduct.

45. Therefore, upholding the removal of petitioner from service, it is directed that all dues, including gratuity, leave encashment, unpaid bonus, EPF and pension etc., as admissible under law with reference to length of service of petitioner-workman shall be released by respondent-employer to him, in case such dues have not already been paid/released.

46. Petition is disposed of in aforesaid terms. Pending applications, if any, are also disposed of accordingly.

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

Ram Chander ....Petitioner.
Versus
Darshan Lal Arya ....Respondent

CMPMO No. 412 of 2016
Judgment Reserved on 9th March, 2018
Date of Decision 5th May, 2018

Code of Civil Procedure, 1908- Order X Rule 1- Order XII Rules 2, 2A and 3- Implied/constructive admission of a document- Held – Scope of Order X Rule 1 is different from scope envisaged by Order XII Rule 2A - Under Order X Rule 1, there can only be admission and denial of pleadings by the opposite parties – Whereas Order XII Rule 2 speaks of issuance of notice in prescribed form with suitable variation alongwith documents or copies thereof to other party to admit or deny documents relied upon by it – When opposite party does not admit or deny such documents, court can infer implied admission of same documents by invoking Order XII Rule 2-A. (Paras- 28 and 29)

Cases referred:
Kanwar Singh Saini vs. High Court of Delhi (2012)4 SCC 307
Badami (deceased) by her LRs vs. Bhali (2012) 11 SCC 574
Ved Prakash Wadhwa vs. Vishwa Mohan (1981)3 SCC 667

For the Petitioner: Shri Ashok K. Tyagi, Advocate.
For the Respondent: Shri K.S. Kanwar, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Instant petition has been filed by the petitioner-defendant (hereinafter referred to as the defendant) assailing impugned order dated 17.8.2016 passed by learned Civil Judge (Senior Division), Sirmaur at Nahan allowing an application under Order 12 Rule 3-A read with Section 151 CPC bearing CMA No. 19/6 of 2016 filed in civil suit No. 110/1 of 2012, by the respondent/plaintiff (hereinafter referred to as the plaintiff) whereby learned Civil Judge (Senior Division), Nahan has ordered deemed admission of the documents on behalf of defendant, referred in application.

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

3. Controversy in present petition in brief is that after completion of pleadings i.e. filing of replication on 10.7.2013, the trial Court listed the case for presence of parties on 19.8.2013, for admission and denial and compliance of Section 89 CPC. The said order reads as under:-

> "Replication filed. Taken on record. Let the file be listed for admission and denial and compliance of Section 89 CPC and presence of parties on 19.8.2013."

4. On 19.8.2013 defendant was not present and following order was passed:-

> "Defendant is not present, hence, admission and denial could not be done. Let the file be listed for settlement of issues on 11.9.2013."

5. Thereafter, on 11.9.2013, plaintiff preferred an application under Order 12 Rule 3-A CPC praying for recording admission or denial in respect of documents referred in application or legal consequences and effects of neglect of the defendant to admit or deny the same.

6. Defendant contested the said application by stating that documents had not been supplied to him and contents of those documents required to be proved on merits and as such those documents could not be answered in application and as the pleadings for damages based on criminal jurisprudence were to be proved by plaintiff beyond all doubts and also by cross examining the defendant wherein the defendant would have opportunity to explain his version.

7. With regard to issue of absence of defendant on the date fixed for admission and denial i.e. 19.8.2013, raised in the application, it was explained that absence of defendant was on account of illness and it was also claimed that counsel for the defendant had submitted to the Court that admission and denial in present case was not possible as the defendant had to explain all documents and plainitff was required to prove his case and for that reason only, the Court had passed the order that admission and denial was not possible and case was fixed for framing of issues.

8. It is also convassed that once it has been recorded by the Court that admission and denial was not possible and case was listed for framing of issues, it was not permissible under law to again ask the defendant to admit or deny the documents as it was amounting to review of order dated 19.8.2013 without having any jurisdiction to do so as the powers under Order 12 Rule 2-A CPC were to be exercised by the Court only once and the Court had already exercised the said power and thereafter the case was proceeded further, and plainitff could have moved the application for admission only within seven days from service of notice of suit whereas application in present case was moved at belated stage i.e. after about one year of service of defendant and thus for all these reasons, maintainability of application was questioned.

9. Relying upon judgment of Punjab and Haryana High Court in case ***G.M.Worsted Spinning Mills vs. Lakshmi Commercial Bank Ltd. Air 1986 P&H 310(1985)88 PLR 403)*** and referring the provisions of Order 12 Rules 2, 2-A, 3, 3-A CPC, learned Civil Judge has recorded the deemed admission of documents on behalf of defendant by allowing the application vide impugned order.

10. In civil suit admission may be of three kinds.

(i). Admission of fact;

(ii). Admission of document;

(a). Admission of documents along with contents.

(b). Admission of documents without admitting its contents.

(iii). Admission of question of law.

11. Admission and/or denial of question of law, contrary to law, is of no consequences like even if the defendant does not dispute or admit the jurisdiction of Court, it will have no affect on adjudication of issue of jurisdiction of Court on merits.

12. Mode of admission during trial can be classified in following manner:-

(I). Admission in pleadings;

(II). Admission by agreement;

(III). Admission by notice;

(a). Notice by party;

(i) to admit facts.

(ii) to admit documents.

(b). Notice by Court.

(i) to admit documents.

(IV). Admission in evidence

(a). Oral evidence.

(i). In examination in chief.

(ii). In cross examination.

(b). Documentary evidence.

(V). Admission may be

(a) expressed or

(b) Implied/constructive/deemed.

13. Civil Procedure Code provides admission of facts in pleadings, under the provisions of Orders 7 and 8 CPC. Admission otherwise than in pleadings is provided during examination by Court under Order 10 Rules 1 and 2, in answer to interrogatories under Order 11 Rules 8 and 22, on notice under Order 12 Rules 2, 3A and 4, on oath under Order 18 Rule 3 and by agreement of parties under Order 23 Rule 3 CPC.

14. Admission may be expressed as provided under Order 7 Rule 11, Order 11 Rule 22 and Order 12 Rules 2, 3A and 4, Order 10 Rules 1 and 2, Order 18 Rule 3 and Order 23 Rule 3 CPC and it may be constructive under Order 8 Rules 3, 4,5 or under Order 12 Rule 2-A CPC and also under Order 18 Rule 3 CPC.

15. Notice to admit documents has been provided under Rule 2 of Order 12 CPC. Rule 3 under Order 12 CPC provides that notice to admit documents shall be in the form No.9 in Appendix 'C' with such variations as circumstances required. Order 12 Rule 3A empowers Court also to call upon a party to admit any documents. Order 10 Rule 1 CPC deals with admission and denial with regard to pleadings of parties, whereas Order 12 Rule 2-A CPC provides deeming admission of documents, if any, which are not denied by party after service of a notice to admit those documents.

16. Order 12 Rule 3-A CPC empowers the Court, even if no notice to admit documents has been given under Rule 2, to record admission of documents "at any stage" of proceedings on "its own motion" after calling upon any party to admit any document and in case such also to record as to whether the party admits, or refuses or neglects to admit such document.

17. I am in agreement with the ratio laid down by Punjab and Haryana High Court in case ***G.M.Worsted Spinning Mills vs. Lakshmi Commercial Bank Ltd. AIR 1986 P&H 310 (1985) 88 PLR 403,*** where a party unreasonably neglects or refuses to admit a document, after calling upon that party by the Court under Order 12 Rule 3-A CPC to admit documents, provisions of deemed admission contained in Order 12 Rule 2-A CPC shall be applicable.

18. Order 10 Rule 1 CPC states that at the time of first hearing, the Court shall call upon the parties for admission or denial of pleadings of facts. It is now settled that first date of hearing in civil suit is when the case is called for hearing and Court has really gone into pleadings of parties and has applied its mind and such situation normally is after filing of replication. ***(See Kanwar Singh Saini vs. High Court of Delhi*** reported in ***(2012)4 SCC 307 , Badami (deceased) by her LRs vs. Bhali*** reported in ***(2012) 11 SCC 574*** and ***Ved Prakash Wadhwa vs. Vishwa Mohan (1981)3 SCC 667).***

19. Order 10 Rule 1 empowers the Court to call upon the parties to admit or deny the allegations made in pleadings whereas Order 12 Rule 4 CPC provides that any party by notice in writing at any time prescribed under this Rule before the day fixed for hearing may call any other party to admit any specific fact or facts mentioned in such notice, for the purpose of suit only. It also provides the consequences of refusal or neglect to admit the same within six days after the service of such notice or within such further time as may be allowed by Court. Rule 5 of Order 12 CPC provides Form of Notice to admit the facts and also Form for admissions of facts with variations as circumstances may require and Rule 6 empowers the Court to make such

order or give such judgment as it may think fit having regard to admission without waiting for determination of any other question between the parties.

20. Order 10 Rule 2 empowers the Court to conduct oral examination of parties or companion of the party or any person able to answer any material question relating to suit by party to the suit or his pleader is accompanied and to record the substance of such examination in writing under Rule 3 of Order 10 CPC. In case of refusal or inability of the pleader of any party or any such person accompanying a pleader as is referred to in Rule 2, Rule 4 empowers the Court to direct any party to appear in person on a date fixed which in the opinion of the Court is likely to able to answer any material in question relating to suit put to the pleader or any person exercising the power under Rule 2 of Order 10 CPC.

21. Order 10 Rule 1-A of CPC provides that after recording the admissions and denial, the Court shall direct the parties to the suit to opt either mode of settlement outside the Court as specified in Section 89 (1) of CPC and on option of parties to fix the date of admission before such Forum or authority as may be opted by the parties.

22. In the light of aforesaid provisions, present controversy in present petition is to be adjudicated upon.

23. In the present case, after filing of replication by the plaintiff, vide order dated 10.7.2013, the suit was listed for admission and denial and in compliance of Section 89 CPC with direction for presence of parties on 19.8.2013. On 19.8.2013 defendant was not present. Learned Civil Judge observed that for want of presence of defendant, admission and denial could not be done and he listed the case for settlement of issues on 11.9.2013.

24. As discussed above, it was stage of first hearing as provided under Order 10 Rule 1 CPC calling upon the parties by Court to admit or deny allegations of facts made in plaint or written statement, but are not expressly or by necessary implications admitted or denied by the party against whom they are made.

25. In order dated 10.7.2013 learned Civil Judge had also directed for compliance of Section 89 CPC. Order 10 Rule 1-A CPC provides that after recording the admission and denial, the Court shall direct the parties to the suit to opt either mode of settlement outside the Court as specified in Sub-section 1 of Section 89 CPC. It again reflects that direction to admit or deny the documents vide order 10.7.2013 was at the stage of Order 10 Rule 1 CPC. Therefore, this direction/order to the parties to admit or deny the facts was related to admission or denial of pleadings but not of documents as provided under Order 12 Rules 2 and 3-A CPC after notice by party or calling upon by Court to admit documents.

26. After passing of orders dated 10.7.2013 and 19.8.2013, defendant was never put to a notice or called upon by the Court to admit the documents except filing of application by plaintiff under Order 12 Rule 3-A CPC read with Section 151 CPC praying for recording defendant's admission or denial in respect to documents (Annexures A to L) referred in said application and/or to record legal consequences and effects of neglect of defendant to admit or deny those documents. In reply to the said application, defendant had neither admitted the documents nor denied the same. Defendant had evaded either to admit or deny those documents.

27. This application was filed assuming that admission and denial directed vide order dated 10.7.2013 was called by learned Civil Judge defendant for admission and denial of documents in the presence of parties. The said contention of plaintiff is misconceived. As discussed above, on 10.7.2013 the case was not fixed for admission and denial of documents by Court as provided under Order 12 Rule 3-A CPC. The said order is completely silent as to whether the case was fixed for admission and denial of facts in pleadings or documents. However, from the stage and contents of order, it can easily be inferred that it was the stage of asking for admission and denial of pleadings under Order 10 Rule 1 CPC, which relate to admission of allegation of facts made in pleadings. Whereafter, direction for recording admission and denial of documents was prayed on behalf of defendant by filing the application by plaintiff under Order 12 Rule 3-A

CPC. There is no notice served upon defendant as required under Order 12 Rule 2 read with Rule 3 CPC much less any order or direction issued by Court calling upon the defendant to admit the documents as provided in Order 12 Rule 3-A CPC.

28. Plaintiff has filed application under Order 12 Rule 3-A CPC on 11.9.2013 and defendant had filed reply to said application on 26.10.2013 and said application was decided on 17.8.2016. The said application though stated to have been filed under Rule 3-A of Order 12 CPC but can be considered notice under Rule 2 of Order 12 CPC. Rule 3 provides a Form of Notice to admit the documents, but it also provides that such Form can have variations according to circumstances and in present case when application was filed in the year 2013 and same was finally decided on 17.8.2016, it would not be appropriate to say that said application was not a notice in the Form as provided in CPC. Form No. IX in Appendix 'C' of CPC as referred in Rule 3 requires issuance of notice along with documents proposed to be adduced in evidence either in original or true copies thereof to the opposite party to admit the same, saving all just exceptions to the admissibility of all such documents as evidenced in the suit. In application, all documents, filed in the suit, are certified or original copies of those documents, which have been referred as Annexures A to L, have been supplied to the defendant. Therefore, this application can be considered as a notice to admit documents under Order 12 Rule 2 CPC.

29. Learned Civil Judge for invoking provision of deeming admission under Order 12 Rule 2A CPC has mistakenly referred order dated 10.7.2013 as an order of Court under Order 12 Rule 3-A CPC. But there is another fact which justifies action of learned Civil Judge to invoke provision of deeming admission of documents. Though there was neither any notice to defendant specifically mentioning Order 12 Rule 2 read with Rule 3 nor any specific order/direction of the Court calling upon the defendant mentioning Rule 3-A to admit the documents, however, there is an application filed by plaintiff for recording admission and denial of certain documents specifically mentioned in the application. Copy of the said application was served upon defendant and the Court had directed the defendant to file reply to the said application. But inspite of such notice in the shape of application and direction of the Court defendant had neither admitted nor denied the documents, but raised issue with regard to the contents of documents. The defendant had option to admit or deny those documents without admitting the contents if warranted. Therefore, learned Civil Judge had not committed any mistake by invoking provision of deeming admission of documents under Rule 2-A of Order 12 CPC.

30. It is also borne out from record that defendant was contesting this application under Order 12 Rule 3-A CPC and the trial Court has also not considered the said application as notice but has considered direction/order dated 10.7.2013 as a call by the Court upon the defendant to admit the documents. Therefore, considering entire facts and circumstances, it would be in the interest of justice to prove one more opportunity to the defendant to admit or deny documents after considering the application under Order 12 Rule 3-A CPC as a notice under Order 12 Rule 2 CPC. Even otherwise, even if application is not considered as a notice under Rule 2 of Order 12 CPC, the Court is competent and empowered under Order 12 Rule 3A CPC to call upon the defendant at any stage to admit the documents and the said power can also be exercised by this Court and also by the trial Court at this stage.

31. The defendant was put to notice of documents by filing an application on 11.9.2013 alongwith documents. Therefore, only one opportunity on a date to be fixed by the trial Court shall be granted to defendant to admit the documents. No further opportunity shall be granted thereafter.

32. In view of above discussion, present petition is disposed of with direction to the trial Court to provide an opportunity to defendant to admit the documents referred in application under Order 12 Rule 3-A CPC and proceed further in accordance with law including exercising its power under Rule 2-A of Order 12 CPC if necessary.

33. Parties are directed to appear before the trial Court on ***19.5.2018*** on which date the trial Court shall fix the date for admission and denial of documents under Order 12 CPC and thereafter proceed further in accordance with law.

34. Petition stands disposed of including all pending miscellaneous application(s), if any. Record be returned to the trial Court forthwith.

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

Rama Kant Misra ...Petitioner.

Versus

H.P. Labour Court-cum-Industrial Tribunal and another ...Respondents.

CWP No. 1390 of 2008
Reserved on:16.11.2017
Decided on: 05.05.2018

Industrial Disputes Act, 1947- Sections 33(2)(b) and 33(3)- **Industrial Disputes (Central) Rules, 1957-** Rule 61- 'Protected Workmen'- Meaning of – Employer passed order of dismissal against petitioner-employee after holding domestic inquiry and also complied provision of Section 33(2)– Employer referred matter to Labour Court for approval of dismissal as general reference of industrial dispute to which petitioner was also a party was already pending before it – Labour Court approving dismissal order of petitioner – Petition against – Petitioner arguing before High Court that being union leader he was 'protected workman' and employer could not have passed dismissal order during pendency of earlier reference before Labour Court – Held – Every registered trade union is to communicate to employer before 30th April, names and addresses of its officers who should be recognized as 'protected workman' – Name of petitioner was not figuring in that list supplied to employer – Thus, petitioner was not a 'protected workmen' – Section 33(3) of Act has no applicability – Order of Labour Court approving dismissal of petitioner upheld.

(Paras-40 and 41)

Cases referred:

Yallawwa (Smt) versus Shantavva (Smt), (1997) 11 Supreme Court Cases 159

Union of India and others versus Dinanath Shantaram Karekar and others, (1998) 7 Supreme Court Cases 569

V.N. Bharat versus Delhi Development Authority and another, (2008) 17 Supreme Court Cases 321

Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. versus Ram Gopal Sharma and others, (2002) 2 Supreme Court Cases 244

Indian Telephone Industries Ltd. and another versus Prabhakar H. Manjuare and another, (2003) 1 Supreme Court Cases 320

Jagdish Lal and others versus State of Haryana and others, (1997) 6 Supreme Court Cases 538

A.P. SRTC versus Raghuda Siva Sankar Prasad, (2007) 1 Supreme Court Cases 222

Divisional Controller, Karnataka State Road Transport Corporation versus M.G. Vittal Rao, (2012) 1 Supreme Court Cases 442

M/s. Firestone Tyre & Rubber Co. of India (P) Ltd. versus The Workmen Employed represented by Firestone Tyre Employees' Union, AIR 1981 Supreme Court 1626

Raj Kumar Dixit versus Vijay Kumar Gauri Shanker, Kanpur Nagar, (2015) 9 Supreme Court Cases 345

K.V.S. Ram versus Bangalore Metropolitan Transport Corporation, (2015) 12 Supreme Court Cases 39

For the petitioner: Mr. Rajnish Maniktala, Advocate.
For the respondents: Mr. R.L. Sood, Senior Advocate, with Mr.Sanjeev Kumar, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Present petition has been instituted assailing order, dated 15th January, 2008, passed by H.P. Industrial Tribunal-cum-Labour Court, Shimla (for short "Labour Court") whereby an application preferred by employer (respondent No. 2) under Section 33 (2) (b) of Industrial Disputes Act, 1947 (for short "ID Act") for approval of dismissal of petitioner herein with effect from 24th February, 2001 after completion of domestic inquiry against him, upholding the findings of management of respondent No. 2 qua dismissal of the petitioner has been allowed (for short "impugned order").

2. Petitioner had been working as a workman with respondent No. 2 since 5th January, 1978. On 1st July, 2000, he was served with a charge sheet (Annexure P-1) alleging therein that on 30th June, 2000, he left his seat at 11.45 a.m. and forcibly entered in new unit of the factory, created unnecessary nuisance alongwith other workers and warned the officers to advice their staff failing which dire consequences would follow and thereafter, on the same day, at 5.00 p.m., he alongwith his companions beat one Mr. Ravinder Tiwari with stone and fist blows while he was going home on his scooter after his duty hours. Petitioner was suspended with immediate effect during inquiry with a direction to file response to the charge sheet within three days.

3. Petitioner filed response (Annexure P-2) on 3rd July, 2000, refuting the allegations of charge sheet stating that charge sheet was illegal, concocted, unconstitutional and contrary to facts based on wrong information. It was further stated that on 30th June, 2000, when he was taking his lunch after working till lunch time, he received information that Sheetla Parsad had been beaten up by foreman whereupon he went there and wrote a complaint of Sheetla Parsad addressing the management, got it signed by workers, handed over the same to Managers during lunch time and returned to his own department. It was also stated that allegation about beating Ravinder Tiwari was also false, baseless and wrong and had been labelled for assisting Sheetla Parsad in writing his complaint and getting the signatures of workers thereon, who were present at the time of incident. It was also stated that he was Joint Secretary of Kapda Mazdoor Lal Zhanda Union and the Union had served a demand notice to Managers and the charge sheet might have been for that reason also.

4. On finding the reply filed by the petitioner unsatisfactory, management appointed Inquiry Officer, who submitted ex-parte inquiry report (Annexure P-10) on 8th January, 2001 stating therein that information of date of inquiry was sent to petitioner on 18th August, 2000 directing him to appear before the Inquiry Officer on 25th August, 2000, but the said letter was received back with endorsement that no such person was residing there. Thereafter, information was again sent for the dates fixed on 6th October, 2000 and 14th October, 2000, however, the petitioner did not appear before the Inquiry Officer whereupon last opportunity was granted to petitioner to appear on 6th January, 2001. For service of petitioner notices were pasted on the gate of the factory and notice for 6th January, 2001 was also published in daily newspaper *Dainik Tribune* on 3rd January, 2001, but the petitioner did not join the inquiry whereupon ex-parte inquiry was conducted. Mr. Balbir Singh Thakur presented the case on behalf of respondent No. 2-Company and examined the witnesses in support of charge sheet. After going through the statements of witnesses and record, the Inquiry Officer submitted his report admitting the allegations of charge sheet to be true. Inquiry Officer had also informed petitioner vide registered letter, dated 10th January, 2001 (Annexure P-11) about submission of inquiry report, dated 8th January, 2001.

5. After receiving the inquiry report, management of respondent No. 2 decided to dismiss services of the petitioner and sent registered AD to him on 23rd February, 2001 with information that as an industrial dispute under general reference was pending before the Labour Court, Shimla in which petitioner was also one of a workman, respondent No. 2 had been filing an application under Section 33 (2) (b) of the ID Act for approval to dismiss petitioner as a part of the same transaction and one month salary was also sent to petitioner alongwith the notice.

6. In application preferred by respondent No. 2 before the Labour Court (Annexure P-3), petitioner was served. After service, petitioner filed a reply (Annexure P-4) to the said application, whereafter parties were permitted to lead evidence in support of their respective claims. Respondent No. 2-Company examined Shri A.K. Sinha as PW-1 and petitioner appeared as RW-1 (Annexure P-5).

7. After considering the material placed before it, the Labour Court approved the finding of the management of respondent No. 2-Company upholding the dismissal of petitioner vide the impugned order.

8. Present petition has been preferred by the petitioner mainly on the ground that he was not granted opportunity of being heard and ex-parte inquiry was conducted without effecting service upon him properly despite the fact that he was available in Baddi area and very much agitating for rights of workmen, which is evident from copies of judgments (Annexures P-13/1 to P-13/8) passed by Judicial Magistrates in various criminal cases lodged by the management of respondent No. 2-Company against petitioner and other Union leaders wherein petitioner was duly served and defended the said criminal proceedings. Copies of summons issued by the Criminal Courts served upon petitioner during the period in which inquiry was initiated and completed have also been placed on record as Annexures P-14/1 to P-14/6 in order to substantiate that respondent No. 2-Company had not made any serious and effective efforts to serve petitioner during inquiry so as to deprive his valuable right to defend him.

9. It is contended on behalf of petitioner that there was no material before Inquiry Officer as well as management of respondent No. 2-company so as to return finding against petitioner and to dismiss him pursuant thereto. Further that petitioner has been deprived from leading evidence in his support and to place material before the Inquiry Officer enabling him to refute the charge sheet and to prove his defence. It is also contended that alleged notices (Annexure P-7 and P-8) were never served upon petitioner and document Annexure P-6 is not having necessary details to prove its posting except the address of petitioner thereon.

10. It is further contended on behalf of the petitioner that notice in newspaper (Annexure P-9), which was required to be published by Inquiry Officer, was published by respondent No. 2, i.e. Birla Textile Mills. Further that the said notice was published in a newspaper which was not having wide circulation in the area. Also that pasting of notices on the gate of premises of factory cannot be termed as effective and proper service of petitioner.

11. Relying upon the judgment rendered by apex Court in case titled as **Yallawwa (Smt) versus Shantavva (Smt),** reported in **(1997) 11 Supreme Court Cases 159,** it is contended on behalf of the petitioner that substituted service has to be resorted as the last resort when respondent cannot be served in ordinary way and the Presiding Officer is satisfied that there is reason to believe that respondent is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way. It is argued that in present case, substituted service was resorted to without adhering to the basic principle for adopting substituted service in place of service through ordinary course and, thus, for want of proper service of petitioner, inquiry report deserves to be set aside.

12. Reliance has also been placed by the petitioner on pronouncement of apex Court in case titled as **Union of India and others versus Dinanath Shantaram Karekar and others,** reported in **(1998) 7 Supreme Court Cases 569,** wherein the apex Court has held that a single effort for service of respondent cannot be termed to be sufficient and service of notice sought to be effected on respondent by publication in a newspaper without making any earlier effort to serve

him personally by tendering show cause notice either through office peon or by registered post was held illegal. It has further been observed that there was nothing on record to indicate that the newspaper, in which show cause was published, was a popular newspaper which was expected to be read by public in general or it had a wide circulation in the area or the locality where the respondent lived and, therefore, the respondent was held not to be served.

13. Placing reliance on judgment of the apex Court in case titled as **V.N. Bharat versus Delhi Development Authority and another,** reported in **(2008) 17 Supreme Court Cases 321,** it has been contended on behalf of petitioner that in view of specific stand of petitioner that he was never informed or served with any notice notifying the date, time and place of alleged inquiry and the notice was published in a newspaper not widely circulated in the area where the dispute arose, the statutory presumption of service under Section 114 Ill. (f) of Evident Act is not available in present case.

14. It is also argued on behalf of petitioner that in para 8 of its application (Annexure P-3) filed before the Labour Court, respondent No. 2-Company itself has referred that there were other references bearing No. 96/2000, 129/2000, 56/2000 and 152/2000 which were pending adjudication before the Labour Court and, therefore, in view of proviso to Section 33 (2) (b) of ID Act, respondent No. 2-Company was not entitled to discharge or dismiss the petitioner as respondent No. 2-Company had dismissed his services vide order, dated 24th February, 2001 and the application (Annexure P-3) had also been filed on the very same day whereas proviso to Section 33 (2) (b) of ID Act provides that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of action taken by the employer.

15. Relying upon judgments of apex Court in cases titled as **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. versus Ram Gopal Sharma and others,** reported in **(2002) 2 Supreme Court Cases 244;** and **Indian Telephone Industries Ltd. and another versus Prabhakar H. Manjuare and another,** reported in **(2003) 1 Supreme Court Cases 320,** it has been contended that non-compliance of proviso to Section 33 (2) (b) of ID Act has rendered the dismissal of petitioner void and inoperative.

16. Learned counsel for respondent No. 2-Company, while placing reliance on pronouncement of apex Court in case titled as **Jagdish Lal and others versus State of Haryana and others,** reported in **(1997) 6 Supreme Court Cases 538,** has pleaded that present petition deserves to be dismissed for unexplained and inordinate delay and laches as the impugned order was passed by the Labour Court on 15th January, 2008 and the instant petition was filed in the Court on 12th August, 2008.

17. Relying upon judgments of the apex Court in **A.P. SRTC versus Raghuda Siva Sankar Prasad,** reported in **(2007) 1 Supreme Court Cases 222;** and **Divisional Controller, Karnataka State Road Transport Corporation versus M.G. Vittal Rao,** reported in **(2012) 1 Supreme Court Cases 442,** it has been canvassed that judicial review under Article 226 of the Constitution of India on findings returned by a Tribunal on the basis of material placed before it is available only in case the Tribunal has ignored the evidence placed before it or the findings returned by Tribunal are totally perverse and contrary to the evidence on record.

18. It is argued that power of judicial review cannot be exercised as a power of appellate Court to re-appreciate the finding of fact based on evidence before the Tribunal.

19. Respondent No. 2-Company has also relied upon judgment, dated 27th October, 2015, rendered by a Division Bench of this Court in case titled as **M/s Krishna Paper Board Industries versus Sh. Rakam Singh and another,** being **LPA No. 12 of 2009,** emphasizing upon the limits of judicial review by the Writ Court.

20. Relying upon **M/s. Firestone Tyre & Rubber Co. of India (P) Ltd. versus The Workmen Employed represented by Firestone Tyre Employees' Union,** reported in **AIR 1981**

Supreme Court 1626, it is contended on behalf of the petitioner that where the charge sheet was vague, it must be held that there is no proper inquiry and when it appears that inquiry conducted by the employer was not fair in the sense that proper charge had not been served on the employee or proper or full opportunity had not been given to the employee to meet the charges or inquiry had been affected by other grave irregularities vitiating it, then position would be that Tribunal would be entitled to deal with the merits of the dispute as to the dismissal of the employee itself and the same result would follow, if no inquiry had been held at all.

21. Further, it is argued that in present case, for the aforesaid reasons, the Labour Court should not have approved the dismissal of petitioner on the basis of irregular domestic inquiry. As discussed hereinabove, the evidence led by petitioner is not sufficient to rebut the evidence led by respondent-Company and the findings returned by the Inquiry Officer on the basis of the said evidence.

22. of apex Court in **Raj Kumar Dixit versus Vijay Kumar Gauri Shanker, Kanpur Nagar,** reported in **(2015) 9 Supreme Court Cases 345,** has also been relied upon by respondent No. 2-Company to contend that no new pleadings are permissible in a petition under Article 226 of the Constitution of India to contest the order passed by the Labour Court and the judicial review is permissible on the basis of material already placed before the Tribunal and, in present case, petitioner has failed to adduce evidence in support of his claim not only before the Inquiry Officer but also before the Labour Court despite having opportunity to do so.

23. It is also contended on behalf of respondent No. 2-Company that the judgments passed by the Judicial Magistrates and summons placed on record as Annexures P-13/1 to P-13/8 and P-14/1 to P-14/6, respectively, though, are not permissible to be placed as evidence in support of claim of the petitioner at this stage, however, even if considered, they are of no help to the petitioner, rather these documents establish that petitioner was available in the area of dispute but was avoiding his service deliberately in order to linger on the inquiry initiated against him.

24. Considering ratio of law laid down by the apex Court, as also reiterated in **K.V.S. Ram versus Bangalore Metropolitan Transport Corporation,** reported in **(2015) 12 Supreme Court Cases 39,** it is settled law of land that in exercise of power of judicial review as well as superintendence, High Court can interfere with order of Tribunal only when there is patent perversity in order of Tribunal or where there is a gross and manifest failure of justice or principles of natural justice have been flouted.

25. I am not inclined to agree with the learned counsel for the petitioner that petitioner was not properly and effectively served during the inquiry. Plea of petitioner, that Annexure P-6 does not contain any material proving that it was ever posted to petitioner, is not tenable for the reason that it is a copy of envelope which would have only the address of recipient, i.e. petitioner and sender, i.e. respondent No. 2, which is very much available in this document. Not only this, the said document contains the postal stamp and also letter No. 3809 with posting date being 21st August, 2000.

26. So far as the factum of publication in *Dainik Tribune* and circulation of the said newspaper is concerned, learned counsel for respondent No. 2-Company has rightly pointed out that *Dainik Tribune* is one of the newspapers recognized even by the High Court for publication of notices including summons for substituted service. No material has been placed on record including in the statement of petitioner as RW-1 to establish that *Dainik Tribune* was not having circulation in the area of Baddi, rather, in his cross-examination, petitioner had stated that he did not know that *Dainik Tribune* was in circulation in Baddi. He had not denied by saying that *Dainik Tribune* was not having circulation in Baddi, though, in his reply, he had stated that notice was published in a paper not widely circulated in the area but that plea is not substantiated by leading any evidence.

27. It has also come on record that notices were also pasted on the gate of factory premises. Presence of petitioner in the factory premises including the gate of factory is evident

from the judgments placed on record by the petitioner himself as Annexures P-13/2 P-13/3, P-13/5, P-13/6 and P-13/7, wherein incidents, dated 13th July, 2000; 9th November, 2000; 13th August, 2000; 27th August, 2000 and 14th September, 2000 had taken place either inside the factory premises or outside the date of factory. In all these cases, petitioner is one of the accused.

28. Plea of petitioner, that when he was served in criminal cases, had respondent No. 2-Company made serious/effective efforts, he could have been served intimating the date fixed by Inquiry Officer, is also not tenable for the reason that in criminal cases, the accused is served by the police after searching him all around in the area whereas for service of registered AD, the postman can only approach and knock the door of the house of the addressee, who can conveniently be avoided in case the addressee is not interested to receive the letter.

29. In the facts of present case, the ratio of law laid down by the apex Court in its pronouncements in **V.N. Bharat, Yallawwa and Dinanath Shantaram Karekar's cases (supra),** relied upon by the petitioner, is not applicable. In present case, no statutory presumption under Section 114 Ill. (f) of Evidence Act has been drawn only after posting registered letter(s)/notice(s) to petitioner, but, thereafter, notice was pasted on gate of factory and publication of notice was also made in daily newspaper. Pasting of notice on gate of factory and publication thereof in the newspaper was also resorted only after issuing registered AD letters more than once. Presence of petitioner in the area has not been disputed. As also evident from copies of judgments passed by Judicial Magistrates placed on record by the petitioner, the petitioner was very much present in the area, not only area, but, in fact, the premises of factory and, therefore, the Inquiry Officer was right in believing that petitioner was avoiding his service through ordinary course, i.e. registered letters, and the publication of notice in the newspaper *Dainik Tribune,* being a well recognized paper for publication of notices even by High court, cannot be said to have been made in an unpopular newspaper.

30. Further, petitioner is not an ordinary workman, but is office bearer of Union having knowledge about the rights of workman and is also well versed with the procedure to be adopted by the management after issuing the charge sheet and consequences on failure to defend him in a charge sheet issued to him. In present case, charge sheet was duly served upon the petitioner and he had also filed reply to the same. He was suspended from service from the date of service of charge sheet. According to him, no suspension allowance was being paid to him. His suspension was also not revoked. In such circumstances, it is unbelievable and unnatural conduct that petitioner did not enquire about the fate of charge sheet but continued to be a suspended workman and waited for summons from Labour Court in application for approval of his dismissal. Therefore, plea of the petitioner that he remained uninformed about inquiry is not tenable.

31. Appreciating the entire facts on this issue, it can easily be inferred that petitioner was avoiding the service deliberately so as to get the findings of Inquiry Officer set aside on this sole ground.

32. There is no dispute with regard to ratio of law laid down by the apex Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.'s case (supra),** wherein it has been held that where an application is made under Section 33 (2) (b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine; whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc.; and if the authority refused to grant approval, obviously it follows that the employee continues to be in service as if the order of discharge or dismissal had never been passed and though, the order of dismissal of discharge passed invoking Section 33 (2) (b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. Further held that in other words, this relationship comes to an end de jure only when the authority grants approval; if approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the

order of discharge or dismissal had never been passed and consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. But, in present case, after considering the evidence on record, authority has approved dismissal and the same is operative from the date of order as the application for approval of dismissal and payment of one month's salary, as envisaged in proviso, was made simultaneously.

33. Facts in **Indian Telephone Industries Ltd.'s case (supra);** wherein after refusal to approve the first order of dismissal for want of compliance of proviso to Section 33 (2) (b) of ID Act, second order of dismissal was passed on the assumption that non-compliance of requirement of proviso was only a technical breach and after complying with the requirement of proviso, second order of dismissal could be passed; are entirely different to that of the instant case. In present case, requirement of proviso has already been complied with simultaneously at the time of passing the dismissal order.

34. Similarly, plea of petitioner that for want of adequate opportunity to defend his case by leading evidence in support of his contention is also not tenable. It is settled position of law that the Labour Court can resort to calling for evidence of parties in an application filed for approval of dismissal in pursuance to domestic inquiry and in such eventuality, parties are free to lead evidence in support of their claim. In present case also, even if it is considered that petitioner was deprived of leading evidence during the inquiry, he was having opportunity to lead evidence in support of his contentions before the Labour Court where, though, he appeared as a witness as RW-1, but, has not led any evidence corroborating his plea taken in the reply to the application as well as response to the charge sheet.

35. His claim is that he had not indulged in the activities, as alleged in the charge sheet, but had only assisted Sheetla Parsad to file his complaint with the management after getting signatures thereon of other workmen present on the spot when Sheetla Parsad was beaten by foreman. But, the petitioner has failed to produce not only Sheetla Parsad but any other workman who had witnessed the incident, as alleged by the petitioner.

36. I may not be in agreement with the Labour Court that the petitioner could have produced the application of Sheetla Parsad as the said application, if any, might be lying with respondent No. 2-Company and not with the petitioner. However, the persons, including Sheetla Parsad, who had been helped by the petitioner, could have been easily examined as witness in support of the petitioner.

37. In reply to charge sheet, petitioner had also taken a ground that the charge sheet might have been the result of submitting a demand notice to management by the Union. In his statement in the Labour Court, the petitioner is completely silent in this regard. It is not a case where the workman was defending him in person before the Labour Court, but, he was duly represented by the counsel and despite having been represented by an expert, no material whatsoever has been placed on record before the Labour Court to substantiate the plea of petitioner.

38. So far as the prayer of respondent No. 2-company for dismissal of petitioner on the ground of delay and laches is concerned, I am not inclined to accept the same as it cannot be ignored that petitioner is a workman and also in para 16 of the petition, the petitioner has duly explained the period spent during the intervening period after passing of impugned order and filing of petition.

39. Learned counsel for the petitioner has contended that petitioner was an office bearer of registered trade union and, thus, being a 'protected workman', during the pendency of references/proceedings in respect of an industrial dispute before the Labour Court, respondent No. 2-Company could not have taken the impugned decision punishing him by dismissal or otherwise in view of sub-section (3) of Section 33 of the ID Act.

40. Plea of petitioner is not sustainable. 'Protected workman' has been defined in Rule 61 of The Industrial Disputes (Central) Rules, 1957, wherein it is provided that every

registered trade union connected with an industrial establishment, to which the Act applies, shall communicate to the employer before 30th April every year, the names and addresses of such of the officers of union, who are employed in that establishment and who, in the opinion of the union should be recognized as 'protected workmen' and any change in the incumbency of any such officer shall be communicated to the employer by the union within fifteen days of such change. In response thereto, employer shall, subject to limit of number of workmen to be recognized as 'protected workmen', shall recognize such workmen to be 'protected workmen' for the purpose of sub-section (3) of Section 33 of ID Act and communicate the same to the union in writing within fifteen days of receipt of information from the trade union and the life of such 'list of protected workmen' is twelve months from the date of such communication. In present case, there is nothing on record to indicate that trade union had ever communicated the name of petitioner for enlisting him as a 'protected workman' and/or in response thereto, respondent No. 2-Company had conveyed such recognition

41. For aforesaid discussion and settled law of land, no case to interfere with conclusion returned by the Labour Court and the Inquiry Officer with regard to domestic inquiry is made out.

42. There is another aspect to be looked into necessarily. It is not only the workman who suffers but there are his family members who are also sufferers of any action taken against the workman. Even if the management had lost faith in the petitioner and was considering his presence as a threat to his officers or to the work culture, then also it was not appropriate to deprive him from other benefits of his long service and it would have been appropriate to remove him alongwith terminal benefits.

43. The Court has an obligation to consider as to whether punishment imposed upon a workman is proportionate to his misconduct and at the time of considering the same, other relevant factors are also necessary to be considered.

44. Petitioner was employee of the lowest rank in respondent No. 2-Company and though, alleged in the charge sheet, but, there is nothing on record to establish that except present one, the petitioner was ever served with any notice for misconduct or he had involved in committing any misconduct.

45. Therefore, upholding the removal of petitioner from service, it is directed that all dues, including gratuity, leave encashment, unpaid bonus, EPF and pension etc., as admissible under law with reference to length of service of petitioner-workman shall be released by respondent-employer to him, in case such dues have not already been paid/released.

46. Petition is disposed of in aforesaid terms. Pending applications, if any, are also disposed of accordingly.

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

Reena Devi. ...Petitioner

Versus

Suresh Kumar. ...Respondent.

CMPMO No. 124 of 2018
Date of Decision: 5.5.2018

Code of Civil Procedure, 1908- Section 24- **Hindu Marriage Act, 1955-** Section 13- Transfer of divorce petition – Wife residing at 'Kandaghat' with her children, whereas her husband residing at 'Chambaghat' near Solan – He intentionally filed divorce petition before District Judge, Nahan by

showing himself as a resident of Rajgarh, District Sirmour- High Court ordered transfer of divorce petition to court of District Judge, Solan. (Paras-5 and 6)

For the Petitioner: Mr. Anirudh Sharma, Advocate, vice Mr.P.S. Goverdhan, Advocate.
For the Respondent: None.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

Notice issued to respondent has been received back duly served, but there is no representation on his behalf, hence he is proceeded ex parte.

2. Petitioner is wife of respondent. Respondent has filed a petition for dissolution of marriage under Section 13 of the Hindu Marriage Act before learned District Judge, Sirmaur at Nahan, H.P. In the said petition, respondent has been shown to be residing before marriage and at the time of filing of the petition at Rajgarh in District Sirmaur, H.P.

3. Present petition has been filed by petitioner-wife for transfer of said petition preferred by respondent/husband to the Court of learned District Judge, Solan on the ground that at present, petitioner/wife is residing in Village Silhari, Tehsil Kandaghat, District Solan, H.P. and respondent/husband is also residing in Village Shikargaon, Post Office Salogra, Tehsil and District Solan, H.P. In petition for divorce, respondent/husband, before marriage, has shown himself as resident of Chambaghat, Tehsil and District Solan, H.P. and at the time of filing of petition, his place of resident has been mentioned in Village Shikargaon, referred supra.

4. According to petitioner, she is residing in village Silhari (Kandaghat) along with her two daughters, who are pursuing their studies in LR Group of College at Oachghat, Solan and Polytechnic College, Kandaghat, respectively. Her son is studying in 9th standard and is residing with her parents at Rajgarh. It is further stated that it is difficult for daughters of the petitioner to commute regularly from Rajgarh to Kandaghat and Solan, therefore, they are residing at Kandaghat and also petitioner being unemployed is also finding it difficult to bear the expenses of routine day to day life.

5. It is submitted on behalf of petitioner that both i.e. petitioner and respondent, are residing near Solan town and therefore, it would be easier for both of them to contest divorce petition at Solan. It is further submitted that respondent-husband has chosen to file the petition before learned District Judge, Sirmaur at Nahan with deliberate intention to harass the petitioner, despite having knowledge that petitioner along with her daughters is residing in Village Silhari (Kandaghat). As Nahan is situated at a distance of 100 kilometers from Kandaghat, whereas Solan is situated at 15 Kilometers from Kangadhat and about 5-7 kilometers from the present place of residence of respondent. Therefore, transfer of divorce petition from Nahan to Solan has been advocated.

6. Considering the facts and circumstances discussed hereinabove, I am of the opinion that it would be in the interest of both the parties to transfer divorce petition bearing No. 27HMA/3 of 2018, titled as Suresh Kumar Vs. Reena Devi, filed under Section 13 of the Hindu Marriage Act for dissolution of marriage, from learned District Judge, Sirmaur at Nahan to learned District Judge, Solan. Therefore, transfer of the said divorce petition is ordered accordingly.

7. It is informed that the next date of hearing before learned District Judge, Sirmaur at Nahan is fixed for 11th May, 2018. On that date petitioner shall produce certified copy of this order before learned District Judge, Sirmaur at Nahan, who in compliance thereof shall

transfer the record of the case to learned District Judge, Solan within two weeks, directing the parties to appear before learned District Judge, Solan on **1st June, 2018**.

8. The petition is allowed in the aforesaid terms.

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

Jagjit Singh & others .....Appellants.
Versus
State of H.P. & another .....Respondents.

RFA No. 5 of 2008.
Reserved on : 1st May, 2018.
Date of Decision: 7th May, 2018.

Code of Civil Procedure, 1908- Order XXXIX Rules 1 & 2- Ad interim Mandatory Injunction – When can be availed of - Trial Court granting ad interim mandatory injunction of delivery of possession to plaintiff- Appellate Court upholding trial court's order – Petition against by defendants- Held, Ad interim mandatory injunction can be granted to restore or preserve last known uncontested status or for undoing illegal acts committed upon suit property by errant litigant(s) on making out a very strong case for trial – It shall be of a higher standard than a prima facie case – On facts, the plaintiff had appended only a copy of e-mail sent by him to Superintendent of Police regarding his dispossession – No material placed on record suggesting his exclusive possession over suit property and dispossession therefrom – Petition of defendants allowed – Order (s) of lower courts set aside – Application filed under Order XXXIX Rules 1 and 2 dismissed. (Paras-3 to 6)

For the Appellant(s): Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the respondent(s): Mr. Yudhvir Singh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the award pronounced by the learned Reference Court, upon, Land Reference Petition No. 11-S/4 of 2006/04, whereunder, the aforesaid reference petition, stood hence dismissed.

2. The land acquisition collector concerned, had vis-a-vis the landowners' land, as, brought to acquisition, hence, pronounced an award, whereunder, he assessed compensation amount vis-a-vis the lands, of the landowners, in the hereinafter extracted manner:-

Sr. No.	Classification of land	Rate per Bihga
1	Kulahu Awal	Rs.1,53,579-20
2.	Kulahu Doyam	Rs.1,26,958-80
3.	Bakhal Awal	Rs.79,861-20
4.	Banjar/Ghasni	Rs.12,286-20

The aforesaid computation of compensation, at variant rates vis-a-vis contradistinct categories of land, brought to acquisition, apparently, is in consonance, with, the apposite rates, as, approved by the Deputy Commissioner. The petitioner being aggrieved by the award pronounced, by the Land Acquisition Collector concerned, had hence constituted before the Collector concerned, a petition under Section 18 of the Land Acquisition Act, for hence it being referred to the learned Reference Court. Upon the learned Reference Court, hence, receiving the petition, cast, under the provisions of Section 18 of the Land Acquisition Act, it proceeded to pronounce the impugned award. Being aggrieved therefrom, the landowners/appellants herein, hence, motioned this Court.

3. The learned Reference Court, had discountenanced, the probative vigour, of, the sale exemplars, respectively borne in Ex.PW4/A, and, the one borne in Ex.PW1/A. The merit-worthiness of the learned Reference Court in discarding the aforesaid sale exemplars, is to be tested, on anvil, of, existence, of, evidence in display of (a) lands respectively borne therein, being established by cogent evidence, to be holding vis-a-vis the land(s) brought to acquisition, the requisite, proximity in location angle, and, (b) proximity in time angle, unfolded by the closest contemporaneity in timing, of, execution of the apposite sale exemplars, and, the issuance of the apposite notification, whereunder the land(s) of the appellants herein hence stood brought to acquisition.

4. For determining whether the aforesaid sale exemplars, hence, satiating the principle, of the lands embodied therein, holding proximity in time angle vis-a-vis the lands brought to acquisition, an allusion to the notification, issued under Section 4 of the land Acquisition Act, is imperative, wherein, it is displayed, of it, being issued in the year 1997, and, with the sale exemplars being also executed in proximity thereto, thereupon, the test, of, occurrence, of, imperative inter se proximity, of, time angle, arising, from evident execution(s) of sale deeds hence occurring in close proximity vis-a-vis the issuance of the apposite notification, is evidently meted satiation. However, even if the aforesaid parameter, is evidently satiated, nonetheless it is also imperative, for, the claimants, for, hence constraining any placing, of, any implicit reliance thereupon, to also adduce, further evidence in satiation of the other, principle, of proximity in location angle, (a) arising from the lands borne, in the respective sale exemplars, being located in the closest proximity, to the lands brought to acquisition. However, a close reading of the testifications, of, the petitioners' witnesses, omits to unveil, of theirs making, any, vivid clear echoing(s) of the lands borne, in the sale exemplars, hence, holding the closest proximity in location vis-a-vis the location, of, the lands brought to acquisition, thereupon, with the aforesaid principle remaining unsatiated, hence, no reliance can be placed upon the sale exemplars.

5. Be that as it may, the learned reference Court, had also countenanced, the contradistinctivity(ies) in the approved market rates vis-a-vis contradistinct categories of lands, as, brought to acquisition, for hence its assessing the compensation amount. The aforesaid countenancing, by the learned refence Court, does not warrant any vindication, being meted thereto, (a)especially given the lands brought to acquisition, being evidently acquired for a common purpose, inasmuch as for construction of pump house, and, a link road. The Land Acquisition Collector concerned, under, the impugned award, determined compensation qua the lands brought, to acquisition, at diverse rate(s), vis-a-vis contradistinct/varying categories of land, as, were brought, to acquisition. The aforesaid diverse determination(s) of compensation amounts, for contradistinct categories of lands, is per se illegal, given a catena of judicial verdicts, making forthright pronouncements, (i) of, though acquired lands, hence, carrying different, and, varying classifications, nonetheless, when they are evidently acquired for a common purpose, (ii) thereupon, the factum, of theirs bearing contradistinct nomenclature(s), in the apposite classification column of the revenue record , being insignificant, (iii) rather all contradistinct categories of lands being amenable to determination, of uniform rate(s) of compensation. Thereupon, though uncontrovertedly, the acquired lands, bear varying categories/classifications, nonetheless, when they stand acquired, for, a common purpose, (iv) thereupon, bearing in mind the settled principles of law, of, acquisition of lands, for a common public purpose, as the lands

in the instant case, stood acquired, for construction of a pump house, and, a link road, hence in consonance therewith, wholly rendering insignificant, the effect, of, theirs carrying distinct categorizations or varying classifications, (v) especially when in sequel, to, the completion of the public purpose for which the lands are acquired, inasmuch as, on completion of construction of pump house, and, a link road, their diverse classifications, and, categorizations, hence lose, significance, (vi) rather hence with theirs holding an innate common/uniform potentiality, concomitantly, hence, necessitates assessment, of, uniform/common rates, of compensation, for each diverse category(ies) of acquired land(s). Obviously, thereupon uniform rates of compensation ought to be assessed, for, different categories of lands or lands bearing different classifications. Since, apparently, the apposite assessment has occurred, in contravention, of, the settled legal position, envisaging assessment of uniform rates, of compensation qua lands bearing different categories/classifications, (vii) especially when lands bearing different classification, were, acquired for a common public purpose, hence the Land Acquisition Collector concerned, has proceeded to untenably assess varying or distinct rates of compensation, for lands bearing distinct categories or classifications, thereupon, he has irrevered the aforesaid principle of law, hence, both the Reference Court, and, the Land Acquisition Collector concerned, have committed an impropriety. The said impropriety needs to be undone.

6. Consequently, the instant appeal is partly allowed and it is held that the rate of compensation for all categories of land, including land(s) of the appellants herein, shall be at the rate assessed qua Kulahu Awal i.e. Rs.1,53,579.20 per bigha along with all the statutory benefits detailed hereinafter:-

(a) Interest at the rate of 12% per annum on the market value from the date of notification under Section 4 of the Act till the date of award under Section 23(1-A) of the Act.

(b) In addition to the market value, the appellants are held entitled to get solatium or compulsory acquisition charges at the rate of 30% on such market value as provided under Section 23(2) of the Act; and

(c) Interest at the rate of 9% per annum from the date of notification under Section 4 of the Act upto one year and thereafter, at the rate of 15% per annum, till payment is made in the Court as provided under Section 34 of the Act.

The impugned award is modified accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Smt. Malkiat Kaur & Ors .....Appellants/defendants.

Versus

Kulwant Singh .....Respondents.

RSA No. 32 of 2007.
Reserved on : 3rd May, 2018.
Decided on : 7th May, 2018.

Specific Relief Act, 1963- Section 10- Suit for specific performance of agreement to sell and in alternative for recovery – Defendant denying execution of any such agreement and depicting same to be result of fraud – Defendant further alleged of plaintiff having obtained his signatures on pretext of filing documents before settlement authorities – Trial Court dismissing suit but in appeal decree of Trial Court set aside and suit stood decreed for specific performance – RSA – Held, Trial Court laid undue emphasis on spacing occurring in different portions of agreement to sell for its finding that defendant probably had signed it when document was blank – Whereas no

such plea was taken in written statement – Signatures of executant 'A' on agreement not denied by any one – Purchase of non-judicial stamp paper by 'A' and execution of agreement to sell duly proved by marginal witnesses to it – RSA dismissed – Decree of first Appellate Court upheld.

(Paras- 10 to 13)

For the Appellants: Mr. Anupinder Rohal, Advocate vice to Mr. Tek Chand Sharma, Advocate.

For Respondent No.1: Mr. Shayam Singh Chauhan, Advocate vice to Mr. Neeraj K. Sharma, Advocate.

Respondents No. 2 to 7already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition of a decree, for specific performance of contract, stood dismissed, by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the plaintiff, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that defendant Ajit Singh (now deceased) has entered into an agreement to sell the land measuring 0-4 marlas, comprising Khewat No.990, Khatauni No.1660, Khasra No.5058/4203/2674-2675 on 31.8.1992 for a consideration of Rs.20,000/-, out of which he has paid Rs.18,000/- to the defendant as earnest money and undertook to pay the balance amount of Rs.2,000/- at the time of the attestation of the sale deed before the Registrar. The defendant agreed to execute the sale deed within two months after the completion of the settlement proceedings. The defendant also agreed that in case he fails to execute the sale deed in favour of the plaintiff within two months after the completion of the settlement proceedings, then he will pay the amount of Rs.36,000/- to the plaintiff and in case the plaintiff fails to get the sale deed executed, the earnest money paid will stand forfeited. The plaintiff has come to know now that the settlement proceedings have been completed and the plaintiff is ready and willing to perform his part of contract by paying the balance sale consideration amounting to Rs.2,000/- to the defendant and asked the defendant to perform his part of contract several times but he failed to do so. The plaintiff also served the defendant with a registered notice through counsel on 20.12.1993, requiring the defendant to perform his part of contract by executing the sale deed but he failed to get the sale deed executed. Therefore, the plaintiff has prayed for a decree for specific performance of contract by way of execution of sale deed of the suit land and in the alternative a decree for recovery of Rs.36,000/-.

3. The defendant contested the suit and filed written statement, wherein, he has averred that no such agreement was ever executed by the defendant and in case there is any such agreement, the same is the outcome of fraud and misrepresentation as no consideration was ever received by the defendant. The defendant is an illiterate person and residing at Kiratpur Sahib in Punjab. The father of the parties is residing with the plaintiff and asked the defendant to sign few papers which were required to be given to the settlement authorities, as the settlement operation was going on and took the defendant to Tehsil Head Quarter, Una, and obtained the signature of the defendant on some papers and might have executed the alleged agreement on these papers. Therefore, no such agreement has been executed by the defendant and there is no question of its performance.

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

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

1. Whether the defendant has executed an agreement to sell the land on 31.8.1992 for consideration, if so, its effect? OPP.
2. Whether the alleged agreement dated 31.8.1992 is out coming of misrepresentation and fraud, if so, its effect? OPD.
3. Whether the plaintiff has no cause of action? OPD.
4. Whether the suit property is not properly valued for jurisdiction of the Court?OPD.
5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the latter Court dismissed the suit of the plaintiff/respondent No.1 herein. In an appeal, preferred therefrom, by the plaintiff/respondent No.1 herein, before the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

7. Now defendant No.1/appellant(s) herein, hence institute the instant Regular Second Appeal, before this Court, wherein they assail the findings recorded, in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 10.09.2007, this Court, admitted the appeal instituted, by the defendant(s)/appellant(s) against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the document Ex.P-4 is shrouded with suspicious circumstances and has not been duly proved to be executed between the parties?

b) Whether the judgment of the First Appellate Curt below is based on surmises and conjectures?

c) Whether the statement of PW-5, Sh. Chander Mohan Sharma, Advocate in support of the case of the plaintiff ought to have been relied upon by the First Appellate Court, especially when the said witness has appeared as an advocate in the same case for the plaintiff, in view of the bar as contained in the Evidence Act?

d) Whether the ld. First Appellate Court below was right in allowing the application for additional evidence filed on behalf of the plaintiff especially when no grounds were made out for the same.

Substantial questions of Law No.1 to 4:

8. For adjudging, the respective validities, of, the judgments and decrees, respectively pronounced, by the learned trial Court, and, by the learned First Appellate Court, (i) it is imperative to bear in mind, the written statement instituted, during, his life time by deceased defendant Ajit Singh, (ii) therein, he omits, to, specifically rear, any contention of his signatures, not, existing on Ex.P-4, contrarily, he rears therein, a, contention, of, agreement, if any, as executed by him, with, the plaintiff, rather being an out come of fraud and misrepresentation, arising, from his being beguiled to sign blank papers, for their user before the settlement authorities concerned. The aforesaid contention hence palpably, makes, a display of there being, no, scribed denial by the defendant vis-a-vis his signatures, existing upon EX.P-4, (iii) thereupon, any denial, of, the signatures, of, the deceased defendant, one Ajit Singh, as, existing upon Ex.P-4, by his wife, is beyond, the apposite pleadings reared in the written statement nor also hence any tenacity can imputed to her testification, as rendered, in respect thereto.

9. Be that as it may, the learned trial Court, had meted overemphasis vis-a-vis the apposite spaces occurring, in, different portions of Ex.P-4, hence, had assigned, merit to the

espousal of the counsel, for the defendant, of per se, thereupon the deceased defendant Ajit Singh, during, his life time scribing his signatures upon Ex.P-4, at a stage when no scribings, occurred thereon, (i) besides concomitantly drew an inference, that the deceased defendant, one, Ajit Singh's contention, of his being beguiled to sign thereon, for its being purportedly hence used, before, the settlement authorities concerned, being amenable for credence, being meted thereto.

10. The aforesaid imputation, of, credence vis-a-vis the deceased defendant, one Ajit Singh's espousal, as addressed through his counsel, is also to be tested, within, the ambit of the apposite scribed contention(s), as, reared in his written statement. Since, the summons, are, imperatively enjoined to be accompanied, with a copy of the plaint besides also, all, appended therewith documents, are, also enjoined to accompany, the relevant processes, (i) thereupon, unless evidence, is adduced, of, at the stage contemporaneous, to the deceased defendant, during, his life time, hence being served, thereat only, the apposite summons being delivered upon him, whereas, theirs remaining unaccompanied, by the copy of the plaint, besides with copies, of, all the documents appended therewith, (ii) evidence in respect whereof, is grossly amiss hereat, (iii) thereupon, obviously a conclusion, is rendered open, of, the apposite processes, being also accompanied by a copy of the plaint, and, also at the relevant stage, of, personal service, through, ordinary mode being effectuated, upon, the deceased defendant thereat, also Ex.P-4, theirs being accompanied hence by all appended therewith apt documents. Consequently, when all the aforesaid infirmities, if any, in purported support of the defendants' espousal, addressed through his counsel before the learned trial Court, were apparently discernible, from, a circumspect perusal, of Ex.P-4, and, when at the time contemporaneous, to, the defendants' hence furnishing written statement to the plaint, it was open to his/their counsel, to propagate therein, the aforesaid contention, (iv) whereas, the aforesaid contention remaining unespoused, in the defendant's written statement, (v) also hence estopped the learned trial Court, to proceed, upon, apposite spacings purportedly existing in Ex.P-4, hence untenably, draw an inference, of it, being signed blank, by deceased defendant, one Ajit Singh. Further sequel(s) of the afore gathered inference, is of, the defendant being not beguiled, to scribe his signatures on Ex.P-4, at a stage when it was blank nor it can be concluded of his being beguiled, to make his signatures thereon, for the purpose other than the one in respect whereof, it, stood drawn, (vi) conspicuously, when, in support, of the aforesaid inference, the marginal witness(es) thereto, make, firm testifications, of, the deceased defendant, one Ajit Singh, rather subscribing in their respective presence(s), his signatures on Ex.P-4, (vii) and, also with the stamp vendor concerned, while making his testification, his thereat, making firm echoings, of, the deceased defendant Ajit Singh, purchasing the non judicial stamp paper, from him, testification whereof gathers strength, from, an endorsement, made, on the reverse of Ex.P-4. (viii) Furthermore, with the father of the parties, at contest making a clear, and, candid testification, of deceased defendant Ajit Singh, studying upto 4th or 5th class, when stand conjoined, with, the testifications rendered by the marginal witnesses to Ex.P-4, besides when both cogently prove, of, the deceased defendant one Ajit Singh, subscribing his signatures on Ex.P-4, after its contents being readover and explained to him, (ix) thereupon, a firm inference, is marshalled, of, deceased defendant, one Ajit Singh, with an awakened conscious mind besides after his fully comprehending, all the recitals borne in Ex.P-4, his scribing his signatures thereon, concomitantly also a further firm inference is also mobilised, of, the deceased defendant, one Ajit Singh not signing a blank, Ex.P-4.

11. The learned trial Court, has, unnecessarily overemphasised, upon, the apposite denial of signatures, by the widow of deceased defendant, one, Ajit Singh, whereas, for the reasons to be ascribed hereiabove, and for the reasons ascribed hereinafter, the aforesaid denial, rather holds no tenacity, (i) conspicuously when the deceased defendant never stepped into the witness box, for making the apposite denial; (ii) whereas his stepping into the witness box, was, hence imperative, especially when thereat alone he was hence enabled to stand faced with Ex.P-4; (iii) and also hence was facilitated, to see his signatures thereon, and, thereafter proceed to make the apposite denial. The denial of signatures by the executant, of any document, during, the pendency of any proceedings, drawn, before the Civil Court concerned, has to occur, only upon

the executant concerned, stepping into the witness box, whereat, he is facilitated to see the document and also to make the apposite denial, (iv) and, also for facilitating the counsel for the apposite contestant, to confront him, with, all the requisite material, for hence belying his denial. (v) The mere denial of signatures by any executant, of any document, importantly, when he is not faced, with the document, is insufficient, for per se imputing any credence, to, the apposite denial, the reason being that (vi) the counsel for the apposite litigant is thereupon untenably precluded to confront him, with, all the apposite necessary materials, for hence belying his credibility, and, also is preempted, to, confront him, with, all the documents, wherefrom rather echoings may upsurge, of, his hence admitting execution thereof, and, concomitantly his being estopped to make the denial, (vii) whereafter, the civil courts concerned, may proceed (viii) to hence draw proceedings under Section 340 of the Cr.P.C., against, any executant, who makes, an incredulous denial. In summa hence, the Court before whom, the apposite denial is made, (a) is enjoined to ensure that the denial is made, upon, the executant concerned, stepping into the witness box; (b) the counsel for the opposite party, being facilitated, to cross-examine him, and, also being enabled to confront him with the apposite material, for belying his denial, whereafter, the Court may discern therefrom, qua whether the drawing, of, proceeding under Section 340 of the Cr.P.C., is imperative, against, the witness concerned, (c) and also the Court wherebeforewhom or whereon whose records, the apposite document exists, is, alone seized, with, the jurisdiction, to ensure adduction(s), of, evidence in respect of its valid, and, due execution, by the witness concerned, and, no other Court, than the aforesaid Court, holds, the jurisdiction to test the validities of denial, of, signatures, on the apt document, by the apposite executant concerned. Contrarily, hereat all the aforesaid trite expostulations remain visibly unsatiated, hence, the apposite denial, is, unmeritworthy.

12. Even though, the learned counsel for the appellant, has contended with much vigour, before, this Court, that with the father of the defendant, namely, one Dalip Singh, rather instituting an application, borne in Ex.D-2, wherein, he claimed relief of corrections of revenue entries, application whereof rather standing dismissed, and, in immediate succession thereto, Ex.P-4 being drawn, (i) thereupon, per se an inference being erectable, of, deceased defendant Ajit Singh, subscribing his signatures, on Ex.P-4, when the latter was blank. However, the aforesaid contention is unmeritworthy, (ii) given the apposite application being not moved, by the plaintiff, rather it being moved by the father of the defendant, named one Dalip Singh, whereas, only upon the application being moved by the plaintiff, it, was inferable, of, given his failing, in his endeavour to seek correction of the revenue entries, his rather proceeding to obtain, on blank Ex.P-4, the signatures of deceased defendant, one Ajit Singh. Even otherwise, the effect of the aforesaid contention, is subsumed, by this Court imputing credence, to, the testification(s) rendered by the marginal witness(es) to Ex.P-4, also, its concluding of deceased defendant one Ajit Singh, not subscribing his signatures on Ex.P-4, at a stage when it was blank, rather only subsequent, to, all the recitals carried therein being readover, and, explained to him, and, his comprehending them, in sequel, thereto, his hence volitionally appending, his signatures, on EX.P-4.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court, has not, excluded germane and apposite material from consideration. Substantial questions of law No.1 answered in favour of the respondent, and, against the appellant.

14. In view of above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 56 of 2002, is, affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Naresh Kumar .....Petitioner/defendant.
Versus
Har Pal Singh and others .....Respondents/Plaintiffs.

CMPMO No. 264 of 2016.
Reserved on : 26th April, 2018.
Date of Decision: 7th May, 2018.

Code of Civil Procedure, 1908- Order XXXIX Rules 1 and 2- Temporary injunction – Essentials for grant of – Held, party seeking temporary injunction must have a prima facie case and balance of convenience in its favour – Further, party must face irreparable loss in event of refusal of temporary injunction - Suit land found having been allotted to plaintiffs in partition and their claim of possession duly supported by revenue record- High Court upheld orders of lower courts granting temporary injunction to plaintiffs – Petition of defendant dismissed. (Paras-3 and 4)

For the Petitioner: Mr. Ashok K. Tyagi, Advocate.
For the Respondents: Mr. Ramakant Sharma, Sr. Advocate with Mr. Dinesh Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition is directed against the concurrent affirmative, orders, recorded by both the learned Courts below, upon, the plaintiffs'/ respondents' application cast under the provisions of Order 39, Rules 1 and 2, of, the CPC.

2. The plaintiff had instituted a suit for permanent prohibitory injunction, for, restraining the defendants either personally or through his servants or assignees, from occupying, digging, and, raising construction over the land comprised in khasra No.892/2, measuring 7 biswas, situated in mauza Bhagani, Tehsil Paonta Sahib. Also, during the pendency of the aforesaid Civil Suit, an application cast, under the provisions of Order 39, Rules 1 and 2, of, the CPC, was, preferred by the plaintiffs/applicants/respondents herein, before the learned trial Court, wherein, they sought relief of ad interim injunction being pronounced vis-a-vis them, and, qua the suit land. Relief upon the aforesaid application, was afforded vis-a-vis them, by both the learned Courts below. The defendant/petitioner herein being aggrieved therefrom, hence, has instituted the instant petition before this Court.

3. This Court with the able assistance of the learned counsel appearing for the parties, has traversed through the relevant records, appertaining to the lis at hand. The short ground reared, before this Court, by the learned counsel appearing for the defendant/petitioner herein, for upsetting the concurrent affirmative orders pronounced, upon the plaintiffs' application, is, grooved (a) in the factum of construction already existing at the site, of, the suit khasra number. However, vigour, if any, of the aforesaid contention, (b) is repulsed by the trite factum, of the relevant records, rather making candid clear disclosure(s), of the suit khasra number, being recorded in the revenue records, as gair mumkin abadi, (c) and, also after drawing, of, apposite partition(s), it standing allocated vis-a-vis the plaintiffs, (d) besides the suit khasra number being vacant. The documentary evidence comprised in the apposite revenue records, as, germane thereto, does at this stage, hence, hold a presumption of truth, and, when the presumption of truth enjoyed by them, obviously, remains unreplused at this stage, (e) thereupon, it is to be concluded, of, the suit khasra number, upon, drawing, of, the apposite partition(s) being allotted vis-a-vis the plaintiffs, also, it being vacant. Consequently, it is to be reiteratedly inferred qua the contention reared, by the defendant, of, construction existing

thereon, further standing completely belied. Further sequel(s) thereof, is that triplicate principles governing the affording or declining, of, apposite relief, comprised in, (a) prima facie good arguable case being established by the plaintiffs; (b) balance of convenience being loaded vis-a-vis the plaintiffs and (c) irreparable loss or injury being, causable to the plaintiffs, in case, ad interim injunction is not granted, hence visibly begetting satiation.

4. The aforesaid discussion, unfolds, that both the learned courts below, in making, the affirmative concurrent pronouncement(s) vis-a-vis the plaintiffs/respondents herein, have neither omitted to discard apposite material, from consideration nor both the learned Courts below have mis-appraised the relevant material.

5. For the foregoing reasons, there is no merit in the instant petition and it is dismissed. In sequel, the impugned orders are maintained and affirmed. The parties are directed to appear, before, the learned trial Court, on 23rd May, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of. Records, if received, be sent back forthwith.

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

National Insurance Company Limited ..Appellant

Versus

Kanwar Rawat and another ..Respondents

FAO(MVA) No. 44 of 2018
Decided on: May 7, 2018

Motor Vehicles Act, 1988- Sections 149 and 166- Quantum of Compensation – Petitioner filing claim application before Tribunal on account of death of his son in a motor accident – Petitioner claiming that his son, who was aged 20 years was working in a hotel at Goa – Claims Tribunal assessing monthly income of deceased at Rs.6,000/- per month, granted 50% increase towards future prospects – Tribunal also granting Rs.25,000/- towards funeral expenses and Rs.1 lac towards loss of love and affection – Appeal against – Insurer contending that deceased was actually the driver of offending vehicle and had no valid and effective driving licence besides he was drunk at the time of accident – On facts, High Court found that vehicle was not being driven by the deceased and it was being driven by one 'R' – Driving Licence of 'R' was found valid and effective – However, in the absence of other evidence as to income of deceased, the daily wages prevalent at the relevant time, were taken for determining income of deceased – Further, increase of only 40% towards future prospects, was allowed by High Court – Payments under conventional heads were also reduced in consonance with principles laid down in **National Insurance Company Vs. Parnay Sethi, 2017 ACJ 2700** – 9% per annum rate of interest as granted by the Tribunal, however, not interfered with in the facts of case. (Paras-11 to 16)

Cases referred:

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157
Sarla Verma & Ors. v. Delhi Transport Corporation and Anr., AIR 2009 SC 3104
Reliance General Insurance Co. Ltd. v. Shalu Sharma, (2018) 2 SCC 753

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents : Mr. Arvind Sharma, Advocate, for respondent No.1.
Mr. Anil Kumar God, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Respondent No.1, who happened to be mother of the deceased Ankesh alias Sanam (herein after, 'deceased') filed a claim petition under Section 166 of Motor Vehicles Act, before the Motor Accident Claims Tribunal-II, Shimla, camp at Rohru, Himachal Pradesh, claiming therein compensation on account of death of her son Ankesh alias Sanam, who at the relevant time was working at Goa in a three Star hotel.

2. Allegedly on 3.5.2016, deceased was coming back from Dehradun to Chirgaon in an Alto car bearing registration No. HP-10A-8151. At about 2 pm, on 3.5.2016, aforesaid ill fated car went down the road near Gumma and Ankesh alias Sanam died on the spot. FIR No. 22/16 under Sections 279 and 304A of the Indian Penal Code came to be lodged at Police Station Nerwa. Claimant-mother of deceased averred in the claim petition that her son after having completed diploma in hotel management was serving in Goa in a three star hotel and was getting salary of Rs. 25,000/- per month. She further claimed that her son had also qualified test of constable in Himachal Pradesh Police. Accident allegedly took place on account of rash and negligent driving of Rockey Negi, who also expired in the said accident.

3. Aforesaid petition was resisted by respondent No. 2, who happened to be owner of the ill fated car. Though, he did not deny the factum with respect to accident and death of Ankesh in the same but denied that deceased was a diploma holder in hotel management. He also denied the factum with regard to employment of deceased in a three star hotel in Goa and his having income of Rs. 25,000/- per month. Respondent No.1 also denied that the accident took place due to rash and negligent driving on the part of driver namely Rockey Negi and claimed that car developed some mechanical defect, as a result of which, it met with an accident.

4. Appellant-Insurance Company (hereinafter 'appellant') refuted the claim of the claimants on the ground that the vehicle was being plied in violation of the terms and conditions of the insurance policy and claimed that deceased driver was not having a valid and effective driving licence as such, appellant is not liable to indemnify the insurer. Appellant also alleged that the deceased Ankesh alias Sanam was traveling in the car as a gratuitous passenger as such, claimant has no cause of action to file the claim petition and same deserves to be dismissed.

5. Learned trial Court, on the basis of material adduced on record by respective parties allowed the claim petition and held the claimant entitled to compensation to the tune of Rs.11,07,000/- alongwith interest at the rate of 9% per annum from the date of filing of the petition till payment. In the aforesaid background, appellant has approached this Court in the instant proceedings laying therein challenge to the impugned award dated 16.8.2017 passed in MAC Petition No. 10-R/2 of 2016.

6. Mr. Jagdish Thakur, learned counsel representing the appellant, while terming impugned award to be illegal, vehemently argued that the same is against law and facts as such, is liable to be set aside. Mr. Thakur further contended that the learned Tribunal below has not appreciated the evidence in its right perspective and as such, erroneous findings have come on record to the detriment of the appellant. Mr. Thakur, while inviting attention of this Court to the notification issued by the State Government, prescribing therein minimum wages in the State of Himachal Pradesh, with effect from 1.5.2015 contended that minimum wages prevalent in the year 2016 were Rs.180/- per day, meaning thereby monthly income of the deceased could not have been more than Rs.5400/- whereas in the case at hand, learned Tribunal below assessed income of deceased as Rs.6,000/- per month, as such, impugned award deserves to be set aside. Mr. Thakur, further contended that the deceased was not serving in any regular establishment and as such, learned Tribunal below ought not have made addition of 50% in the established income of the deceased, as has been categorically held in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157. While placing reliance upon aforesaid

judgment, Mr. Thakur contended that the learned Tribunal below has further erred in awarding a sum of Rs.25,000/- on account of funeral charges and Rs.1.00 Lakh on account of loss of love and affection, because, as per latest judgment in **Pranay Sethi** (supra) only Rs.15,000/- can be awarded on account of funeral charges, whereas no amount can be awarded on account of loss of love and affection. Mr. Thakur further contended that bare perusal of evidence available on record suggests that deceased was under the influence of liquor and quantity of alcohol in his body was 338.58 mg%, as such, vehicle was being plied in violation of terms and conditions of the insurance policy, as such, appellant is not liable to indemnify the insured. However, Mr.Thakur was not able to point out evidence, if any, collected on record by appellant that at the relevant time, vehicle in question was being driven by deceased. Lastly, while placing reliance upon judgment rendered by Hon'ble Apex Court in **Laxmidhar Nayak and ors** v. **Jugal Kishore Behera and Ors**, (Civil Appeal No. 19856 of 2017, arising out of SLP(C) No. 31405 of 2016), Mr. Thakur contended that interest awarded by the learned Tribunal below is on higher side and same deserves to be modified/reduced to 7.5% per annum instead of 9% per annum, as awarded by learned Tribunal below.

7. Mr. Arvind Sharma, learned counsel representing respondent No.1-claimant, fairly admitted that in the year 2016, minimum wages were Rs.180/- per day and as such, court below ought to have taken monthly income as Rs.5400/- instead of Rs.6000/-. While fairly conceding that in terms of judgment rendered in **Pranay Sethi** (supra), claimant is entitled to Rs.15,000/- on account of funeral charges, Mr. Sharma disputed the claim of the appellant company that no amount is payable under the head "loss of love and affection'. Mr. Sharma also contended that interest is not on higher side, rather same has rightly been awarded by the learned Tribunal below in the peculiar facts and circumstances of the case.

8. Having heard the learned counsel representing the parties and perused the record, this Court finds no force in the contention having been raised by learned counsel representing the appellant that learned Tribunal below, while passing impugned award failed to take note of the fact that deceased was under the influence of liquor because admittedly in the case at hand, there is no evidence led on record by appellant or by respondent No.2 suggestive of the fact that vehicle in question was being driven by deceased Ankesh alias Sanam, rather evidence clearly suggests that vehicle was being driven by driver namely Rockey Negi, who unfortunately also died in the accident. There is no evidence led on record by the appellant that Rockey Negi, driver of vehicle was under influence of liquor. Similarly, this court finds that it stands duly proved on record that at the time of alleged accident, deceased was traveling with Rockey Negi, who was having a valid and effective driving licence, which was issued by RLA Rohru and was valid with effect from 17.4.2013 to 16.4.2033.

9. Similarly, onus to prove that vehicle was being plied in violation of terms and conditions of insurance policy was on the appellant, but, it has not been able to discharge aforesaid onus, rather, it stands duly proved on record that the deceased driver was having valid and effective driving licence to drive the offending vehicle. Similarly, this court finds from record that no evidence, whatsoever was led on record by the appellant to prove that Ankesh alias Sanam was traveling in the vehicle as a gratuitous passenger, whereas, it is admitted fact that all the four occupants of car died on the spot.

10. After having perused evidence with regard to minimum wages applicable in the State of Himachal Pradesh with effect from May 1, 2015, this court finds considerable force in the arguments of learned counsel representing the appellant that learned Tribunal below has erred while arriving at a conclusion that monthly income of deceased Ankesh was Rs.6,000/-, whereas on the date of accident, daily wages were Rs.180/- per day and monthly income ought to have been assessed as Rs.5400/-, as has been noticed above. Mr. Arvind Sharma, fairly conceded aforesaid error committed by learned Tribunal below, as such, same is required to be rectified in accordance with law.

11. In view of aforesaid position, monthly income of deceased is required to be taken as Rs.5400/- at the time of accident. Learned Tribunal below, while placing reliance upon

judgment rendered by Hon'ble Apex Court in **Sarla Verma & Ors.** v. **Delhi Transport Corporation and Anr**., AIR 2009 SC 3104, rightly applied multiplier of 18 because undisputedly deceased was 20 years old at the time of accident. However, this Court is in agreement with the contention of Mr. Jagdish Thakur that since deceased was 20 years old and self employed, addition of 40% of the established income of the deceased is/was to be made while determining future prospects as has been held in **Pranay Sethi's** case (supra).

12. Having perused judgment rendered by the Hon'ble Supreme Court in **Pranay Sethi's** case, this court is persuaded to agree with the contention of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that the Tribunal has erred in making addition of 50% of actual salary /income of deceased while determining future prospects. In the aforesaid judgment Hon'ble Apex Court has specifically quantified the amounts to be paid under conventional heads i.e. loss of estate, loss of consortium and funeral charges. Relevant paragraphs of aforesaid judgment are reproduced herein below:

> "47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided. 48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socioeconomic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-
>
> "17. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."
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> 49. Be it noted, Munna Lal Jain (2015 AIR SCW 3105) (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.

50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another it has been reiterated by stating:-

"...we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

"3. General Damages (in case of death):

The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses- Rs.2,000/-.

(ii) Loss of Consortium, if beneficiary is the spouse- Rs.5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should

be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. Presently, we come to the issue of addition of future prospects to determine the multiplicand.

56. In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self employed or engaged on fixed wages.

57. Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the opposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any

amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

13. In view of aforesaid exposition of law laid down in **Pranay Sethi's** case, amount awarded under various heads i.e. funeral expenses and loss of estate needs to be reassessed, whereas no amount could be awarded under the head of loss of love and affection. Accordingly, amount awarded under funeral expenses is modified to Rs.15,000/- whereas no amount can be awarded under the head of loss of love and affection. Similarly, as has been observed above an addition of 40% of established income is required to be made in the case of deceased who was self employed and 20 years old, while assessing compensation on account of loss of future prospects. In the case at hand, established income of deceased is Rs.5400/- per month and after adding 40% of the actual income/salary of deceased, same comes to Rs.7560/- (Rs. 5400+2160) per month. Taking note of the ratio of law laid down in **Sarla Verma's** case half of the amount towards personal living expenses of the deceased are required to be deducted as he was a bachelor and as such, contribution of deceased towards family comes to Rs.7560-3780 = 3780, which comes to Rs.45,360 per annum and after applying multiplier of 18, same comes to Rs. 8,16,480/-.

14. In view of aforesaid modification, claimant is entitled to a sum of Rs. 8,16,480/-, on account of loss of dependency instead of Rs. 9,72,000/- as awarded by the learned Tribunal below. However, this Court while exercising powers under Order XLI, Rule 33 CPC, wherein appellate court enjoys power to pass any decree and make any order, which ought to have been

passed or made, as the case may be, deems it fit to enhance the amount awarded under head of loss of estate from Rs.10,000/- to Rs.15,000/-. In view of aforesaid modification, now the claimants shall be entitled to the following amount:

1.	Loss of dependency	Rs.8,16,480/-
2.	Loss of Estate	Rs. 15,000/-
3.	Funeral charges	Rs.15,000/-
	Total	Rs.8,46,480/-

15. Having carefully gone thorough the judgment passed by Hon'ble Apex Court in **Laxmidhar Nayak** (supra), as relied upon by learned counsel for the appellant-Insurance Company, this Court is not inclined to agree with the contentions of the learned counsel representing the appellant that interest awarded by the learned Tribunal below is on higher side. In the case referred herein above, Hon'ble Apex Court reduced the rate of interest in the peculiar facts and circumstances of the case and certainly laid no thumb rule/law that interest cannot be awarded at the rate of 9% per annum.

16. Recently, Hon'ble Apex Court in **Reliance General Insurance Co. Ltd.** v. **Shalu Sharma,** (2018) 2 SCC 753, awarded 9% interest and as such, this court finds no reason to interfere with the rate of interest awarded by the learned Tribunal below. The Hon'ble Apex Court in the aforesaid judgment has held as under:

> "The Tribunal has awarded a sum of Rs 3,14,335 towards medical expenses. An addition of Rs 70,000 would be required to be made in terms of the decision in Pranay Sethi (supra) on account of the conventional heads of loss of estate (Rs 15,000), loss of consortium (Rs 40,000) and funeral expenses (Rs 15,000). Hence, the total compensation is quantified at Rs 27,66,522 on which the claimants would be entitled to interest @ 9% p.a. from the date of the filing of the claim petition. The apportionment shall be carried out in terms of the award of the Tribunal. We order accordingly."

17. Consequently, in view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned award passed by the learned MACT below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications if any.

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

Nopany Charitable Trust .....Petitioner.

Versus

Kanwar Jeotendra Singh (since deceased through his legal representatives/assignees and another .....Respondents.

CMPMO No. 64 of 2017
Reserved on : 26th April, 2018.
Date of Decision: 7th May, 2018.

Code of Civil Procedure, 1908- Section 2(11)- Legal Representative – Meaning – Held, legal representative includes any intermeddler with estate of deceased- Assignee may be an intermeddler but assignee must be bestowed with requisite authorization on account of death of a party – Assignment must have taken place during pendency of suit – Pre-suit assignee is not an intermeddler as used in Section 2(11) – Order of trial Court declining application of plaintiff under Order XXII Rules 4 and 10 upheld. (Paras-6 and 7)

Code of Civil Procedure, 1908- Order XXII Rules 4 and 10- Substitution of Legal Representative(s) and/or Assignee(s) of a party – Held, in order to attract provisions of Rule 4 and/or Rule 10, death of a party or assignment of interest by him as the case may be, should occur during pendency of suit – If assignment is during pendency of suit, only then assignee can seek leave of court to continue proceedings initiated by or against the assigner – On facts, suit was instituted by plaintiff in January, 2009, whereas, defendants had assigned their interest in favour of 'OS' and 'AS' way back on 7.2.2008 – Since, assignment of interest did not happen during pendency of suit, Order XXII Rule 10 CPC, held not applicable. (Paras-3 to 5)

For the Petitioner(s): Mr. Umesh Kanwar, Advocate.
For the Respondents : Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During the pendency of Civil Suit No. 52/1 of 2009 before the learned trial Court, hence occurred, the demise(s) of defendants, namely, Kanwar Jeotender Singh, and, Kanwar Harinder Singh. Given occurrence of demise(s) of the aforesaid defendants, before the learned trial Court, an application cast under the provisions of Order 22, Rules 4 and 10 of the CPC read with Section 151 of the CPC, was preferred before it, with prayers (a) that given assignments ,of the decree(s) rendered in Civil Suits Nos. 75/FT/1/04/02, 76/FT/1/04/02, 30/FT/1/04/01, 35/FT/1/04/01, 74/FT/1/04/02, 34/FT/1/04/01, 27/FT/1/04/01, and 39/FT/1/04/01, being made by the deceased defendants vis-a-vis Shri Om Prakash Sahni and Shri Amit Sahni, hence, theirs being enabled to represent the estate of the deceased defendants, (b) and, also theirs being construable to be the legal representatives, of, the deceased defendants, (c) besides the plaintiff/applicant claimed, rendition of an affirmative pronouncement, upon the aforesaid application. Under the impugned orders, the learned trial Court, declined, the espoused relief(s) to the applicant/petitioner herein, hence, the applicant/petitioner herein being aggrieved therefrom, has, motioned this Court. The relevant civil suit was instituted in the month of January, 2009, whereas, the apposite assignment, occurred prior thereto, on 7.2.2008. Nonetheless, the assignees rather permitted the arraying of the assignors, in the array of defendants, and, also under a general power of attorney executed, vis-a-vis them, by the assignors, arrayed as defendants in the apposite civil suit, rather, obviously hence proceeded to contest the suit, on their behalf. Nowat, the tenacity(ies) of the disaffirmative pronouncement, recorded, by the learned Courts below, upon the apposite application, is to be tested, in the light of the aforesaid scenario, besides, in the imminent factum of applicability(ies) thereof, of the provisions borne in Order 22, Rules 4 and 10 CPC, and, read with Section 151 of the CPC, whereunder the apposite application, as, instituted, before, the learned trial Court, stood hence cast.

2. For making an appropriate adjudication, it is also deemed imperative, to extract the provisions borne in Order 22, Rules 4 and 10 of the CPC, provisions whereof read, as under:-

> **4. Procedure in case of death of one of several defendants or of sole defendant.-** (1) Where one of the two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
>
> (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4)The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where,—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified there for in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

10. Procedure in case of assignment before final order in suit.- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a Suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1). "

3. An analysis of the provisions, borne, in Order 22, Rule 4 of the CPC, makes, apparent revelations, of statutory authorization(s), being bestowed, upon, the Court concerned, to on demise of the defendant concerned, and, upon, an appropriate scribed motion being made therebefore, hence permit his proven legal representative(s), to , beget their substitution in his place, given theirs obviously hence representing, the estate of the deceased defendants concerned. Furthermore, an analysis of the provisions borne in Order 22, Rule 10, of the CPC, unfolds, the trite factum of the creation or devolution, of interest, during the pendency of the suit, also bestowing, an empowerment, in Court, to permit hence the continuation, of, the suit, by the assignee or by the persons whereuponwhom, the creation or devolution of interest in the suit property is endowed, and, also a power is bestowed, upon, the Court concerned, to permit the assignee, whereuponwhom, an interest or devolution, in the suit property, is created to hence seek his impleadment in the array, of defendant(s).

4. The aforesaid indepth analysis of the provisions, respectively borne, in, Order 22, Rule 4 of the CPC, and, in Order 22, Rule 10 of the CPC, bring forth the imminent factum, (a) of the substitution of the defendant, by his legal representative(s), under an order, recorded by the Court concerned, wherebefore, his demise, occurs, being permissible, only when the defendant concerned hence evidently, expires during the pendency of the suit, (b) and upon his demise, the right to represent his estate, devolving upon his proven legal representatives, (c) and, besides upon proven occurrence, of assignment(s), whereunder interest in the suit property, is created, (d) and, upon the assignment provenly occurring, during, the pendency of the suit also hence empowering the court concerned, to permit the assignee, to seek his impleadment either in the array of the plaintiffs or in the array of defendants, (e)tritely hence, the substitution of the deceased defendant by his proven legal heirs or creation of an interest in a assignee, has apparently ought to occur, during the pendency of the civil suit, and, also thereupon alone his proven legal heirs or assignees, are statutorily enabled, to seek their impleadment, in the apposite array of parties, to the lis.

5. Contrarily, hereat, dehors, the relevant assignment evidently occurring prior, to the institution of the suit, whereupon, hence though the assignees were rendered, empowered/enabled, to be arrayed in the apposite array of defendants also hence, were, at the inception, of the lis, hence, enabled to seek their impleadment, in the array of defendants, (a), given theirs solitarily holding the locus standi, to defend the civil suit, yet, they abandoned or waived their rights, to contest the suit, and, rather proceeded under a power of attorney bestowed upon them, by the defendant(s) concerned, to hence defend the latters', in, the apposite civil suit. The aforesaid open abandonment(s), and, waivers, despite, theirs holding the apposite locus standi, obviously adversarialy swings vis-a-vis them, the aforestated provisions of the CPC, whereunder the apposite application is cast, (b) especially when as aforesaid all ingredients thereof, are attracted only upon the demise(s) of the defendants, occurring, during the pendency of the civil suit or the apt assignment, also, occurring during pendency thereof, (c) and, not contrarily, as hereat, with there being an evident pre-suit assignment, whereupon, the apposite locus, was solitarily vested upon the assignee(s). Pre-suit assignment(s) or creation(s) or devolution(s) of interest, forbids, hereat any attraction, of the aforesaid provisions of law, whereunder the apposite application is cast, rather reiteratedly, with, the apposite capacity, and, locus, at the inception of the suit, rather solitarily vesting in the assignees, renders blunted their endeavour, to, beget vis-a-vis them any attraction(s), of the apposite provisions, whereunder the apposite application is cast. Preeminently also the aforesaid provisions of law, warrant, their attraction at a stage subsequent to the demise, of, the defendant concerned, and, whereat alone the apposite rights, to, defend, the estate of the deceased, hence, occur, whereas, attractions thereof are impermissible, upon evident pre existing rights, or his pres-suit rights, to defend, hence, vesting in the defendants, as evidently hereat.

6. Be that as it may, the learned counsel appearing for the petitioner, has with vigour contended, before this Court, while alluding to the definition, of “legal representatives”, borne in Section 2(11) of the CPC, provisions whereof read as under:-

> “(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;”

wherein the phrase, “legal representative” has been imputed a signification, (a) of its, also including any intermeddler, with, the estate of the deceased, (b) whereupon, he contends that the assignee(s), also are, within its ambit, hence, construable to be the legal representative(s) of the JDs, and, the impugned order hence warranting reversal. However, the aforesaid submission has been made by the counsel for the petitioner, without, his making a wholesome reading, of, the aforestated statutory definition, of, phrase “legal representative”, whereas, upon its wholesome reading, though a legal representative, also, includes any intermeddler with the estate of the deceased, yet the intermeddler, with the estate of the deceased, carries the apt signification, (i) of one who subsequent, to the demise of the deceased, is bestowed with the apposite authorization, (ii) and apparently, it does not include, the apt pre-suit assignee, of the decree, (ii) especially when the latter openly, as hereat, has abandoned his befitting solitary locus to defend the apposite suit, in the aforesaid capacity. Furthermore, the aforesaid parlance ascribed to the aforesaid phrase, both blends and begets harmony with the hereinabove extracted statutory provisions, and, hence for promoting harmony inter se them vis-a-vis the parlance, borne by the aforesaid statutory phrase, this Court concludes, of, it appertaining, to, post demise acquisition(s), and, to not any pre lis acquisition(s).

7. For the foregoing reasons, the instant petition is dismissed, and, the impugned order is maintained and affirmed. The parties are directed to appear, before, the learned trial Court on 24th May, 2018. No order as to costs. All pending applications also stand disposed of . Records be sent back forthwith.

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

Pradeep Sharma ....Petitioner.

Versus

Executive Engineer, Shillai ....Respondent.

Arb. Case No.42 of 2012.
Reserved on : 26.04.2018.
Decided on: 7th May, 2018.

Arbitration and Conciliation Act, 1996- Section 34- Objections to arbitral award – Maintainability - Building contract requiring work engineer to certify to contractor frustration of contract – Also providing for payment of all dues to contractor till date of receipt of said certificate by him – Contract was rescinded by department on 10.7.2008 as landowners were not permitting to raise construction of road through their land(s) – On reference of dispute to arbitrator he granting indemnification from 2.8.2007 to 25.11.2007 only instead till 10.7.2008 – Arbitrator also denying petitioner rates qua machinery, equipment and manpower – Objections to award – Held, (i) contract specifically provided of intimating decision of rescinding contract to contractor and payment of dues till that date to him – As decision of rescinding of contract was taken only on 10.7.2008, it was the date of rescission of contract and not 25.11.2007 – Hence, he was entitled to payments till 10.7.2008 – Further held, petitioner not entitled for indemnification on rates claimed by him for want of evidence – Petition partly allowed – Award modified. (Paras-4 to 7)

For the Petitioner: Mr. B.C. Negi, Sr. Advocate with Mr. Nitin Thakur and Ms. Kritika Dipta, Advocates.

For the Respondent:: Mr. Hemant Vaid, Addl. A.G. with Mr. Yudhveer Singh Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner was awarded works, for construction, of, Kando Chittli Road KM 0/0 to 8/060 (SH:Formation cutting 5/7 mtr. Wide, X-Drainage work, R/Wall, Logo Sign Board, Passing Places etc., KM0/0 to 8/060) under package No. HP10-32. A period of 12 months was prescribed in the apposite contract, executed inter se the petitioner herein, and, the respondent herein, for completion, of, awarded works. However, before the awarded works could be completed by the petitioner, the contract was rescinded, on 10.07.2008. The rescission of the contract executed inter se the petitioner, and, the respondent, was a sequel of certain landowners, whereupon whose lands, the awarded work was to be executed, rather causing hindrance(s), in the execution of the work, by the petitioner. Consequently, on anvil of the relevant clause 55.1, of, the contract executed inter se the petitioner, and, the respondent, provisions whereof stand extracted hereinafter, the respondent concluded, of, the performance of the contract being hence frustrated, whereupon, it was constrained, to, rescind it.

> "**55. Release from Performance**
>
> 55.1 If the contract is frustrated by the outbreak of war or by any other event entirely outside the control of the Employer or the Contractor, the Engineer shall certify that the Contract has been frustrated. The Contractor shall made the Site safe and stop work as quickly as possible after receiving the certificate and shall be paid for all work carried out before receiving it and for any work carried out afterwards to which a commitment was made."

2. Uncontestedly, the apposite contract, contains an arbitration clause, and, on anvil thereon, the disputes with respect to, all, the claims raised by the petitioner herein against

the respondent, where hence referred, for, their arbitration vis-a-vis the Arbitrator. The Arbitrator concerned, pronounced his award, wherein, he allowed the petitioner's claim, for monetary indemnification, arising, from his plant, machinery and equipments besides man power remaining idle, only, from, 2.8.2007 to 25.11.2007, whereas, he refused to allow indemnification in respects thereof, from 2.8.2007 to 10.07.2008 also the Arbitrator refused, to, in consonance with the rates, claimed, by the petitioner vis-a-vis the expenditure(s) incurred towards defrayment(s) of rent vis-a-vis machinery, equipments, and, manpower hence maintained at the relevant site, hence mete vis-a-vis him, conspicuously for the aforesaid claimed period, rather he proceeded, to, discard the rates claimed by the petitioner, and, he proceeded to make monetary indemnification, in respect of various claims, reared before him, by the petitioner in the manner, encapsulated in the award.

3. The petitioner is aggrieved, on both, the aforesaid counts. Initially, the justifiability of the petitioner, to seek monetary indemnification, under various heads, from the period commencing, from, 2.8.2007 to 10.07.2008 is to be set at rest. The Arbitrator had while restricting the apposite claim, espoused before him by the Contractor, had placed reliance upon communications addressed from 2.08.2007 to 15.11.2007. He also proceeded to place reliance, upon, Annexure P-3(Q), (a) Annexure whereof, is a communication addressed, on 15.11.2007 by the Executive Engineer, Shillai, to the Assistant Engineer, Shilai, Sub Division, whereunder, an apposite information, was purveyed, to him, (b) also a proposal occurs, therein, for closure of works, being referred to the higher authorities, on account of hindrances being created, by certain landowners, whereupon whose lands, the awarded work, was to be executed by the contractor, (c) and, hence the Arbitrator proceeded to therefrom also hence draw an inference, of the contractor being throughout aware, of the imminent closure of the project, (d) besides his also throughout holding the requisite knowledge, of imminent frustration of the contract, hence, was enjoined, to, in contemporaneity thereof, remove his man power, machinery, plant and equipments etc., from the relevant site, (e) whereas, his waiting for rendition, of, an order of rescission of contract by the authorities concerned, rendering him, rather estopped to claim the apposite monetary indemnification, from, the respondent.

4. The aforesaid reason(s), assigned, in the impugned award, are, per se pretextual besides flimsy, and, are a sequel of gross misreading, of, the mandate enshrined in clause 55.1, of, the apposite contract. The afore extracted mandate, occurring, in clause 55.1, of, the relevant contract, holds prescription, for rescission of the contract, upon surfacing, of, material vis-a-vis its imminent frustration, arising, from evident unavoidable circumstances. Hereat, the unavoidable circumstances, are, comprised in the landowners, whereupon, whose lands the awarded work was to be executed, by the contractor/petitioner herein, creating hindrances or obstruction(s) in its execution. There is a clear specific recital, in the apposite contract, of the Engineer, being enjoined to certify qua imminent frustration, of contract. Nowat, it is to be adjudged whether Annexure C-3 (Q), comprises a certificate, within the ambit, of clause 55.1 of the contract. On a close reading of its contents, it emanates, of its only containing, a proposal for closure, of project, and, also when the official concerned, who made thereunder an intimation to his superior official, obviously did not hold any authorization to rescind the contract, thereupon, rather the time whereat the contract stood ultimately rescinded by the authority hence superior to the authority, who prepared Annexure C-3 (Q), (a) rather constitutes, the apt tenable time, whereat, the rescission of contract occurred, besides also the time whereat, the apposite certification, qua imminent frustration, of the contract also hence ensued, (b) thereupon, 10.07.2008, is the apt date, whereat the contract stood rescinded, and, is also the date, in contemporaneity whereof, the apposite certification within, the ambit of clause 55.1, of, the apposite contract, rather hence, ensued, (c) thereupon placing of any reliance upon Annexure C-3(Q), by the Arbitrator, for, his hence concluding, of it, comprising the apposite certification or its constituting a valid order, of rescission of contract, hence being a sequel of gross misreading, of, clause 55.1 of the apposite contract, (d) concomitantly also any inference, of, in its making the contractor/petitioner herein holding the requisite knowledge, of imminent closure of works, is wholly insignificant, (e) repeatedly when the rescission of contract, occurred subsequent thereto,

and was communicated, to the contractor only on 9.7.2008, and, also when the officials concerned, despite, being aware of its dispatch therewith, (f) thereupon, the apt proposal(s) contained in Annexure C-3 (Q), though, hence enjoined the authorised officials, of, the respondent with the quickest immediacy, hence, take a binding conclusive decision thereon, for hence avoiding any pecuniary damages being assessed vis-a-vis the contractor/petitioner, (g) contrarily theirs impeding, the pace of making, of, an apposite order of rescission, and, to in contemporaneity thereof, hence, also issue the apposite certification, renders the respondent liable, to, make the apposite pecuniary contractually prescribed indemnification(s) vis-a-vis the petitioner herein/contractor.

5. Furthermore, with the recital, occurring, in clause 55.1, of, the apposite contract, hence enjoining the contractor to remove his plant, machinery and equipments etc., from the relevant site, only after his receiving the apposite certification, (a) renders amenable an inference of the issuance, of, order of rescission of contract, by the competent authority, and, concomitantly in contemporaneity thereto, hence issuance of an apposite contractual certification also emanating, (i) rather being a prerequisite condition, for the contractor proceeding, to remove his plant, machinery and equipments etc., from, the relevant site, and, obviously his being also enjoined, to not, until his receiving the aforesaid certification, (ii) hence maintain the plant, machinery and equipments etc., at the relevant site. Further inferences therefrom, are, of any awareness of the contractor/petitioner, preceding 10.07.2008, of, the imminent frustration of contract, being insignificant nor thereat he was obliged, to hence remove, from, the site, the relevant machinery, plant and equipments etc., (iii) rather with his being contractually obliged to remove the plant, machinery and equipments, from, the site, only upon, his receiving the apposite certificate or a valid order of rescission. Consequently, it is held that the petitioner, is, entitled for apposite contractual monetary indemnification(s), comprised in Claim-A, and, in Claim-B from 2.8.2007 to 10.07.2008 instead of 2.8.2007 to 25.11.2007.

6. Be that as it may, the learned counsel appearing for the petitioner/contractor, has vehemently contended, that the negation by the Arbitrator of all claims in the manner computed, by the contractor, being rendered in short shrift manner, and, also arising from his omitting, to revere the documentary evidence adduced before him, by the Contractor/petitioner. However, the aforesaid submission, falters, as a perusal of the record, makes a clear depiction, of, the documents tendered or placed before the Arbitrator by the petitioner/contractor , being merely photo copies, and, hence no reliance being imputable thereon, besides obviously when the authors thereof remained unexamined, hence, the apposite claims as reared by the petitioner/contractor, before, the Arbitrator, stood aptly rejected.

7. For the foregoing reasons, the instant petition is partly allowed and the award impugned before this Court, is, modified only with respect to Claim-A and Claim-B and it is held that the petitioner/contractor is entitled, to the apposite monetary indemnification, from, 2.8.2007 to 10.07.2008, instead of 2.8.2007 to 25.11.2007, at the rates, as adjudged by the Arbitrator, whereas, the award of the Arbitrator, on other counts, is affirmed and maintained. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith to the concerned quarter.

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

Ramesh Chand .....Petitioner/defendant.

Versus

Ichha Devi (since deceased) and another .....Respondents/plaintiffs.

Civil Revision No. 186 of 2017.
Reserved on : 2nd May, 2018.
Date of Decision: 7th May, 2018.

Code of Civil Procedure, 1908- Order XXII Rule 3- **Limitation Act, 1963-** Section 5- Condonation of delay - Filing of separate application, whether necessary? - Defendant challenging trial court's order setting aside abatement of suit and ordering substitution of legal representatives of deceased plaintiff, in a suit filed for decree of permanent prohibitory injunction – Defendant arguing that no condonation of delay could have been allowed as separate application under Section 5 of Limitation Act was not filed – Held, separate application under Section 5 of the Act was not required to be filed since explanation for delay was duly given in application filed for substitution of legal representative (s) – Further, such application was supported by an affidavit of legal representative, contents of which remained unrebutted – Order of Trial Court upheld – Petition dismissed. (Para-5)

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction – Death of sole plaintiff – Whether cause of action survives? Held- Yes - Principle of reliefs in personam is applicable only where cause of action accrues in respect of personal contract of service or the same is closely appertaining to his personal status - Suit for permanent prohibitory injunction is with respect to an estate – Cause of action survives after death of plaintiff and suit can be continued by his legal representatives – Petition dismissed – Order of trial court upheld. (Para-6)

Case referred:
Ragho Singh vs. Mohan Singh and others, (2001)9 SCC 717

For the Petitioner: Mr. Ajay Sharma, Advocate.
For Respondent No. 2 : Mr. Pawan Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition is directed, against, an affirmative order, pronounced, by the learned trial Court upon the applicant's/respondent No.2's application, for begetting substitution, of, deceased sole plaintiff Ichha Devi, whereunder, the legal heirs of the deceased sole plaintiff, were permitted to be substituted in her place also whereunder the abatement was set aside.

2. The deceased sole plaintiff, had, in her life time, instituted a suit for rendition of a decree for permanent prohibitory injunction, for restraining the defendant, from interfering in any manner vis-a-vis her possession, upon, the suit khasra numbers and also had sought a decree of permanent prohibitory injunction, from, restraining the defendant, from, demolishing the cattle shed existing upon the suit land, till occurrence of partition thereof, in accordance with law.

3. The sole plaintiff Ichha Devi, expired, during the pendency of the suit, and, thereupon her legal heir preferred an application, whereunder he sought, his substitution in her place, in the array of co-plaintiff(s). The aforesaid application was allowed, by the learned trial Court. The defendant/petitioner herein, being aggrieved therefrom, hence, motioned this Court.

4. The learned counsel appearing for the defendant has initially, with much vigour by placing reliance, upon, a decision of the Hon'ble Apex Court, rendered, in a case titled as ***Ragho Singh vs. Mohan Singh and others*** reported in ***(2001)9 SCC 717***, wherein, it stands expostulated, that, upon an apposite application being preferred, beyond, the statutorily prescribed period of time, and, it remaining unaccompanied, by an application cast under Section 5 of the Limitation Act, (I) thereupon, the court concerned being precluded, to condone the apposite delay, and, also being precluded, to allow the apposite application. The aforesaid mandate, of, the Hon'ble Apex Court, would be straight way applicable, vis-a-vis the factual matrix prevailing hereat, (a) only upon the apposite application, not, containing any recitals, in explication of the apposite delay. Contrarily, if the apposite application, does therewithin, hold(s), recitals, in explication of the apposite delay, (b) besides when the apposite explication is

supported by cogent material, comprised in an affidavit sworn, by the applicant concerned, (c) thereupon, dehors any separate application, cast under the provisions of Section 5 of the Limitation Act, remaining unappended with the apposite application, yet would not straightway, attract mandate supra, (d) especially when therein, there is no disclosure, of dehors, the apposite scribed motion, being unaccompanied by an application, cast, under Section 5 of the Limitation Act, also, with no tangible explication being purveyed in the apposite scribed motion, for hence the apposite delay being condoned, rather also entailing dismissal of the apposite application.

5. Bearing in mind, the aforesaid prima donna expostulation, an allusion tot he apposite application, does bear out the factum, of, it containing a recital in explication, of the apposite delay. The apposite recital embodied, in the application at hand, is also accompanied by an affidavit, and, with contents of the affidavit remaining unrebutted, (i) thereupon with the tenacity, of, the apposite explication, being hence cogently established, thereupon, the mere factum of the apposite scribed motion, remaining unaccompanied, by an application, cast under the provisions of Section 5 of the Limitation Act, would not render applicable or attractable hereat, the mandate supra, recorded by the Hon'ble Apex Court in Ragho Singh's case, significantly, when as aforestated the factual matrix prevailing thereat, is pointedly contradistinct vis-a-vis the factual matrix prevailing hereat.

6. Furthermore, the learned counsel appearing for the petitioner has contended with much vigour, that, with the cause of action, ventilated, by the sole deceased plaintiff, singularly appertaining to her, also the reliefs espoused, therein, being reliefs propagated in personam, thereupon, her legal representative(s) being barred to, on her demise, seek his substitution, in her place nor also thereupon, the learned trial Court, is, empowered to permit his substitution in the apposite array of co-plaintiff. The aforesaid submission is straightway rejected (a) as the principle of reliefs propagated, in personam, by the deceased plaintiff, hence debarring her legal representative, to, on her demise seek, his, substitution in her place, (b) is workable only in respect of personal contract of service or vis-a-vis contracts whereunder the obligation, for their personal execution, is fastened only upon deceased plaintiff or also when causes of action, propagated in the plaint by the deceased plaintiff are closely appertaining to her personal status/reliefs in the suit land concerned, and, on her demise neither cause(s) of action hence surviving nor cause(s) of action, devolving upon her successor-in-interest. Bearing in mind the aforesaid principles, and, also for guaging whether the causes of action, espoused, in the plaint by the deceased plaintiff, being hence propagated, in personam or for the benefit of the estate, an allusion, to the averments, cast in the plaint more importantly, the one(s) occurring in paragraph No.2, is imperative, paragraph No.2 whereof is extracted hereinafter:-

> "2. That the defendant who is very clever and headstrong person and has no respect for law, has started threatening the plaintiff to interfere, take forcible possession, to demolish the cattle shed and make additions and alterations in the cattle shed, to raise forcible construction and to take forcible possession by forcibly ousting the plaintiff and her sons since yesterday. The alleged act and conduct of the defendant is wrong, incorrect, illegal, void and the same amounts to invasion of the legal rights of the plaintiff. The defendant has no right to disturb the exclusive Hissedari possession of plaintiff and to demolish the existing cattle shed and raise any sort of construction until and unless the suit land is partitioned in due course of law."

A reading thereof does pointedly, and, candidly make a vivid disclosure, of the deceased plaintiff, not, propagating therein reliefs in personam, rather hers propagating therein reliefs vis-a-vis her estate. Consequently, on her demise, given the causes of action, initially propagated being vis-a-vis her estate, thereupon, hence they remained alive, and, also remained continued, for their espousal, even by her successors-in-interest. In sequel, the substitution of her legal representative, in place of the sole deceased plaintiff, in the array of co-plaintiff(s), is apt as well as meritworthy.

7. For the foregoing reasons, the instant petition is dismissed and the impugned order is maintained and affirmed. The parties are directed to appear, before, the learned trial Court on 23rd May, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of. Records, if received, be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Balam Singh ....Respondent.

Cr. Appeal No. 232 of 2008.
Reserved on: 27th April, 2018.
Date of Decision: 7th May, 2018.

Indian Penal Code, 1860- Sections 170 and 420- Cheating by impersonating as a public servant- Accused allegedly impersonated himself to complainant as Inspector of Food and Civil supplies while visiting his shop and induced him to give money to do favour – He also cheated one another shopkeeper on same pretext to deliver a bag of sugar to him – Accused acquitted for offence under Section 420 but convicted for offence under Section 170 I.P.C. by trial Court- State not filing any appeal against acquittal under Section 420 I.P.C. - In appeal at the instance of accused Sessions Judge acquitting him for offence under Section 170 I.P.C. also – Appeal against by State – Held, offence (s) under Section 170 and 420 I.P.C. are closely interconnected – unchallenged acquittal for offence under Section 420 I.P.C. on same facts would make statement of complainant equally doubtful vis-à-vis offence under Section 170 I.P.C. – Statement of another victim of having delivered a bag of sugar to accused found missing in his statement recorded under Section 161 Cr.P.C. – Acquittal recorded by Sessions Judge for offence under Section 170 of I.P.C. upheld – Appeal of state dismissed. (Paras-10, 12 and 14)

For the Appellant: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G.
For the Respondent: Mr. Virender Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State against the judgment rendered, on 18.02.2008, by the learned Sessions Judge, Shimla, H.P., upon, Criminal Appeal No. 7-S/10 of 2007, whereby, he set aside the judgement of conviction, and, sentence recorded, upon, the accused/respondent herein, by the learned trial Court.

2. The facts relevant to decide the instant case are that on July 22, 2006, at about 3.10 p.m., Up Pradhan Shri Narain Datt Sharma, Gram Panchayat Khatnol, informed the police of Police Station Dhalli, telephonically that the villagers had caused a person, who states himself to be an Inspector and seems to be a suspect. It is averred that on the aforesaid information, Inspector Vijay Sharma along with other police officials proceeded to village Khatnol. On reaching the spot, Lal Chand made a statement under Section 154 Cr.P.C., to the effect that on the aforesaid date at about 2 or 2.30 p.m., he was present in his shop and one person came there and demanded cold drinks from him. It is averred that he gave him two bottles of cold drinks and the latter asked for the price of the cold drinks which was disclosed at the rate of Rs.11/- per bottle. The latter told that he was selling the same at higher price than the prescribed rate. It

was reported that the accused had disclosed to him that he is Food and Supplies Inspector and he can fine upto Rs.10,000/-. It was reported that said person asked for suitable treatment and then he will leave him. Upon this, the complainant paid him a sum of Rs.500/- and the accused had stated that it is quite less amount. Then, the complainant again paid him a sum of Rs.100/- and, in all, paid a sum of Rs.600/-. It is reported that the complainant got suspicious about that person and accordingly, he had informed Prakash Thakur, who asked for the identity card from the accused. Then the accused had shown his Pan Card. In the mean time, many people had gathered there and the accused after seeing the gathering, ran away in his maruti van bearing No.HP-01-0420 towards Devla and he was chased and was apprehended at Devla by stopping the van. It is reported that he was inquired and on inquiry, he disclosed his name as Balam Singh, dismissed peon from the office of Food and Supplies Department. Upon this statement, FIR was registered in the police station concerned and the police completed all the codal formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed before the learned trial Court.

4. The accused/respondent herein stood charged by the learned trial Court, for his committing offences, punishable under Section 170 and Section 420, of the IPC. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, he claimed innocence, and, pleaded false implication.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/respondent herein, for his committing an offence punishable under Sections 170 of the IPC, however, it acquitted the accused for charge under Section 420, IPC. In an appeal preferred therefrom, by the accused/respondent herein, before, the learned Sessions Judge concerned, the latter reversed the apposite findings of conviction, and, sentence recorded in the judgment, pronounced, by the learned trial Court.

6. The State of H.P., stands aggrieved, by the findings recorded by the learned Sessions Judge concerned, in dis-concurrence vis-a-vis the judgment, of conviction recorded against him, by the learned trial Court. The learned Addl. Advocate General appearing for the appellant herein, has concertedly and vigorously contended qua the findings of acquittal, recorded by the learned Sessions Judge concerned, standing not based on a proper appreciation, by him, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by him, of the material on record. Hence, he contends qua the findings of acquittal rather warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Sessions Judge standing based on a mature and balanced appreciation, by him, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The prosecution, for proving the genesis of the case, borne in the apposite FIR, Ex.PW8/A, primarily depended upon the testifications, of, PW-1, PW-2, PW-3, PW-4, PW-5, and, PW-6. Through the aforesaid witnesses, the prosecution concerts, to prove the trite factum, (a) of the accused by impersonating himself, as an Inspector in the Food and Civil Supplies Department, his extorting a sum of Rs.600/- from PW-1, (b) besides the testifications of the aforesaid PWs, the prosecution also depended, upon, exhibits P-3 to P-41, exhibits whereof comprise the articles unearthed, from, the possession of the accused, upon his being subjected, to jama-talasi, whereafter memo borne in Ex.PW2/A, hence, stood prepared. Furthermore, the prosecution for proving the charge against the accused, depended upon memo, borne in

Ex.PW2/B, whereunder, 5 kgs of sugar stood recovered from the maruti van, occupied, at the relevant time, by the accused.

10. Be that as it may, before proceeding to impute sanctity to the aforesaid incriminatory evidence existing on record, it is imperative to also bear in mind the trite factum, that, (a) unless the respectively rendered testifications by PWs aforesaid, are, unbereft of any intra se or inter se contradictions, (b) and, unless each of the prosecution witnesses while rendering their respective testification(s), theirs neither improving nor embellishing, upon, their previously recorded statements in writing, (c) thereupon, alone solemn sanctity is enjoined to be imputed, to their respectively rendered testifications. While bearing in mind, the aforesaid principle, for hence imputing, vigour, to the respectively rendered testifications, by the prosecution witnesses, an allusion to the testification of PW-1 is significant, (d) wherein, he makes a disclosure, of, his handing over two bottles of Coca Cola, to the accused, and, his also asking the accused to defray to him Rs.11/- per bottle to him, being the labelled rate of each bottle. However, upon the aforesaid labelled rate of two bottles of Coca Cola, being demanded, by PW-1, from the accused, evidently a wrangle ensued inter se both, and, evidently thereat a threat was meted by the accused, qua his reporting the factum of overcharging, to the authorities concerned. PW-1 continues to testify, of the accused, demanding a sum of Rs.600/-, from him, for suppressing the aforesaid factum. The aforesaid echoing by PW-1, of the accused, demanding a sum of Rs.600/- from him, for suppressing the factum of his purportedly overcharging, from him, for two bottles of Coca Cola, is, ipso facto per se personificatory, of PW-1 conceding, to his overcharging for two bottles of Coca Cola, purchased from him, by the accused, (e) and, also his echoing, of, a sum of Rs.600/- being purportedly given by him, to the accused, on the latter's demand, for his hence suppressing the trite factum, of, his overcharging, is, also a tangible piece of evidence, (f) qua hence of PW-1 contorting besides twisting, the factum of the accused extorting a sum, of Rs.600/-, from him, and, also his concomitantly inducing him to deliver him a sum of Rs.600/-, by impersonating himself, to be an Inspector in the Food and Civil Supplies Department. Even the learned trial Magistrate concerned, recorded, findings of acquittal in favour of the accused qua the charge framed against him under Section 420 of the IPC, and, with the State not challenging, the acquittal pronounced by the learned trial Magistrate qua the charge framed against him under Section 420 of the IPC, thereupon, the findings of acquittal, recorded by the trial magistrate qua the charge framed against the accused, under Section 420 of the IPC, acquires conclusivity, (i) further corollary thereof, being, of, with there being close interconnectivity inter se the charge of impersonation, and, of PW-1 being induced, to hence deliver a sum of Rs.600/-, vis-a-vis the accused, thereupon, the effect, of, findings of acquittal recorded qua the charge framed under Section 420 of the IPC, against, the accused, hence, acquiring conclusivity, also gives enhanced momentum to a conclusion of PW-1, for all the reasons aforestated rather prevaricating the factum of his delivering a sum of Rs.600/-, to, the accused.

11. The testification rendered by PW-5 is obviously an improvement besides a gross embellishment vis-a-vis his previously recorded statement in writing, especially with his, in his earlier statement recorded under Section 161 of the Cr.P.C., omitting to make any voicing therein, of the accused hence demanding a sum of Rs.600/- from him, for avoiding his being challaned. The testification of PW-6 alike the testification of PW-5, is ridden with a vice of embellishment besides gross improvement vis-a-vis his previously recorded statement in writing, conspicuously, with his acquiescing in his cross-examination, of the accused liquidating to him, the entire payment(s) vis-a-vis all the articles purchased by him, from his shop.

12. Be that as it may, nowat PW-3 wherefromwhose commercial establishment, the accused by impersonating himself, to be an Inspector in the Food and Civil Supplies department, hence, induced him, to deliver 5 kgs of sugar, in respect whereof memo borne in Ex.PW2/B was prepared, rather, in his cross-examination making an apt acquiescences vis-a-vis an affirmative suggestion, of his omitting to record the aforestated factum, in his previously recorded statement, under Section 161 of the Cr.P.C., (I) thereupon, renders his testification vis-a-vis the aforestated fact, to be ridden with an entrenched vice, of embellishments besides improvements, whereupon,

it is rendered incredible. The aforesaid analysis, of, the evidence, of, Pws concerned, underscores the factum of the respectively rendered testifications by all Pws concerned, being incredible, therefrom, it is inevitable to conclude of the prosecution abysmally failing to prove the charge against the accused.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge concerned has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge concerned does not suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

14. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

General Manager, NHPC and another .....Appellants.

Versus

Rattan Dass and others ... ..Respondents.

RFA No. 430 of 2010 and connected matters.
Date of decision: 8.5.2018.

Land Acquisition Act, 1894 (As amended vide H.P. Amendment Act, 1984)– Section 23- Determination of compensation – Held, where entire land is to be used and no area is to be left for development activities, claimants are entitled for compensation at uniform rate(s) regardless of classification and nature of land. (Para-8)

Land Acquisition Act, 1894 (As amended vide H.P. Amendment Act, 1984)– Sections 18 and 25- Jurisdiction of Reference Court- Whether amount awarded as compensation by Collector, can be reduced by Reference Court? - Held- No - Amount awarded by Reference Court cannot be less than amount awarded by Collector. (Para-13)

Case referred:
Special Land Acquisition Officer, Kheda and another versus Vasudev Chandrashankar and another (1997) 11 SCC 218

For the Appellants : Mr. K.D. Shreedhar, Senior Advocate, with Ms. Shreya Chauhan, Advocate, in all the appeals.

For the Respondents: Mr. Sunil Mohan Goel and Mr. Vipul Sharda, Advocates, for the private respondents, in all the appeals.

Mr. Ashok Sharma, Advocate General, with Mr. Vinod Thakur, Mr.Sudhir Bhatnagar, Additional Advocate Generals and Mr. Bhupinder Thakur, Deputy Advocate General, for the respondent-State in all the appeals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

Since all these appeals arise out of the same award, they were taken up together for consideration and are being disposed of by this common judgment.

2. For the sake of convenience and to maintain clarity, facts of RFA No. 430 of 2010, titled as 'General Manager, NHPC vs. Rattan Dass and others' are being referred to.

3. Brief facts of the case are that a notification under Section 4 of the Land Acquisition Act (for short 'Act') was issued by State of Himachal Pradesh on 9.2.2015 whereby it was proposed to acquire the land situated at Phati-Manyasi, Suchain-Kanon and Kotla, District Kullu, H.P. for the construction of various components of Parbati Hydroelectric Project.

4. After the completion of all codal formalities under the Act, the Collector, after taking into consideration one year average price of the land determined the value of the land on the basis of its quality in the following manner:-

Sr.No.	Land Type	Rate per Bigha (Rs.)
1.	Ropa Awwal	3,56,500.00
2.	Ropa Som	1,72,500.00
3.	Bathal Awal	2,87,500.00
4.	Bathal Dom	1,26,500.00
5.	Bathal Som	80,500.00
6.	Bathal Chaharam	46,000.00
7.	Banjar Kadeem	11,500.00
8.	Bageecha Bathal	1,72,500.00
9.	Gair Mumkin	---

5. The claimants/respondents, being aggrieved and dis-satisfied with the award, preferred Reference Petition under Section 18 of the Act before the Collector, wherein it was submitted that the market value of the land under acquisition had not been determined in accordance with law and, therefore, the same was liable to be modified and enhanced.

6. That the learned Reference Court after taking into consideration the purpose of acquisition of the land hold the claimants to be entitled to a uniform rate of compensation at Rs. 2,87,500/- per bigha as had been determined by the Collector.

7. Aggrieved by the award so passed, the beneficiaries have filed these appeals questioning the award on number of grounds as taken in the appeal.

8. At the outset, it may be observed that it is settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization. This aspect of the case has been considered by a co-ordinate Bench of this Court in ***RFA No. 282 of 2010 titled Suresh Kumar and others vs. Collector Land Acquisition, NHPC, decided on 22.10.2016*** alongwith connected matters, wherein it was observed as under:

> *"26. It is a settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization.*
>
> *27. The apex Court in Haridwar Development Authority vs. Raghubir Singh & others, (2010) 11 SCC 581 has upheld the award of compensation on uniform rates.*
>
> *28. In Union of India vs. Harinder Pal Singh and others 2005(12) SCC 564, while determining the compensation for acquisition of land pertaining to five different villages, the apex Court uniformly awarded a sum of Rs.40,000/- per acre, irrespective of the classification and the category of land.*

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

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

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

9. Adverting to the facts of the case, it is not in dispute that the entire land that was acquired was put to public purpose and Power Project stood constructed thereupon. It was used for only one purpose and as such, there cannot be any error in the uniform determination of the market value of the acquired land.

10. That being the legal position, then the award passed by the Collector assumes greater significance as admittedly under Section 25 of the Act, the amount of compensation by the Court cannot be lower than the amount awarded by the Collector and in the instant case, the highest amount is admittedly Rs.2,87,500/- per bigha and, therefore, no infirmity or illegality can be found in the award of the Collector.

11. The learned Advocate General would however contend that since the State of Himachal Pradesh has carried out amendment in Section 25 of the Act whereby the words "or be less than the amount awarded by the Collector under section 11", have been omitted from the main Section, therefore, the Reference Court could not have relied upon the provisions of Section 25 for upholding the award of the Collector.

12. In order to appreciate this submission, it would be necessary to reproduce in entirety the provisions of Section 25 as it stood prior to the amendment carried out in that Section w.e.f.24.9.1984 and the same reads as under:

*"**25. Rules as to amount of compensation** – (1) When the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11.*

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the judge) to make such claim, the amount awarded by the court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by the judge) to make such claim, the amount awarded to him by the court shall not be less than, and may exceed, the amount awarded by the Collector."

13. The State of Himachal Pradesh vide Himachal Pradesh Act 9 of 1964, has carried out amendment vide Section 5 w.e.f. 24.12.1964 in Section 25 of the Act to the following effect:

"(i) In sub-section (1); omit the words "or be less than the amount awarded by the Collector under Section 11";

(ii) In sub-section (3), after the word "Collector", add the words "unless the State Government has required the Collector that a reference be made under Section 18

and the Court is opinion that the amount awarded by the Collector is excessive and should be reduced".

14. However, Section 25 of the Act came to be substituted by Act 68 of 1984 vide Section 17, w.e.f. 24.9.1984 and the same now reads as under:

> ***"25. Amount of compensation awarded by Court not to be lower than the amount awarded by the Collector**.- The amount of compensation awarded by the Court shall not be less than the amount awarded by the Collector under Section 11."*

15. Indubitably, no amendment has been carried out by the State of Himachal Pradesh after substitution of Section 25 as aforesaid.

16. Therefore, in terms of the provisions contained in Section 25 (supra), as it stands today, the award passed by the Reference Court cannot be lower than the amount awarded by the Collector.

17. Apart from the above, it is not in dispute that the awards relating to the similar other purpose were assailed not only by the beneficiaries but even by the claimants and in those cases, the Court has proceeded to award compensation at the rate of Rs.3,56,000/- per bigha (Rs.17,800/- per biswa) as against the compensation of Rs.2,87,500/- per bigha as awarded in this case.

18. Once the award passed by the learned Reference Court have been upheld or rather even enhanced, then in such circumstances no interference is warranted especially in light of the judgment of the Hon'ble Supreme Court in ***Special Land Acquisition Officer, Kheda and another*** *versus* ***Vasudev Chandrashankar and another (1997) 11 SCC 218,*** wherein it was held that the judgments and awards of Courts are the best piece of evidence which can safely be relied upon by the Courts while determining the fair market value of the land at the relevant time.

19. In view of the aforesaid discussion, I find no merit in these appeals and the same are accordingly dismissed, so also all pending applications, if any, leaving the parties to bear their own costs.

20. Registry is directed to place a copy of this judgment on the files of connected matters.

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

Sher Singh .....Petitioner.
Versus
State of H.P. and Anr. .....Respondents.

Cr.MMO No. 49 of 2017
Date of Decision: 8.05.2018

Code of Criminal Procedure, 1973- Section 482- Inherent Powers – Quashing of FIR and consequential proceedings - Prosecutrix filing FIR against petitioner-accused for offences under Sections 376 and 452 of I.P.C. – Police filing cancellation report before CJM and stating that commission of aforesaid offences not established during investigation – CJM issuing notice to prosecutrix and also recording her statement to the effect that she was satisfied with police investigation and had no objection in case cancellation report was accepted – However, CJM declining cancellation report and directing SHO to file regular charge sheet for said offences – CJM taking cognizance and issuing notices to accused – Accused filing petition in High Court and seeking cancellation of FIR etc. – Prosecutrix arguing that her 'no objection' before CJM was

obtained by police under pressure – High Court found that on date of alleged offence prosecutrix had consumed poison and she was admitted in a hospital – Incident of alleged rape was revealed by her only after eight days - No reason was given for delayed filing of FIR – Her version that no objection before CJM was taken by police under pressure, was found unbelievable – Accused and prosecutrix were well known to each other - In factual matrix, High Court set aside order of CJM as well as FIR and consequent proceedings – Petition allowed. (Paras-9 to 18)

Cases referred:

State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335
State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330

For the petitioner:	Mr. N.K. Thakur, Senior Advocate, with Mr. Divya Raj Singh, Advocate.
For the respondents:	Mr. Dinesh Thakur, Additional Advocate General and Mr. Vikrant Chandel, Deputy Advocate General, for the State.
	Mr. Naveen K. Bhardwaj, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

By way of instant petition filed under Section 482 Cr.PC, prayer has been made on behalf of the petitioner to quash FIR No. 245 of 2007 dated 4.10.2007, registered at PS Chamba, District Chamba, HP, under Sections 376 and 452 of IPC and consequent criminal proceedings registered as Cr.MA No. 462-2013, pending in the Court of learned Chief Judicial Magistrate, Chamba, H.P.

2. Briefly stated facts as emerge from the record are that on 4.10.2007, aforesaid FIR came to be lodged against the petitioner (herein after referred to as the accused) at the behest of respondent No.2 (hereinafter referred to as the prosecutrix), who alleged that on 26.9.2007, accused taking advantage of her loneliness, sexually assaulted her against her wishes in her house. Though, alleged incident occurred on 26.9.2007, but aforesaid FIR came to be lodged after eight days i.e. 4.10.2007. On 26.9.2007, when alleged incident took place, prosecutrix consumed poison, as a consequence of which, she was admitted in hospital at Chamba, where she remained admitted for two days. There is nothing on record from where, it can be inferred that during that period, when she remained admitted in hospital, she made any statement to the police with regard to forcible sexual assault committed upon her on 26.9.2007 by the accused. Subsequently, police on the basis of FIR, which admittedly came to be lodged after eight days of alleged incident, started investigation and came to conclusion that no case is made out against the accused. After completion of investigation, police presented cancellation report under Section 173 (2) Cr.PC, in the Court of learned CJM, Chamba, District Chamba, H.P (Annexure P-1), who having received cancellation report, issued notice to the prosecutrix, who in turn got her statement recorded on 25.7.2013, stating therein that she is satisfied with police investigation and has no objection, in case FIR No. 245 of 2007, registered under Sections 376 and 452 of IPC, is ordered to be cancelled.

3. Careful perusal of statement having been made by the prosecutrix (Annexure P-2) clearly suggests that aforesaid statement was recorded by the Chief Judicial Magistrate, Chamba, who after having read over and explained the same to the prosecutrix, put signature on the same. Subsequently, on 17.10.2014, learned court below rejected the cancellation report submitted by the Investigating Agency and directed it to file proper challan along with list of witnesses.

Pursuant to aforesaid directions contained in order dated 17.10.2014, challan came to be presented in the Court of learned CJM, Chamba, District Chamba, thereafter accused put in appearance before the learned CJM on 31.12.2016. Subsequently, on 13.2.2017, instant petition came to be filed by the accused in this Court, seeking therein quashment of FIR referred herein above, as well as consequent proceedings pending in the Court of learned CJM Chamba.

4. Mr. N.K. Thakur, learned Senior Advocate, duly assisted by Mr. Divya Raj Singh, Advocate, representing the petitioner, vehemently argued that order dated 17.10.2014, passed by the learned CJM, is not sustainable in the eye of law as the same is not based upon correct appreciation of material made available on record by the Investigating Agency. While inviting attention of this Court to the para-5 of the order dated 17.10.2014, Mr. Thakur, contended that statement of prosecutrix was recorded on 25.7.2013, by learned CJM herself, wherein prosecutrix had categorically stated that she is/was satisfied with the police investigation and has no objection, if the aforesaid case registered against the accused under Sections 376 and 452 of IPC, is ordered to be cancelled. Mr. Thakur, further contended that since prosecutrix was 19 years' old at the time of recording her statement, it is not understood what prompted the learned CJM to pass order dated 17.10.2014, because there is nothing on record, from where it can be inferred that after 25.7.2013, prosecutrix had made any prayer/request to the learned CJM to get the matter reinvestigated from the Investigating Agency. Mr. Thakur, while making this Court to travel through the order dated 17.10.2014, also made an endeavor to persuade this Court to agree with his contention that no cogent and convincing reasons have been assigned by the learned CJM while disagreeing with the cancellation report submitted by the Investigating Agency, which is based upon proper appreciation of material collected on record by the Investigating Agency. While referring to para-7 of the order passed by the learned CJM, Mr. Thakur, contended that bare perusal of same suggests that learned CJM while arriving at conclusion that case is made out against the accused under Sections 376 and 452 of IPC, wrongly, injected her own thesis causing prejudice to the accused, who was admittedly not present at the time of recording of order dated 17.10.2014. Lastly, Mr. Thakur, with a view to justify the cancellation report submitted by the Investigating Agency, made this Court to travel through the evidence collected on record by the Investigating Agency, to demonstrate that no much reliance could be placed upon the version put forth by the prosecutrix. Mr. Thakur, specifically invited attention of this Court to the medical evidence adduced on record by the Investigating Agency, to suggest that no definite evidence has come to fore with regard to sexual assault, if any, committed by the accused on the alleged date of incident. He further contended that apart from above, none of other witnesses corroborated the version put forth by the prosecutrix and as such, Investigating Officer rightly arrived at conclusion that no triable case is made out against the accused.

5. Per contra, Mr. Naveen K. Bhardwaj, learned counsel representing respondent No.2, while refuting the aforesaid submissions having been made by the learned Senior counsel supported the impugned order passed by the court below and contended that there is no illegality and infirmity in the same, rather learned CJM having perused material available on record rightly came to conclusion that case is made out against the accused under Sections 376 and 452 of IPC. Mr. Bhardwaj, further contended that since prosecutrix was unable to understand the consequence of putting the signature on the statement alleged to have been made by her before the learned court below, no much advantage can be taken by the accused on that ground. He further stated that police forcibly got her statement recorded before the learned CJM and as such, it is of no consequence. He further contended that there is ample material available on record suggestive of the fact that on the date of alleged incident, accused committed offence punishable under Sections 376 and 452 of IPC and as such, there was no scope left for Investigating Agency to conclude that no case is made out against the accused. Lastly, Mr. Bhardwaj, contended that direction to Investigating Agency to file challan was issued on 17.10.2014, but present petitioner (accused) being aggrieved with the same approached this Court, after an inordinate delay and as such, present petition deserves to be dismissed on this ground only.

6. I have heard learned counsel for the parties as well as gone through the records of the case.

7. Before ascertaining the correctness of rival submissions made by the learned counsel representing the parties vis-à-vis prayer made in the instant petition to quash the FIR as well as consequent proceedings thereto, this Court deems it necessary to elaborate upon scope and competence of this Court to quash the criminal proceedings while exercising power under Section 482 of Cr.PC. Hon'ble Apex Court in judgment titled ***State of Haryana and others vs. Bhajan Lal and others***, 1992 Supp (1) SCC 335 has laid down several principles, which govern the exercise of jurisdiction of High Court under Section 482 Cr.P.C. Before pronouncement of aforesaid judgment rendered by the Hon'ble Apex Court, a three-Judge Bench of Hon'ble Court in case titled *State of Karnataka vs. L. Muniswamy and others*, 1977 (2) SCC 699, held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. Relevent para is being reproduced herein below:-

> ***"7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."***

8. Subsequently, Hon'ble Apex Court in *State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335*, has elaborately considered the scope and ambit of Section 482 Cr.P.C. Subsequently, Hon'ble Apex Court in *Vineet Kumar and Ors. v. State of U.P. and Anr.,* while considering the scope of interference under Sections 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 of the Cr.PC, as enumerated in Bhajan Lal's case, i.e. where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, quashed the proceedings

9. Hon'ble Apex Court in ***Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293***, while drawing strength from its earlier judgment titled as ***Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330***, has reiterated that high Court has inherent power under Section 482 Cr.PC., to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power

must always be used with caution, care and circumspection. While invoking its inherent jurisdiction under Section 482 of the Cr.P.C., the High Court has to be fully satisfied that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material adduced on record itself overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. In the aforesaid judgment titled as ***Prashant Bharti v. State (NCT of Delhi)***, (2013) 9 SCC 293, the Hon'ble Apex Court has held as under:-

> ***"22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 29-30)***
>
> > ***29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.***

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

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

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

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

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

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

10. Having carefully perused aforesaid exposition of law, it is quite apparent that exercising its inherent power under Section 482 of Cr.PC., High Courts can proceed to quash the proceedings if it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the Law.

11. Now this Court shall proceed to examine/consider the prayer made in the instant petition vis-à-vis factual matrix of the case. The details in respect of each aspect of the matter arising out of FIR No. 245/2007 dated 4.10.2007, registered at PS Chamba, have been examined in extensive in foregoing paragraphs. Now this Court would proceed to determine whether steps noticed in the judgment extracted herein above, can be stated to have been satisfied or not?

12. True, it is that learned CJM vide order dated 17.10.2014 directed the Investigating Agency to file challan in the Court, but record as made available to this Court, clearly suggests that pursuant to notice issued to the accused, he put in appearance before the court below for the first time on 31.12.2016, whereafter on 13.2.2017, present petition came to be filed before this Court and as such, there is no force in the argument of learned counsel representing respondent No.2 –prosecutrix that there is an inordinate delay in maintaining the present petition and as such, same is rejected outrightly.

13. Another contention put forth by Mr. Bhardwaj that police forcibly made prosecutrix to sign the statement recorded before the learned CJM on 25.7.2013, is also without any merit because bare perusal of Annexure P-2, clearly suggests that statement of prosecutrix, wherein she stated that she is satisfied with the police investigation and has no objection in case

FIR No.245/2007 under Sections 376 and 452 of IPC is ordered to be cancelled, was recorded before the learned CJM, rather under the hand writing of learned CJM Chamba. Since aforesaid statement Annexure P-2, came to be recorded before CJM Chamba, version put forth by the prosecutrix that she was asked by the police to put signatures on certain papers, cannot be accepted, rather this Court has reason to presume that CJM Chamba, while recording statement dated 25.7.2013, must have made prosecutrix understand the consequence of her giving statement as recorded in the order. It is not the case of the prosecutrix that learned CJM of her own, without taking her consent, recorded statement dated 25.7.2013.

14. Having perused order dated 17.10.2014, this Court finds that though there is mention with regard to recording of statement made by the prosecutrix on 25.7.2013, but no reason or explanation has been rendered on record by the learned CJM to ignore the aforesaid statement of prosecutrix, who admittedly was of 19 years age at the time of recording of her statement. If learned CJM after having recorded the statement of prosecutrix on 25.7.2013, was not satisfied or inclined to accept the version putforth by the prosecutrix, she could order then and there for re-investigation or presentation of challan in the Court of law. But it is not understood that why after more than a year, learned CJM of her own, proceeded to pass order dated 17.10.2014.

15. True, it is that it is well within the domain of CJM or any trial Court to reject cancellation report, if any, presented by the Investigating Agency, but while doing so, it or any court, is /was required to assign cogent and convincing reasons to differ with the reasons recorded by the Investigating Agency while presenting cancellation report. Interestingly, in the case at hand, statement of prosecutrix dated 25.7.2013, was recorded by the same CJM, who subsequently, recorded order dated 17.10.2014, but while directing the Investigating Agency to present challan in the competent court of law, learned CJM has proceeded to inject her own knowledge/logics to arrive at a conclusion that case under Sections 376 and 452 of IPC is made out against the accused. At the cost of repetition, it may be re-iterated that CJM is not barred from rejecting the cancellation report submitted by the Investigating Agency, provided it is convinced and satisfied that investigation has been not carried out in fair and impartial manner and evidence collected on record, by Investigating Agency suggests prima facie case, if any, against the accused. But in the case at hand, this Court taking note of peculiar facts and circumstances of the case, finds considerable force in the contention of learned Senior counsel representing the petitioner that court below after having recorded statement dated 25.7.2013 had no occasion to pass order dated 17.10.2014, as has been noticed herein above. There is nothing on record that after 25th July, 2013, when complainant got her statement recorded to the effect that she is satisfied with the investigation carried out by the Investigating Agency and has no objection in case FIR No. 245/2007 under Sections 376 and 452 of IPC is ordered to be cancelled, complaint or communication, if any, was received by the learned CJM, from the complainant's side alleging therein that she was compelled by the Investigating Agency to get her statement recorded before the learned Chief Judicial Magistrate on 25.7.2013. Though, in the earlier part of the judgment, argument advanced in this regard, by the learned counsel representing respondent No.2 has been rejected by this Court, but otherwise also, this Court has no reason to doubt the correctness of statement recorded on 25.7.2013, especially when it came to be recorded in the presence of CJM, rather in her own handwriting as is evident from Annexure P-2.

16. Leaving everything aside, this Court after having carefully perused order dated 17.10.2014, vis-à-vis material collected on record by the prosecution, is in total agreement with the learned Senior counsel that learned Chief Judicial Magistrate, while arriving at conclusion drawn in order dated 17.10.2014, failed to assign cogent and convincing reasons to differ with the finding recorded by the Investigating Agency, rather she injected her own knowledge and logics with regard to the alleged incident. Though, this Court having carefully perused Annexures P2 and P3 finds no reason to elaborate the matter any further, but on the persuasion of learned counsel representing respondent No.2, also perused the material adduced on record by the Investigating Agency, perusal whereof certainly suggests that no much reliance can be placed

upon the version put forth by the prosecutrix or other witnesses. Alleged incident occurred on 26.9.2007, whereafter prosecutrix allegedly consumed poison and remained hospitalized for two days, but interestingly, there is no evidence available on record suggestive of the fact that during this period, prosecutrix made any complaint against the petitioner with regard to the alleged incident happened on 26.9.2007, rather she chose to keep mum for almost 8 days. FIR came to be lodged on 4.10.2007 and there is no plausible explanation rendered on record by the prosecutrix with regard to the delay, save and except that she being girl hesitated from narrating the alleged incident to her parents or other family members. Otherwise also, if the version put forth by the sister-in-law namely Rekha, is perused vis-à-vis statement of prosecutrix, it completely falsifies the story narrated by the prosecutrix. As per statement of prosecutrix, accused taking advantage of her loneliness unauthorisedly entered her house and sexually assaulted her against her wishes. She further stated that though, she made an attempt to raise hue and cry, but since her mouth was gagged, her voice could not be heard by anyone. If the statement of Rekha (sister-in law of the prosecutrix) is read and examined juxtaposing statement of prosecutrix, it is in contradiction to the statement of prosecutrix. Rekha in her statement stated that when she came back to the house from fields, she saw accused coming out of the room of the prosecutrix, who on inquiry disclosed that accused had come for drinking water. Rekha is/was first person to meet prosecutrix after alleged incident, but she nowhere states that immediately after the alleged incident, prosecutrix disclosed to her that she has been sexually assaulted by the accused, rather she has categorically stated that on inquiry she was informed by the prosecutrix that accused had come to have water. It also emerges from the material available on record that the petitioner-accused was well known to the family of the prosecutrix, rather prosecutrix in her statement given to police has categorically stated that she has cordial relations with the wife of the accused. Medical evidence adduced on record, nowhere corroborates the version put forth by the prosecutrix, rather medical evidence nowhere suggests that prosecutrix was subjected to sexual intercourse. There is no mention, if any, with regard to any injury suffered by the prosecutrix while resisting sexual assault, if any, allegedly committed by the accused. No doubt, in medical evidence, there is mention of blood stains on the clothing of the prosecutrix, but it has been categorically mentioned in the report that blood stains are on account of menstruation.

17. Having carefully gone through the evidence available on record, more particularly, statement of prosecutrix dated 25.7.2013, recorded before the learned CJM, this Court is of the view that learned CJM had no occasion to direct Investigating Agency to present challan in the competent Court of law, rather on the basis of material available on record, it ought to have accepted the cancellation report submitted by the Investigating Agency.

18. Based on holistic consideration of facts and circumstances taken note herein above, this Court is convinced and satisfied that all the steps delineated by the Hon'ble Apex Court in *Rajiv Thaper's* case (supra), which has been further reiterated in *Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293*, stands satisfied. Otherwise also, this Court having perused material available on record, has no hesitation to conclude that chances of conviction, if any, on the basis of material adduced on record by the Investigating Agency, are very remote and bleak and in case, order dated 17.10.2014, is allowed to sustain, accused shall be unnecessarily put to the ordeals of protracted trial, which ultimately may lead to acquittal of the accused.

19. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, present petition is allowed and FIR No. 247 of 2007 dated 4.10.2007, registered at PS Chamba, District Chamba, HP, under Sections 376 and 452 of IPC and consequent criminal proceedings, are quashed and set-aside. Accordingly, present petition is disposed of, so also pending applications, if any.

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

Susheel ..Appellant
Versus
Anju ..Respondent

FAO(HMA) No. 132 of 2018
a/w CMP No. 4194 of 2018
Decided on: May 8, 2018

Hindu Marriage Act, 1955- Sections 13(1)(ia) and 13B- Cruelty – Divorce by way of mutual consent – Trial Court dismissing petition of husband seeking decree of divorce on ground of cruelty of wife – Husband in appeal before High Court – During pendency of appeal, parties filing application for conversion of appeal into petition for divorce by way of mutual consent – On finding that (i) marriage of parties had broken beyond repairs and re-conciliation was not possible (ii) and they had settled all disputes relating to alimony and custody of child, High Court converted appeal into petition under Section 13B of the Act for divorce by way of mutual consent – Petition allowed – Decree of divorce by way of mutual consent granted after waiving cooling off period. (Paras-4 to 6, 11 and 12)

Cases referred:
Veena vs. State (Government of NCT of Delhi) and another, (2011)14 SCC 614
Priyanka Khanna v. Amit Khanna, (2011) 15 SCC 612

For the appellant : Mr. H.R. Jhingta, Advocate.
For the respondent : Ms. Doshi Negi, vice Counsel.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Instant appeal filed under Section 28 of the Hindu Marriage Act, 1955 is directed against judgment dated 26.12.2017 passed by learned Additional District Judge-II, Solan, District Solan, Himachal Pradesh in HMA No. 6ADJ-II/3 of 2015 (Reg. No. 114/2014), whereby petition under Section 13 of Hindu Marriage Act having been filed by petitioner for dissolution of marriage by a decree of divorce came to be dismissed.

2. Precisely, the facts of the case as emerge from the record are that marriage of petitioner and respondent was solemnized on 27.5.205 as per Hindu rites and customs. Parties cohabited together at place Dagshai as husband and wife and from this wedlock a child named Harsh was born on 27.10.2007, who is presently studying in Army Public School, Dagshai in the 6th Standard and is living with the petitioner (husband). Respondent (wife) allegedly left company of the child two years back. Since parties to the *lis* failed to live peacefully together, they started living separately and in the year 2014, a petition under Section 13 of the Hindu Marriage Act for dissolution of marriage by way of decree of divorce on the grounds of cruelty came to be instituted in the court of learned Additional District Judge-II, Solan, Himachal Pradesh on behalf of the petitioner, however, the fact remains that the same was dismissed. In the aforesaid background, petitioner approached this Court in the instant proceedings praying therein for decree of divorce after setting aside judgment passed by Additional District Judge-II, Solan.

3. On 28.3.2018, when notice was issued to the respondent, learned counsel representing the appellant-petitioner apprised this Court with regard to possibility of compromise *inter se* parties. Accordingly, this Court specifically directed the respondent to remain present in the Court on the next date of hearing.

4. Today, 8.5.2018, during proceedings of the case, this Court having interacted with the parties made sincere efforts to ensure reconciliation between the parties but unfortunately, both the parties expressed their unwillingness to join company of each other and both the petitioner and respondent categorically stated before this Court that they are ready and willing to get their marriage dissolved by way of mutual consent. This Court, solely with a view to give some more time to reconsider their decision, adjourned the matter to post-lunch session but in vain. Later on, learned counsel for the parties informed this Court that parties have mutually agreed to get their marriage dissolved by mutual consent and they also placed before this Court, an application filed for divorce by way of mutual consent under Section 13B of Hindu Marriage Act read with Section 151 CPC, praying therein to grant a decree of divorce after converting the present appeal into a petition under Section 13B for grant of divorce with mutual consent. Application is taken on record and registered as CMP No. 4194 of 2018.

5. In the aforesaid application filed under Section 13B of the Hindu Marriage Act, parties, while praying jointly for dissolution of their marriage by way of mutual consent have averred that they are living separately from each other for the last five years at their respective addresses mentioned in the memo of parties and during this period there has been no cohabitation as such, there is no relationship of husband-wife between them. It has been further stated in the application that parties have mutually agreed for their marriage to be dissolved because there has not been any cohabitation between them and there is no likelihood of their cohabiting in future and their marriage has broken beyond repair.

6. In view of the settlement arrived *inter se* parties, petitioner has agreed to pay a sum of Rs. 4,50,000/- to the respondent as one time settlement, whereas respondent has specifically agreed that she will not claim any maintenance in future from the petitioner and shall have no claim to the property of the petitioner. Both the parties have mutually agreed that their son namely Harsh Sharma, who is at present with the petitioner and studying in Army Public School in 6th Standard, shall remain with the petitioner but respondent shall have right to visit him in a week during holidays.

7. This Court with a view to ascertain the correctness and genuineness of the averments made by the learned counsel representing the parties as well as averments contained in joint application filed under Section 13 B of the Hindu Marriage Act also recorded statements of both the parties on oath, who categorically deposed before the Court that they have entered into compromise of their own volition and without there being any pressure or coercion and mutually decided to dissolve their marriage by way of mutual consent. Respondent namely Anju categorically stated before this Court that she has received Rs.4,50,000/- on account of permanent alimony from petitioner and she will not claim any maintenance from petitioner in future and shall have no claim to the property of the petitioner. Their statements are taken on record.

8. Having taken note of averments contained in joint application filed under Section 13B of Hindu Marriage Act read with Section 151 CPC, as well as statements of the parties, this court sees no impediment in accepting prayer made in the application. There is appears to no possibility of reproachment or conciliation between the parties and as such, prayer for grant of divorce by way of mutual consent deserves to be considered by this Court by converting instant appeal of divorce to petition under Section 13B of Hindu Marriage Act.

9. Accordingly, for the reasons and circumstances narrated herein above, present appeal is ordered to be converted into a petition under Section 13B of Hindu Marriage Act. Since both the parties are living separately for the last five years and they have been litigating with each other since the year 2014, statutory period of six months as envisaged under Section 13B of the Act for grant of divorce by way of mutual consent, can be waived, especially when there is no possibility of rapprochement of the parties and marriage has broken beyond repair. In this regard, it would be apt to take note of the judgment rendered by the Hon'ble Apex Court in **Veena** vs. **State** (**Government of NCT of Delhi**) **and another**, (2011)14 SCC 614, wherein the Hon'ble Apex Court has held as under:

12.“ We have heard the learned counsel for the parties and talked to the parties. The appellant has filed a divorce petition under Section 13(1)(a) of the Hindu Marriage Act, 1955, being HMA No.397/2008 which is pending before the Court of Sanjeev Mattu, Additional District Judge, Karkardooma Courts, Delhi. In the peculiar facts and circumstances of this case, we deem it appropriate to transfer the said divorce petition to this Court and take the same on Board. The said petition is converted into one under Section 13B of the Hindu Marriage Act and we grant divorce to the parties by mutual consent.”

10. Reliance is also placed on a judgment rendered by Hon’ble Apex Court in **Priyanka Khanna** v. **Amit Khanna**, (2011) 15 SCC 612, wherein Hon'ble Apex Court has held as under:-

“7. We also see form the trend of the litigations pending between the parties that the relationship between the couple has broken down in a very nasty manner and there is absolutely no possibility of a rapprochement between them even if the matter was to be adjourned for a period of six months as stipulated under Section 13-B of the Hindu Marriage Act. 8. We also see from the record that the first litigation had been filed by the respondent husband on 2.6.2006 and a petition for divorce had also been filed by him in the year, 2007. We therefore, feel that it would be in the interest of justice that the period of six months should be waived in view of the above facts.”

11. In the instant case also, statutory period of six months deserves to be waived keeping in view the fact that the marriage between the parties has broken beyond repair and there seems to be no possibility of parties living together. The Hon’ble Apex Court in Civil Appeal No.11158 of 2017 [arising out of Special Leave Petition (Civil) No.20184 of 2017] titled as **Amardeep Singh** vs. **Harveen Kaur**, decided on 12.09.2017, has held as under:-

“13. Learned amicus submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in K. Omprakash vs. K. Nalini 10, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy11, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra12 and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta13. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan 10 AIR 1986 AP 167 (DB) 11 AIR 1994 Kar 12 (DB) 12 AIR 1990 Del 146 13 AIR 2005 MP 106 (DB) Moorkkanatt14. It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

i) How long parties have been married?

ii) How long litigation is pending?

iii) How long they have been staying apart?

iv) Are there any other proceedings between the parties?

v) Have the parties attended mediation/ conciliation?

vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14 AIR 2010 Ker 157

> 14. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.15as follows:

> 15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." 18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

12. Consequently, in view of the detailed discussion made hereinabove, Cr.MP No.4194 of 2018 filed under Section 13B of the Hindu Marriage Act read with section 151 CPC, is allowed and in view of the peculiar facts and circumstances, as enumerated hereinabove, as well as law laid down by Hon'ble Apex Court, the marriage between the parties is ordered to be dissolved by mutual consent. Registry is directed to draw a decree of dissolution of marriage by mutual consent accordingly. Terms and conditions contained in the application, referred hereinabove, shall also form part of the decree

13. Needless to say, both the parties shall abide by all the terms and conditions contained in the application.

14. The instant appeal alongwith CMP No. 4194 of 2018 is disposed of in the aforesaid terms. Pending applications, if any, are also disposed of.

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

Prem Lal Sharma .....Petitioner.

Versus

Hira Lal & ors. .....Respondents.

CWP No. 9532 of 2014
Judgment reserved on: 02.05.2018
Date of decision: 10th May, 2018.

Constitution of India, 1950- Article 226- Administrative action- Validity of – An action required to be taken in a particular manner by a statute, must be done or performed in that manner or not at all. (Para-16)

Himachal Pradesh Cooperative Societies Rules, 1971- Appendix A, Rule 4(2)- Identification of zones for purpose of election- Basis of – Held, as per Rule 4(2), members from contiguous areas are to be included in a particular ward/zone – Statutory authority is not to carve out wards in such a fashion that voters residing under same roof are made to vote at different wards – Respondents No.1 to 9 who were residents of village Neuri were made voters of Kashlog ward,

whereas all other residents of same village like father, brother and mother etc. of respondents No.1 to 9 were shown voters of Barsnu ward – Petition allowed – Order of Assistant Registrar approving revised voter list set aside. (Paras- 18 to 20)

Cases referred:
Rao Shiv Bahadur Singh and anr. vs. State of Vindh-P, AIR 1954, SC 322
Deep Chand vs. State of Rajasthan, AIR 1961 SC 1527
State of Uttar Pradesh vs. Singhara Singh and Ors., AIR 1964, SC 358
Chandra Kishore Jha vs. Mahavir Prasad, 1999 (8) SCC 266
Dhananjaya Reddy vs. State of Karnataka, 2001 (4) SCC 9
State of Jharkhand & Ors. vs. Ambay Cements and anr.(2005) 1 SCC 368
Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited, 2008 (4) SCC 755
Zuari Cement Ltd. vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764
Uddar Gagan Properties Ltd. vs. Sant Singh and Ors. 2016 (5) JT 389

For the Petitioner	:	Mr. J. L. Bhardwaj and Mr. Sanjay Bhardwaj, Advocates.
For the Respondents	:	Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate, for respondents No. 1 to 9 and 11. Mr. Vinod Thakur, Addl. A.G. with Mr. Bhupinder Thakur, Dy. A.G., for respondents No. 10, 12 and 13.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Can the zones be carved out in such a manner whereby two members of the Cooperative Society residing under the same roof are made to vote in two different wards?

2. The petitioner is the member of respondent No. 11-Society and was contesting the election from Ward No. 2 and the last date for filing the nomination was fixed as 27.11.2014, while the election was to take place on 27.11.2014.

3. Respondents No. 10, as Assistant Registrar, Cooperative Societies, Solan, had approved the zones of election of respondent No. 11-Society vide order dated 18.10.2014 and aggrieved thereby the petitioner alongwith certain other persons preferred revision petition under Section 94 of the H.P. Cooperative Societies Act, 1968 (for short the 'Act'), read with Rules 1971 (for short the 'Rules').

4. This petition came to be allowed by the Joint Registrar, Cooperative Societies (Marketing), Shimla and respondent No. 10 was directed to ensure that the zones are constituted in such a way that the members from contiguous area are included in the particular zone and the provision of Rule 4(2) of Appendix-A with the Himachal Pradesh Cooperative Societies Rules, 1971 are complied with. Respondent No. 10 was further directed to take the zones of 2009 as the base and thereafter add the newly enrolled members in a particular zone in such a way that contiguity of area is maintained as per provisions of the law.

5. In compliance to the said order, respondent No. 10 revised the zones in respect of only zone No. 1 to zone No. 4, though total number of zones for holding the election of respondent No. 11-Society were 11 and the Registration Officer appointed for conducting the election was directed to display the revised voter list on the Notice Board of the Society as per order dated 10.11.2014 passed to this effect.

6. The respondent No. 10 while implementing the order dated 31.10.2014 took the voter list of 2009 as its base and accordingly respondents No. 1 to 9 were included in ward No. 4

i.e. Barsnu Ward, since all of them happened to be the resident of village Neuri and figured at serial No. 77 to 84 of the revised list as approved by respondent No. 10 on 10.11.2014.

7. Respondent No. 11 was not satisfied with the revision of the voter list, therefore, it preferred a petition before this Court by invoking Article 227 of the Constitution of India. However, the said petition was dismissed on 27.11.2014 by observing that Joint Registrar had only directed the authorities for constitution of the zones in such a manner that the members from the contiguous areas are included in a particular zone and the provisions of the Act and Rules are complied with and, thus, there was reason or occasion for the respondent No. 11 to be aggrieved.

8. However, before the aforesaid petition could be decided by this Court, the private respondents preferred a petition against the order passed by the Assistant Registrar (Cooperative) Societies dated 10.11.2014 whereby the directions as contained in the order dated 31.10.2014 had been ordered to be implemented.

9. The revision petition so filed was allowed by the Additional Registrar (Administration) Cooperative Societies vide order dated 03.12.2014 and aggrieved thereby the petitioner preferred revision petition before respondent No. 13. However, the same came to be dismissed vide order dated 15.12.2014 and aggrieved thereby the petitioner has filed the instant petition claiming therein the following substantive reliefs:-

> *i) That the writ in the nature of certiorari may kindly be issued for quashing the orders passed by respondents No. 12 and 13 dated 03.12.2014 and 15.12.2014, respectively and justice be done.*
>
> *ii) That the writ in the nature of mandamus may kindly be issued directing the respondent No. 10 to hold the election as per the order dated 10.11.2014 passed by him and justice be done.*

10. The officials-respondents, save and except, respondent No. 13 have not chosen to contest the petition. As regards the reply filed on behalf of respondent No. 13, it has only been averred that the orders impugned herein have been passed by the authorities in quasi judicial capacity and, therefore, the name of the replying respondent be deleted from the array of the respondents.

11. However, respondents No. 1 to 9 have contested the petition by filing reply wherein various preliminary objections with regard to maintainability of the petition as also the locus standi of the petition have been raised. It is averred that the present petition has rendered infructuous in view of the election having taken place in the interregnum and the petitioner having lost the election is not entitled to maintain the petition and the orders impugned herein have been sought to be justified on the ground that these orders have been passed strictly in accordance with law and, therefore, warrants no interference.

12. On merits, It is further averred that as per the directions passed by the Joint Registrar, Cooperative (Societies), newly added members would be kept in first two wards and further Assistant Registrar, Cooperative Societies was directed to follow Rule 4(2). It was further submitted that even though the voter list of 2009 was taken as the base, however, with respect to only 11 members i.e. the respondents, there was clear cut directions that since they belong to village Neuri, therefore, putting them in ward No. 4 would be clear cut violation of the orders and election rules as ward No. 2 - Kashlog was hardly at a distance of 300 to 400 metres while ward No. 4 was around 3 kms. and accordingly all these respondents were included in ward No.2.

13. To similar effect is the reply filed on behalf of respondent No. 11 i.e. Cooperative Society.

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

14. It is not in dispute that the election to the Society has to be conducted in a manner prescribed under Rules. Sequally, Rule 37 of the Act postulates that the members of the Managing Committee of Cooperative Society shall be elected in accordance with the rules given in Appendix-A.

15. Adverting to the Appendix, it would be noticed that Rule 4 thereof provides for election and it is stipulated that the Manager shall draw up a detailed programme of election in accordance with the instructions issued by the Registrar from time to time. It is further provided that the Manager, shall, when so required by the Registrar for the purpose of such election, divide the area of operation of the co-operative Society to such a number of zones, as there are members to be elected, or into such lesser number as may be specified by the Registrar and communicate the zones so constituted to the Registrar for his prior approval; however there is a proviso to this rule wherein provided that the zones shall be constituted in such a way that members from continuous area are included in a particular zone and where such contiguity is not discernible, the zones shall be constituted as per serial number of the members in the membership register.

16. It is more than settled that an action to be taken in a particular manner as provided by a statute, must be taken, done or performed in the manner prescribed or not at all. More than eighty years back, the Hon'ble Privy Council in Nazir Ahmad vs. King Emperor (AIR 1936, PC 253) held that where a power is given to do a certain thing in a certain way, the things must be done in that way or not at all and this has been approved and further expanded by the Hon'ble Supreme court in catena of judgments (Refer: ***Rao Shiv Bahadur Singh and anr. vs. State of Vindh-P,*** AIR 1954, SC 322; ***Deep Chand vs. State of Rajasthan***, AIR 1961 SC 1527; ***State of Uttar Pradesh vs. Singhara Singh and Ors.***, AIR 1964, SC 358; ***Chandra Kishore Jha vs. Mahavir Prasad***, 1999 (8) SCC 266; ***Dhananjaya Reddy vs. State of Karnataka***, 2001 (4) SCC 9; ***State of Jharkhand & Ors. vs. Ambay Cements and anr.***(2005) 1 SCC 368; ***Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited***, 2008 (4) SCC 755; ***Zuari Cement Ltd. vs. Regional Director, ESIC, Hyderabad & Ors.***, AIR 2015, SC 2764 ; and ***Uddar Gagan Properties Ltd. vs. Sant Singh and Ors.*** 2016 (5) JT 389.).

17. The aforesaid settled legal proposition is based on a legal maxim "*Express io unius est exclusion alterius*"meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following some other course is not permissible.

18. Evidently, as per rule 4(a), the zones have to be constituted in a way that members from the contiguous areas are included in a particular zone and where contiguity is not discernible, the zone have to be constituted as per serial number in the membership register. Therefore, once the contiguity is one of the main basis for the constitution of the wards then it would not be permissible for any authority constituted under the Act to carve out the zones in such a manner that voters residing under the same roof are made to vote at a different wards.

19. The word '*contiguous*' has not been defined under the Act or Rules and, therefore, the word requires to be given its full dictionary meaning i.e. showing a common border or boundary, neighbouring viz. adjacent or adjoining.

20. Admittedly, all the other members of Neuri village were included in Barsnu ward/zone, whereas it is only the respondents No. 1 to 9 whose names have been included in Kashlog-II ward ostensibly for the reason that village Neuri was adjacent to Kashlog whereas Barsnu was at a quite distance.

21. It is also not in dispute that while carving out the zones in the aforesaid manner, only the respondents No. 1 to 9 though eligible to vote in Barsnu ward have been included in the Kashlog ward, whereas, the other voters of Neuri village which include close relatives of respondents No. 1 to 9 like father, mother, brother and sister etc., though residing under the same roof, have been kept in the Basrnu ward.

22. This action of working out the zones in the aforesaid manner, defies logic and reasoning because if contiguity was the main factor to be borne in mind, then in case village Neuri was adjacent or adjoining or neighbouring or bordering village Kashlog, as claimed, and village Barsnu was at a distance, then the entire members of village Neuri, especially, the other family members of respondents No. 1 to 9 who continue to fall in Barsnu ward, were required to be shifted to Kashlog-II ward.

23. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed. The order dated 03.12.2014 as passed by the Additional Registrar (Administration) Co-operative Societies, H.P. and thereafter the order passed by the Special Secretary Corporation to the government of Himachal Pradesh (Annexure P-10), dated 15.12.2014 are quashed and set aside.

24. However, this does not mean that the initial order passed by the Assistant Registrar Cooperative Societies, Solan on 10.11.2014 has been upheld. Reason being that it has specifically come on record that village Neuri is adjacent or closer to Kashlog and if that be so, then obviously in terms of Rule 4(2) it i.e. village Neuri cannot be kept in Barsnu ward. Likewise, there can be other similar discrepancies, therefore, in the given circumstances, the matter is remanded to the Registrar, Cooperative Societies who shall personally re-determine the zones of the Cooperative Society in such a manner so as to ensure that the same does not violate the provisions of law as have been noticed above.

25. Before parting, the Registrar, Cooperative Societies, is directed to decide the matter, as expeditiously as possible, and in no event later than **15.06.2018**, that too after hearing all the stakeholders.

26. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Prem Singh ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 325 of 2017
Judgment reserved on: 04.05.2018.
Decided on: 10th May, 2018.

Indian Evidence Act, 1872- Section 101- Burden of proof - Held, it is settled principle of criminal jurisprudence that more serious the offence, stricter the degree of proof – Since, a higher degree of assurance is required to convict accused. (Para-26)

Indian Evidence Act, 1872- Section 3- Held, duty of Trial Court is to appreciate and analyze evidence adduced before it and not to just reproduce same in entirety in the judgment. (Para-27)

Narcotic Drugs & Psychotropic Substances Act, 1985- Section 20- Recovery of 'Charas'- Special Judge convicting and sentencing accused by holding that he was in conscious and exclusive possession of 2.77 kg. of 'charas' in a bag being carried by him – Appeal against – High Court found (i) resealing certificate issued by Station House Officer showed that parcel initially sealed with seal 'A' was re-sealed by him with seal 'T' – Whereas case of prosecution was that parcel was sealed with seal 'A' and resealed with seal 'D' (ii) alleged recovery was effected from accused at a time when it was dark, but corresponding photographs of proceedings were of day light (iii) false attempt was made to show efforts were made to associate independent persons in

investigation (iv) discrepancies were found in entries of log book vis-à-vis statements of members of police party regarding their arrival in police station from spot (v) As per recovery memo, bag containing contraband was 'yellow' but in FSL documents, it was found of blue, white and yellow colours – Held, these vital contradictions make prosecution case doubtful – Appeal allowed – Judgment of conviction and order of sentence of Special Judge set aside. (Paras-28 to 39)

Cases referred:
Mousam Singha Roy and others vs. State of W.B. (2003) 12 SCC 377
State of Gujarat vs. Kishanbhai and others, (2014) 5 SCC 108

For the Appellant : Mr. Ajay Kochhar and Mr. Vivek Sharma, Advocates.
For the Respondent : Mr. Vinod Thakur, Addl. Advocate General, with Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J:

The appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of two years for having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act) by the learned Special Judge (Forests), Shimla on 7.4.2017 in Sessions Trial RBT No. 9-S/7 of 2016 and aggrieved thereby has filed the present appeal.

2. The prosecution case, in brief, is that in the evening of 30.4.2016, a police party headed by ASI Sunil Kumar of Police Station, Theog was on routine patrol duty in the official vehicle bearing registration No. HP-07A-0729 towards Gajedi, Chhaila, Jais etc. The vehicle was driven by C. Rajesh Kumar and other members of the police party were HHC Muni Lal and C. Surjit Singh. Rapat No. 27, dated 30.4.2016, Ex.PW2-A, in this regard was entered in the Police Station. While the police party was moving on the kuchha link road leading to Tikkari-Sainj below Gajedi bye-pass then at about 7.10 p.m., one person, who was holding a carry bag in his right hand, was seen coming from the lower side towards the upper side. Seeing the police party, the said person got perplexed turned back and started walking. This aroused the suspicion of the police officials. ASI Sunil Kumar got the official vehicle stopped and after alighted therefrom, he alongwith HHC Muni Lal and C. Surjit Singh followed the appellant and caught hold of him at some distance. He was then asked as to why he turned back after seeing the police party. On inquiry, the pedestrian, who by now was in panic, disclosed his name as Prem Singh. Since the place was lonely and secluded, no local person was available for being associated as a witness. Therefore, ASI Sunil Kumar then checked the yellow coloured carry bag, which the appellant was carrying. The search was conducted in the presence of his associates, upon which, black coloured substance in the shape of balls and wicks was found to be contained in the said yellow bag. After smelling the same and on the basis of experience, ASI Sunil Kumar concluded that the substance recovered was 'charas'. Electronic weighing scale was then taken out from his investigation kit and when the substance was weighed, it was turned to be 2.770 Kgs Charas, Ex.P-3, and the same was put in the same carry bag, Ex.P-2 and its parcel Ex.P-1 was prepared and sealed by affixing eight seals of seal impression 'A'. Impression of the seal used was taken on a piece of cloth including Ex.PW-1/A and NCB forms were filled in at the spot in triplicate. Impression of seal 'A' was also taken on the NCB forms. The seal after its use was handed over by ASI Sunil Kumar to HHC Muni Lal. The case property Ext.P-1 to P-3 was taken into possession by the police vide memo Ex.PW-1/B. A copy of the seizure memo was supplied to the appellant free of cost. ASI Sunil Kumar then scribed the rukka Ex. PW-1/C and sent it to SHO, Police Station, Theog, through C. Surjit Singh for registration of FIR. Accordingly, FIR No. 68/2016, Ex.PW-

7/A, was lodged in the Police Station. Endorsement Ex.PW-7/B to this effect was made on the rukka. Thereafter, photographs were clicked at the spot and site plan prepared. The statements of the witnesses under Section 161 Cr.P.C. came to be recorded. The appellant was informed about the ground of arrest and intimation to this effect was given to his wife on her mobile No.89881-04078. Parcel, Ex.P-1 alongwith appellant and relevant documents were produced by ASI Sunil Kumar before Inspector Gauri Dutt, the then SHO, Police Station, Theog. The parcel was re-sealed by the SHO by affixing four seals of seal impression 'D' and its impression was also taken on a piece of cloth Ex.PW-10/A and the NCB forms. Necessary columns of the NCB forms were also filled by the SHO. Special report relating to the case under Section 57 of the Act was sent to Dy.S.P./SDPO, Theog. The case property thereafter was sent for analysis to the State Forensic Science Laboratory, Junga (Shimla). After obtaining the report, copies of the Malkhana Register etc. were collected and on completion of investigation, challan was presented before the Court on 16.7.2016 and copies thereof was supplied to the appellant.

3. Finding a prima-facie case against the appellant, he was charged for the commission of an offence punishable under Section 20 of the NDPS Act, to which he pleaded not guilty and claimed trial.

4. To bring home the guilt of the appellant, the prosecution examined ten witnesses and when on conclusion of the prosecution evidence, the statement of the appellant thereafter came to be recorded under Section 313 Cr.P.C. where his plea was that of total denial.

5. The appellant thereafter examined two witnesses in support of his defence and closed his evidence. The learned Special Judge after recording the evidence and evaluating the same, convicted the appellant as aforesaid.

6. Aggrieved by the order of conviction, the appellant has filed the instant appeal on the following grounds:

(i) The prosecution has failed to connect the contraband with the re-sealing certificate Ex.PW-10/B;

(ii) Photographs Ex.PW-1/D to Ex.PW-1/J are contrary to the case of the prosecution;

(iii) Efforts to create false evidence by claiming that an attempt to associate independent witnesses was made ;

(iv) Log book Ex.PW-9/E falsifies the case of the prosecution;

(v) Colour of the bag as alleged to be recovered does not tally with the one as described by the Forensic Science Laboratory in its report; and

(vi) Prosecution case full of major contradictions, embellishments and improvements.

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

7. Before adverting to the submissions made by the learned counsel for the appellant, it would be necessary to first refer to testimonies of the witnesses examined by the either side. Here it would be necessary to mention that out of the four police officials, who comprised the police party, only C. Surjit Singh and ASI Sunil Kumar were examined by the prosecution as PW-1 and PW-9, whereas HHC Muni Lal and C. Rajesh Kumar (driver) were given up by the learned Public Prosecutor to avoid the repetition.

8. C. Surjit Singh appeared as PW-1 and deposed that he alongwith HHC Muni Lal and ASI Sunil Kumar had gone on routine patrolling in the area in the official vehicle being driven by C. Rajesh Kumar. They had gone towards Jaish, Gajedi, Chaila etc. At about 7.10 p.m. when they were present at Gajedi bye-pass near the link road leading towards Tikkari, Sainj, one person was seen coming on foot by them from the opposite direction. That person was carrying a bag in his right hand and on seeing the police vehicle, he returned back and tried to run away.

They stopped the vehicle and he alongwith HHC Muni Lal followed that person and caught hold of him at a distance of about 20 meters. Since the pedestrian became perplexed, they checked the bag which he was carrying on the basis of suspicion. The bag was checked by ASI Sunil Kumar and black coloured substance in the shape of balls and sticks were found in the bag. On the basis of experience and after smelling the black substance, ASI Sunil Kumar found that the same to be Charas. C. Rajesh Kumar (driver) was sent by ASI Sunil Kumar to call the independent witnesses, but none was available. The name and address of the person, who was nabbed, were inquired by ASI Sunil Kumar and he disclosed his name as Prem Singh. ASI Sunil Kumar then took out the electronic weighing scale from his investigation kit. The charas was weighed and turned out to be 2.770 kgs. The Charas was put in the same carry bag. Its parcel was prepared and sealed by affixing eight seals of seal impression 'A'. The impression of the seal used was taken on three parcels of cloth including Ex.PW-1/A. Impression of the seal used was also taken on the NCB forms. Seal after use was handed over by ASI Sunil Kumar to HHC Muni Lal. Seizure memo Ex.PW-1/B was prepared at the spot. Exts. PW-1/A and Ext.PW-1/B were signed by me and HHC Muni Lal as witnesses. These documents were also signed by the appellant. Rukka Ex.PW-1/C was written by ASI Sunil Kumar and handed over to this witness. He carried the rukka to Police Station where he delivered to MHC. After registering the FIR, the MHC handed over the case file to the witness for being delivered to the Investigating Officer at the spot. On his way to the spot, ASI Sunil Kumar met him alongwith other police officials at Premghat where he delivered the case file to ASI Sunil Kumar. Photographs Ext.PW-1/D to Ext.PW-1/J were clicked at the spot. A parcel Ex.P-1 which was signed by the witness and HHC Muni Lal and the appellant, carry bag Ex.P-2 was claimed to be the same bag from where the charas Ex.P-3 had been recovered.

9. In cross-examination, the witness stated that on the relevant date, he was carrying mobile phone No. 98174-83164 with him. The police party left the Police Station at 6.20 p.m. and thereafter firstly they went to Chaila and then proceeded towards Gajedi bye-pass. Upto Gajedi bye-pass the police party did not check any vehicle nor inquired from any person. From Premghat, the witness accompanied ASI Sunil Kumar etc. in the official vehicle to the Police Station where they reached after 9.30 p.m. His statement was thereafter recorded by ASI Sunil Kumar with his own hand in the Police Station. The time when he left with the rukka was 7.10 and admitted that in the month of April, by about 7.00 - 7.15 p.m. the sun sets and it is dark around 7.30 p.m. He categorically stated that before searching the person of the appellant, no option under Section 50 of the NDPS Act was given to him. He further stated that driver C. Rajesh Kumar had gone towards Tikkri–Sainj road in search of the independent witnesses and admitted that the police party had not travelled via Tikkri – Sainj road on that day and claimed that C. Rajesh Kumar had gone on foot to call the independent witnesses. He further stated that C. Rajesh Kumar returned to the spot after about 15 minutes and it is only thereafter the proceedings of the case were started by ASI Sunil Kumar. He took about one – one and a half hours to prepare the seizure memo, parcel and sample seals. When the proceedings were being conducted at the spot, it was dark. He however, admitted that as per the photographs Ex.PW-1/D to Ex.PW-1/J, it was day time. However, he clarified that it was getting dark at around 7.30 p.m. He admitted that as per photograph Ex.PW-1/D, when the carry bag was being put in the cloth parcel, it was day time. He volunteered to state that it was getting dark. The cloth was stitched at the spot to prepare the parcel by ASI Sunil Kumar. He further stated that at the time when he left the spot with rukka, the official vehicle was there at the spot which was situated approximately one kilometer away from main Chaila-Theog road. Further stated that the distance between Police Station, Theog and the place where the appellant was apprehended is 6 Km. He had walked with rukka upto the main road and thereafter took lift in the truck to reach the Police Station, Theog. On reaching the Police Station, he informed the MHC and a rapat was entered regarding his arrival in the Police Station where he remained for about 25 minutes. He denied the suggestion that three persons namely Adi Ram, Bittu and the appellant were brought by SIU team on that date and further denied the suggestion that Adi Ram and Bittu were left by the SIU and thereafter the case was planted on the appellant. He further denied that during day time, the police party had taken the appellant to an isolated place, clicked the photographs and framed him.

10. PW-9 ASI Sunil Kumar is the Investigating Officer of the case, who has deposed on the similar lines as PW-1 till the time he met PW-1 at Premghat, therefore being repetitive we need not to make a detailed reference thereto. After meeting PW-1 at Premghat, the witness states that on reaching the Police Station, he had handed over the case file to Inspector/SHO Gauri Dutt Sharma. The appellant was also produced by him before the SHO, who was then interrogated by the SHO, who directed him to carry out further investigation in the matter. The appellant was then arrested and informed about the ground of arrest and information in this regard was given to his family members. The personal search of the appellant was taken and memo Ex.PW-9/C was prepared. The appellant was lodged in the lock up in the Police Station and on 1.5.2016 he recorded the statement of C. Rajesh Kumar under Section 161 Cr.P.C. The articles recovered from the appellant on his personal search were deposited with the Incharge Malkhana in the Police Station. On 2.5.2016, special report Ex.PW-3/A relating to the case was handed over by him to Dy.S.P., Theog, who called his Reader HC Het Ram and handed over the special report to him. He recorded the statement of HC Het Ram on 2.5.2016. Chemical report Ex.PW-9/D was received in the Police Station. The copy of log-book of the official vehicle was taken from its driver vide Ex.PW-9/E. During the investigation of the case, CIPA certificate Ex.PW-7/E, re-sealing certificate, seal impression of seal 'D', copies of rapats, copy of Malkhana register and copy of registration certificate were also taken into possession by him. The statements of other witnesses were recorded under Section 161 Cr.P.C. and on completion of investigation the file was handed over by him to the SHO for preparing the challan. Earlier to that parcel Ex.P-1 was prepared at the spot and same was signed by him, appellant and another witnesses. Yellow carry bag Ex.P-2 having charas Ex.P-3 was claimed to be the same that had been recovered from the appellant.

11. In cross-examination, the witness admitted that he had not recorded in the statement of any witness that the accused had tried to run away. He admitted that no efforts were made by the appellant to throw the bag which he was carrying. He also admitted that he did not mention in the rukka Ex.PW-1/C and special report Ex.PW-3/A that driver C. Rajesh Kumar had been sent to call the independent witnesses. Further stated that C. Rajesh Kumar had gone on foot towards the upper side in search of the independent witnesses and returned to the spot alone after about 15 minutes. No proceedings till the time C. Rajesh Kumar did not return, were conducted on the spot. The police party returned to the Police Station at about 9.35 p.m. and after reaching there the witness claims to have remained there. He further claimed that on 30.4.2016 he had not taken copy of Malkhana register into possession nor recorded the statement of SHO regarding re-sealing of the parcel and claimed that he had not seen HHC/Incharge Malkhana or the MHC in the Police Station on the said date. He denied the suggestion that the police party returned to the Police Station at 11.35 p.m. He admitted that as per log-book Ex.PW-9/E, he returned to the Police Station on 30.4.2016 at 11.35 p.m. However, thereafter he of his own stated that he might have gone somewhere else after 9.35 p.m. for patrolling, but could not name the said place. He denied the suggestion that on 30.4.2016 the sun set time was 6.58 p.m. He further stated that it had not come in the statements of the witnesses that the proceedings of the case were conducted with the help of search light and the light of the vehicle since it was dark. However, he volunteered to state that initially the proceedings of the case were conducted in the day light, however, when it became dark, the proceedings of the case were conducted with the help of the search light and head lamps of the vehicle. He further stated that it had correctly recorded in the statements of C. Surjit Singh, HHC Muni Lal and C. Rajesh Kumar that when it became dark, the proceedings were conducted by him with the help of search light and head lights of the vehicle. However, he admitted that photographs Ext. PW-1/D to Ex.PW-1/J were taken in day light. He admitted that no option under Section 50 of the Act was given to the appellant either before the personal search or the search of the bag. He further stated that in the seizure memo Ex.PW-1/B he had mentioned that the search was conducted in a legal manner, where he disclosed to the appellant that no independent witness could be found because of which he himself was conducting the search of his bag. He admitted that on that day he had been carrying mobile phone No. 94181-76230 with him. He claimed to be remained at the spot for about two hours and during that period, no local

person or vehicle had passed from there. He further stated that village was located at a distance of about 4-5 kilometers from the spot and C. Rajesh Kumar had been sent by him with the hope that some independent witnesses might be found. C. Rajesh Kumar went towards the upper side and admitted that there was a Jungle on the upper side. He admitted that spot was located at a distance of about 1 -1.5 kms. from main Chaila-Theog road, which is a National Highway and is a busy road. He denied the suggestion that on the relevant date the appellant, Adi Ram and Bittu were apprehended by SIU team from Neripul and handed over to the police party. He further denied that for some consideration the police party had left Adi Ram and Bittu and involved the appellant in the false case. He admitted that he had not taken into possession the copies of rapats showing the movement of the police officials to FSL and his movement to the SDPO office. He admitted that the appellant is illiterate and could only sign in Hindi and further denied the suggestion that none of the documents had been read over and explained to him.

12. Now adverting to the other witnesses examined by the prosecution, it would be noticed that Lady Constable Anita appeared as PW-2 and deposed that rapat No.27, dated 30.4.2016 Ex.PW-2/A that was entered by her. In cross-examination the witness denied the suggestion that wrong rapat had been entered in the Police Station to create evidence against the appellant.

13. HC Het Ram, who at the relevant time was posted as Reader to SDPO/Dy.S.P., Theog, appeared as PW-3 and testified that on 2.5.2016 ASI Sunil Kumar, PW-9, had come to the office and handed over the special report relating to the case to Sh. Rattan Singh Negi, Dy.S.P., who after going through the special report handed it over to this witness for making the entries in the relevant register. Accordingly the entry was made by him at serial No. 18 of the receipt register which he produced, in original, before the Court. Special report was exhibited as Ex.PW-3/A whereas the copy of the receipt register is Ex.PW-3/B. According to the witness, both these documents are correct as per the original and contained the signatures of Dy.S.P. Rattan Singh Negi, which he identified as that we had worked together. In cross-examination the witness denied that no special report was received in the office and he further denied the suggestion that wrong entries were made in the record subsequently to show the compliance of Section 57 of the Act.

14. C. Sunil Kumar, who at the relevant time was posted in Police Station, Theog, appeared as PW-4 and proved rapats No. 37 and 38, Ex.PW-4/A and Ex.PW-4/B that were entered by him on 30.4.2016. In cross-examination, the witness denied the suggestion that wrong rapats were entered in the police station to create evidence against the appellant.

15. Tilak Raj, Photographer, appeared as PW-5 and stated that ASI Sunil Kumar had visited his shop on 2.5.2016 alongwith his official digital camera where from the memory card containing six photographs were copied by him and thereafter the photographs were sent for developing to Shimla. After developing the photographs, the same were handed over by him to ASI Sunil Kumar and these photographs were Ex.PW-1/D to Ex.PW-1/J. In cross-examination, the witness deposed that the bill was issued by him but the same had not been shown in the Court. He denied that he had been introduced as a witness simply in order to implicate the appellant in this false case.

16. Inspector Gauri Dutt Sharma, appeared as PW-10 and stated that on 30.4.2016 C. Surjit Singh had brought rukka Ex.PW-1/C to the Police Station on the basis of which FIR Ex.PW-7/A was lodged and thereafter endorsement Ex.PW-7/B was made on the rukka. Both these documents containing his signatures. He further stated that the investigation of the case was handed over to ASI Sunil Kumar. On the same day at 9.35 p.m., PW-9 ASI Sunil Kumar and his team, appellant alongwith the case property appeared before him. The parcel was re-sealed by him by affixing four seals of seal impression 'D' and the same was already sealed with seal impression 'A' which were intact. NCB forms, in triplicate, were also produced before him by ASI Sunil Kumar and thereafter columns No.9 to 11 thereof were filled in by him and the same was thereafter signed by him. The impression of seal 'D' was taken on the NCB forms and on a separate piece of cloth Ex.PW-10/A. After resealing the parcel, the case property was deposited by

him with MHC Mohar Singh, Incharge Malkhana and resealing certificate Ex.PW-10/B was issued by him. He further deposed that parcel Ex.P-1 was the same which had been resealed by him. On completion of investigation, he prepared the challan and forwarded it to the Court.

17. In cross-examination, the witness stated that he had not brought the seal 'D' to the Court and volunteered to state that he had been transferred. He denied the suggestion that neither the appellant nor the case property had been produced before him by PW-9 ASI Sunil Kumar.

18. HHC Mohar Singh was at the relevant time posted as Malkhana Incharge, appeared as PW-6 and stated that on 30.4.2016 SHO/Inspector Gauri Dutt Sharma, deposited a parcel sealed with eight seals of seal impression 'A' and four seals of seal impression 'D'. NCB forms in triplicate, specimen impressions of seals 'A' and 'D' and seizure memo were also deposited with him in the Malkhana. Entries in this respect were made by him in the relevant register, the copy whereof was Ex.PW-6/A is being correct as per the original. On 2.5.2016 the case property was handed over by him to MHC Man Dev for being sent to FSL, Junga for chemical analysis. On 12.5.2016 the case property alongwith the report of the laboratory was received by him from HHC Kanshi Ram and entries to this effect were made in the Malkhana register. He further stated that as long as the case property remained with him, the same remained intact.

19. In cross-examination, he stated that the copy of Malkhana Register was taken from him by ASI Sunil Kumar on 6.5.2016. He however denied that the copy of Malkhana register was supplied after 12.5.2016. Further clarified that the entry at serial No. 719/83/16 pertained to the articles recovered from the appellant on his personal search as per entry, mobile having SIM No. 89881-04174 was recovered from the appellant. He denied the suggestion that the case property was never deposited with him or that the same had been tampered with.

20. HHC Man Dev appeared as PW-7 and stated that on 30.4.2016 C. Surjit Singh had brought rukka Ex.PW-1/C to the Police Station, on the basis of which FIR Ex.PW-7/A came to be registered and endorsement Ex.PW-7/B to this effect was made on the rukka. FIR and the endorsement contained the signatures of Inspector/SHO Gauri Dutt Sharma. After registering the FIR, the case file was given to C.Surjit Singh for being delivered to the Investigating Officer. Subsequently on 2.5.2016 the case property was taken by him from HHC Mohar Singh, Incharge Malkhana. One parcel sealed with eight seals of seal impression 'A' and four seals of seal impression 'D', NCB form, copy of seizure memo, sample seals, copy of FIR and docket were sent by him to FSL, Junga for chemical analysis through C. Surjit Singh vide RC No.21/2016. After depositing the case property in the laboratory, C. Surjit Singh returned to the Police Station handed over the Registration Certificate to him. Column No. 12 of the NCB form Ex.PW-7/C was filled in by him on 2.5.2016 and contained his signature. He further deposed that during this period the case property remained with him, the same remained intact and was not tampered with. He produced the copy of RC register Ex.PW-7/D and stated that the same was correct as per the original. CCTNS certificate under Section 65-B of the Indian Evidence Act Ex.PW-7/E was issued by him and further deposed that the computer system was working properly in the Police Station.

21. In cross-examination, the witness deposed that on 30.4.2016 ASI Sunil Kumar had returned to the Police Station during night, his statement was recorded by the I.O. on 6.5.2016. However, no rapat was entered separately regarding the arrival of C. Surjit Singh came to the Police Station alongwith rukka on 30.4.2016. He volunteered to state that this entry is mentioned in the FIR. He denied the suggestion that the paper formalities were completed later on to frame the appellant and the case property was not sent by him to laboratory through PW-1 C. Surjit Singh.

22. HHC Kanshi Ram appeared as PW-8 and deposed that on 12.5.2016 he was deputed by MHC Police Station, Theog to go to FSL, Junga and bring back the case property alongwith the report of the laboratory. He visited the laboratory on the same day and a parcel sealed with three seals of FSL and report of the laboratory was entrusted to him by the concerned

official of the FSL. He thereafter deposited the same with HHC Mohar Singh, Incharge Malkhana. He further deposed that as long as the case property remained with him, the same remained intact. In cross-examination, the witness denied that the case property was not deposited by him with HHC Mohar Singh.

This in entirety is the evidence led by the prosecution.

23. Now, adverting to the evidence led by the appellant in defence. It would be noticed that Hanumant Rai, Assistant Director of Telecom Security, BSNL, CTO, appeared as DW-1 and stated that he had brought the requisitioned record of telephone No.94181-76230 which was in the name of Sunil Kumar PW-9. Telephone No. 89881-04174 is in the name of Prem Singh and telephone No. 94599-62757 is in the name of Hira Singh and information in this regard is Ex.DW-1/A. Record relating to the call details was protected by a password which was known to him only. The call details of the above mobile numbers were Ex.DW-1/B to Ex.DW-1/D and were computer generated and correct as per the record. Coding of the towers showing the area from where the mobile phones were used, are mentioned in the call details and the decoded names of the towers are mentioned in Ex.DW-1/E. In cross-examination, the witness admitted that if a tower is not working, the mobile phone catches the signal of another tower.

24. DW-2 Sanjay Kumar, Nodal Officer, Reliance Communication Ltd., I.T. Park, Manimajra (Chandigarh), produced the call details that were password protected. He claimed that the password was known to him only and my superior at the National level. He stated that he had brought the summoned record of telephone No.98174-83164 which was in the name of PW-1 Surjit Singh. Ex.DW-2/A was the copy of CAF (Construction application form), Ex.DW-2/B was the copy of call details alongwith tower location, Ex.DW-2/C was the certificate issued by him under Section 65-B of the Indian Evidence Act and bore his signatures. He further stated that the call details in Ex.DW-2/B were correct as per the record. In cross-examination, even this witness claimed that if a particular tower is not functional, the mobile phone automatically catches the signal of other tower.

This in entirety is the evidence led by the appellant.

25. At this stage, it would be relevant to point out that the sole basis for convicting the appellant is contained in the reasoning as accorded in para-36 of the judgment, which reads thus:

> *"36. As per the prosecution story, parcel (Ext. P-1) was prepared at the spot by ASI Sunil Kumar (PW-9) and sealed by affixing eight seals of seal impression 'A'. Impression of seal 'A' was taken on a piece of cloth Ext.PW-1/A and the NCB forms including Ext.PW-7/C. Sealed parcel, accused and relevant documents were produced by PW-9 on his return to the Police Station before Inspector Gauri Dutt Sharma (PW-10), the then SHO, Police Station, Theog. The parcel was re-sealed by the SHO by affixing four seals of seal impression 'D'. Impression of seal 'D' was also taken on a piece of cloth (Ext.PW-10/A) and the NCB forms including Ext.PW-7/C. Columns No. 9 to 11 of the NCB forms were filled in by the SHO, who issued the re-sealing certificate and deposited the case property with HHC Mohar Singh (PW-6), Incharge Malkhana. In the resealing certificate Ext.PW-10/B issued by the SHO (PW-10), it has been mentioned that a parcel bearing six seals of seal impression 'P' alleged to be containing 95 grams of charas, sample seal 'P' and NCB forms in triplicate were produced before the SHO by HHC Om Prakash. The parcel was resealed by affixing three seals of seal impression 'T'. While taking me through Ext.PW-10/B, the learned counsel for the accused canvassed that the provisions of Section 55 of the Act were violated by the police in this case which is fatal to the case of the prosecution. To my thinking, this argument of the learned counsel is devoid of any force since the provisions of Section 55 of the Act are directory in nature. Certificate Ext.PW-10/B relates to FIR No. 16/16, dated 10.02.2016 registered in Police Station, Theog under Section 20 of the Act. In the*

present case, the number of the FIR is 68/16, dated 30.04.2016. Photocopy of the resealing certificate issued by the SHO (PW-10) in the instant case is there on record. It corroborates the prosecution version regarding resealing etc. Moreover, there is ample oral and documentary evidence on the file to prove that the case property remained safe and was never tampered with at any point of time."

26. We only need to remind that it is well settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused. (See: ***Mousam Singha Roy and others vs. State of W.B. (2003) 12 SCC 377***.)

27. That apart we notice that the learned Special Judge, who happens to be a senior Judicial Officer has analyzed the statements or reproduced the relevant part thereof, has in fact, reproduced in entirety his statement alongwith his cross-examination in verbatim and thereafter not even bothered to discuss the same. This was not at all expected from the learned Special Judge, as observed above, who is factually senior in the higher judiciary.

Now we will discuss the point-wise submissions made by the appellant.

(i) ***The prosecution has failed to connect the contraband with the re-sealing certificate Ex.PW-10/B.***

28. It is vehemently argued by Mr. Ajay Kochhar, learned counsel for the appellant that the link evidence in the present case is missing and there is sufficient evidence on record to indicate that the case property in fact had been tampered with and the paper work was done only to show the compliance of various provisions of the Act. He would contend that as per the admitted case of the prosecution, the case property being 2.77 kilograms was sealed with seal impression 'A' and resealed with seal impression 'D', whereas the resealing certificate Ex.PW-10/B, placed on record was contrary to the case of the prosecution and thus in fact falsified the case of the prosecution. From the record, we find that PW-10 Inspector Gauri Dutt Sharma, claims to have resealed the case property and the certificate placed on record shows only 95 grams and that too, found sealed with seal impression 'P' and resealed with seal impression 'T' and the document Ext.PW-10/B in fact relates to FIR No.16/16

29. However, learned Additional Advocate General would claim that PW-4 Sunil Kumar has duly proved on record rapat Ex.PW-4/B dated 30.4.2016 wherein it has been categorically recorded that "*ASI Sunil Kumar, PW-9 had submitted a parcel having eight seals of impression 'A' containing one bag of yellow colour mark PADENIA containing 2.770 Kg charas in the shape of sticks and balls alongwith NCB forms in triplicate for resealing before him. On inspection, the seal impression 'A' were found to be correct and the other details were also found to be correct and this parcel was then re-sealed with seal impression 'D' and impression thereof was also taken separately on a piece of cloth. Thereafter columns 9 to 11 of NCB -1 form, in triplicate was filled up and thereafter seal impression 'D' was put on the same and after resealing the parcel alongwith bearing seals 'A' and 'D' and NCB-1 form in triplicate were handed over to HHC Mohar Singh No. 1497, Malkhana Incharge.*"

30. At this stage, it would be noticed that the production of aforesaid rapats Ex.PW-4/A and Ex.PW-4/B had been objected to and rightly so because the resealing in this case was claimed to have been done by PW-10 Inspector/SHO Gauri Dutt Sharma, as aforesaid and not PW-4.

31. That apart, we noticed that after the conclusion of the arguments by the learned Special Judge, the prosecution had moved an application under Section 311 Cr.P.C. read with Section 165 of the Indian Evidence Act whereby it had sought permission to re-examine the SHO, Police Station, Theog as a witness and produce the resealing certificate issued by him in this case, but the said application was dismissed by learned Special Judge vide its order dated 7.4.2017 and the said order admittedly has attained finality as it was never challenged by the prosecution. Therefore, in the given circumstances, we have no hesitation to conclude that the

prosecution has not been able to connect the contraband with the resealing certificate Ex.PW-10/B and has attained finality.

(ii) Photographs Ex.PW-1/D to Ex.PW-1/J are contrary to the case of the prosecution.

32. It is the specific case of the prosecution that at 7.10 p.m. when the police party was present while patrolling at Gazari Tikkri Sainj link road, one person was seen coming on foot from the opposite direction carrying a bag in his right hand and on seeing the police vehicle the appellant turned back and started walking towards the opposite direction. This had raised suspicion in the mind of the police officials and thereafter the person was apprehended at some distance. Driver C. Rajesh Kumar was sent by ASI Sunil Kumar to look for the independent witnesses who after 15 minutes returned and claimed that no witness was available. It is only thereafter that the proceedings were conducted with the help of search light and the light of the vehicle as stated by PW-1 and PW-9. However, when the photographs Ex.PW-1/D to Ex.PW-1/J were put to these witnesses, they admitted that these have been taken during day time. PW-1 in his cross-examination specifically states "*it is correct that as per photographs Ex.PW-1/D to Ex.PW-1/J, it was day time*". Likewise, PW-1 ASI Sunil Kumar, in his cross-examination states "*it is correct that photographs Ex.PW-1/D to Ex.PW-1/J are of day light."*

33. Incidentally, the arguments in this case were heard at the time i.e. 4.5.2018 which coincides with the time and date of the incident i.e. 30.4.2016 and we have no hesitation to conclude that the sun sets in the month of April would be around 7.00 – 7.15 p.m. Anyway, not being emphasized by the personal knowledge, we would rather concentrate on the material that has come on record. PW-1 in his statement admitted that in April the sun sets at around 7.00 – 7.15 p.m. and it is dark around 7.30 p.m. and the appellant was apprehended at 7.15 p.m. PW-1 further admits that C. Rajesh Kumar had gone to call the independent witnesses and had returned to the spot after 15 minutes and therefore, it is but obviously when the proceedings were being conducted on the spot, it was pitch dark. Since the so called eye witnesses PW-1 and PW-9 admit the photographs to be those of day light, obviously then, the story being put-forth by the prosecution cannot be accepted at its face value.

(iii) Efforts to create false evidence by claiming that an attempt to associate independent witnesses was made.

34. As per the case of the prosecution attempts to associate independent witnesses was made, but in vain. As per the specific case of the prosecution, it was C. Rajesh Kumar, who had been sent to look for the independent witnesses, but then the said C. Rajesh Kumar has not even been examined by the prosecution which thus creates a serious doubt in the prosecution story. This looses importance because the other independent witnesses i.e. PW-1 and PW-9 have given different versions regarding the directions in which C. Rajesh Kumar had gone to search for independent witnesses. PW-1 would claim that C. Rajesh Kumar had gone towards Tikri Sainj Road in search of the independent witnesses, whereas PW-9 ASI Sunil Kumar would claim that C. Rajesh Kumar had gone on foot towards the upper side in search of the independent witnesses.

35. Apart from that, now in case the rukka Ex.PW-1/C and special report Ex.PW-3/A is perused, then it would be noticed that there is no mention made therein regarding C. Rajesh Kumar having been sent to look for the independent witnesses and this fact has been clearly acknowledged and admitted by PW-9 ASI Sunil Kumar in cross-examination when he states "*it is correct that I did not mention in the rukka Ex.PW-1/C and the special report Ex.PW-3/A that C. Rajesh Kumar was sent by me to call the independent witnesses."*.

(iv) Log book Ex.PW-9/E falsifies the case of the prosecution.

36. The specific case of the prosecution is that the police party returned to the Police Station at 9.35 p.m. as would be evident from the testimonies of PW-1 and PW-9. In fact, PW-9 claims to have remained in the Police Station after having reached there. However, when confronted with log book Ex.PW-9/E wherein the return of the police party to the Police Station is shown to be 11.35 p.m. on 30.4.2016, he would try to explain that he might have gone

somewhere else after 9.35 p.m. for patrolling, but could not tell the place. He further stated that the statement of driver C. Rajesh Kumar had been recorded by him under Section 161 Cr.P.C. wherein it had not been mentioned that he had gone somewhere after returning the Police Station after 9.35 p.m.

37. Now, in case the statement of PW-1 is adverted to, he has categorically stated that his statement under Section 161 Cr.P.C. had been recorded in the Police Station by ASI Sunil Kumar. That apart, in absence of any reference in any contemporaneous record regarding further patrolling of the police party after 9.35 p.m. on the given date, it would be noticed that the statement of PW-1 under Section 161 Cr.P.C. clearly belies the version putforth by PW-9 in the witness box.

(v) Colour of the bag as alleged to be recovered does not tally with the one as described by the Forensic Science Laboratory in its report.

38. Even though PW-1 and PW-9 are both silent about the colour of the bag, but then as per the seizure memo and the entry made in the Malkhana Register Ex.PW-6/A, the colour of the bag has been shown as yellow, but the bag containing contraband when sent for analysis to FSL, is found to be blue, white and yellow coloured carry bag. No explanation whatsoever has been placed by the prosecution on record to indicate how the yellow colour bag that was so recorded in the documents mentioned above, suddenly reported to be blue, white and yellow. Therefore, in the given circumstances even if it assumed that some substance was recovered from the appellant, the same cannot be connected with the report of the FSL to conclude that the same was Charas.

39. We see no reason to differ with the aforesaid view, therefore, in the given circumstances, even if it is assumed that something was recovered from the possession of the appellant, the same cannot be connected with the report of the FSL to conclude that the same was charas, as alleged.

(vi) Prosecution case full of major contradictions, embellishments and improvements.

40. It is vehemently argued by learned counsel for the appellant that the contradictions appearing in the case which are fatal to the case of the prosecution, according to him, the following contradictions are major in nature:

"a. Basic case of the prosecution is that the person on noticing the police vehicle turned back in started walking towards the opposite direction whereas both PW-1 and PW-9 in their examination in chief had stated that the said person turned back and tried to run away. PW-9, when confronted on page 20 with the basic case of the prosecution he admits that it was not therein in the statement of any witnesses the accused tried to run away. His deposition on page 20, 2nd line of the cross-examination is "I did not record the statement of any witness that the accused tried to run away".

b. PW-1 in his deposition has stated at page 5, 14th line from the top "when the accused turned back we suspected that he is carrying the contraband." To the contrary was deposed by PW-9, on page 21, 5th line from the top "when the accused turned back after seeing the police vehicle I did not suspect that he is carrying the contraband. Even I did not suspect that the accused is carrying the contraband when I sent C. Rajesh Kumar in search of the independent witnesses."

c. PW-1, in his statement has stated "driver c. Rajesh had gone towards Tikkri Sainj Road in search of independent witnesses." To the contrary was stated by PW-9, on page 20 and 22 in the following words " C. Rajesh Kumar went on foot towards the upper side in search of the independent witnesses" and "C. Rajesh Kumar was sent by me with the hope that some independent witnesses might be found. C. Rajesh went towards the upper side, jungle is there on the upper side."

d. Regarding the manner of apprehension, PW-1 states at page 3 "I and HHC Munni Lal followed the said person and caught hold of him at a distance of about 20 meters." T

e. Regarding the cross-examination on option under Section 50 of the Act after having suspicion that the appellant may be carried contraband, PW-1 on page 5 has stated on the 17th line from the top "I do not remember as to whether any option under Section 50 of the Act was given to the accused or not before the search of the bag". Whereas, PW-9 has stated that no option was given under Section 50 of the Act.

f. Regarding the manner in which the rukka was taken by PW-1, from the spot. PW-1 has stated that he went from the spot on foot whereas, PW-9 shows total ignorance by stating that he did not know as to how PW-1 went with the rukka from the spot, which is highly improbable."

41. It is more than settled that some improvements, contradictions and omissions are bound to occur in every case and until and unless the same is very serious, vital and significant so as to disbelieve and discard the substratum and go to the root of the case, the same probably would have no bearing on the case of the prosecution. However, minor contradictions, consistencies, embellishments and improvements on trivial matters without affecting the core of the prosecution case, should not be made a ground to reject the evidence in its entirety. Even though the contradictions, as sought to be pointed out by the appellant, cannot in isolation be considered to be of such magnitude that may actually affect the trial. However, when the cumulative effect and circumstances of the case as have been noticed above are taken into consideration, we have no hesitation to conclude that the prosecution has miserably failed to prove its case.

42. In view of the aforesaid detailed discussion, we find merit in this appeal and the same is accordingly allowed. The judgment of conviction and order of sentence dated 7.4.2017 under Section 20 of the NDPS Act are set-aside. The appellant is acquitted of the charges framed against him. The fine amount, if any, already deposited by the appellant is ordered to be refunded to him. Since the appellant is in Jail, he be released forthwith, if not required in any other case. Registry is directed to prepare the release warrant and send it to the Superintendent of the Jail concerned in conformity with this judgment.

43. However, we have no hesitation to conclude that it was solely on account of the faulty and shoddy investigation conducted by the prosecution that this Court is left with no other option, but to acquit the appellant. However, having regard to the seriousness of the offence, the matter cannot be set at rest here.

44. The Hon'ble Supreme Court in ***State of Gujarat vs. Kishanbhai and others, (2014) 5 SCC 108*** has categorically held that on the culmination of a criminal case in acquittal, the investigating/prosecuting official(s) concerned responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse. It is apt to reproduce the relevant observations in the aforesaid case, which reads thus:-

"21. On the culmination of a criminal case in acquittal, the concerned investigating/prosecuting official(s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the concerned official may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly we direct, the Home

Department of every State Government, to formulate a procedure for taking action against all erring investigating/prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant direction shall also be given effect to within 6 months."

45. PW-1 C. Surjit Singh and PW-9 ASI Sunil Kumar happened to be part of the police party. The alleged recovery in this case is stated to be 2.770 Kg of Charas, yet the callous and casual manner in which the investigation and thereafter evidence led by the prosecution leaves much to desire. That apart, why the remaining two so called eye witnesses i.e. C. Rajesh Kumar and HHC Muni Lal were not examined, that too, only on the ground of repetition, does not augur well, particularly in light of the other evidence that has been led by the prosecution. This Court has no hesitation to conclude that the investigation is based on fabricated documents. We observe so because PW-1 and PW-9, in their statements, have categorically admitted that the photographs Ex.PW-1/D to Ex.PW-1/J are those which having been taken in broad day light, whereas the specific case of the prosecution is that the investigation was commenced at about 7.30 p.m. when it was pitch dark.

46. We further have no hesitation to conclude that the acquittal in this case is a consequence of shoddy investigation and slovenly assimilation of evidence and, therefore, the entire gamut of the case requires to be thoroughly probed and enquired into by the Home Department of the State, which shall not only take appropriate departmental action against PW-1 C. Surjit Singh and PW-9 ASI Sunil Kumar, but shall also conduct a thorough inquiry as to why in the teeth of the evidence that had been recorded, the other two spot witnesses i.e. C. Rajesh Kumar and HHC Muni Lal having been given up and further why an appropriate application for examining these witnesses was not filed at any later stage.

47. However before parting, it needs to be observed that this Court has repeatedly come across the case files of the subordinate Courts, which are neither indexed nor paged. Even in this case, a perusal of the index on the exhibit part would show that the index has been shown as Page 'A' while all other exhibits have been shown from pages 2 to 39 without specifying separately the page of the concerned exhibit. This to say the least is not in accordance with the Rules and Orders. The matter pertaining to the preparation of judicial record in the subordinate Courts is dealt in Chapter 16, Volume IV of Rules and Orders of Punjab and Haryana High Court as applicable to the State of H.P.

Part A(II) deals with the index of papers and provides that each Civil and Criminal record should have pre-fixed to it an index of its contents and such index should be in prescribed form. The prescribed form has been given as Form No. 242 in Volume 6.

Sub Rule 2 provides that each paper admitted should be entered in the index on the day on which it is so admitted by the official incharge. It further provides that entry in column number 4 must be in sufficient detail to allow the paper described being readily identified, for example, the entry regarding a power of attorney should specify by whom the power of attorney is granted and whom it empowers, the entry regarding a deposition sheet should note the name of deponent etc.

Part B of Chapter 16 provides in the transmission of judicial record. Sub Rule (2) provides that on receipt of record, the proper official of the receiving office should check the list and in case of any deficiency should bring it to the notice of the head of the office.

Sub Rule 6 (g) provides that every page and not sheet should be numbered. However, it does not mention about the colour of the ink in which numbering is to be made.

48. It is thus clear that any official preparing the index is under an obligation to fill the index in proper form and it is not sufficient compliance that only Exhibit numbers are marked without any detail regarding the documents in the index.

49. Accordingly, we direct the Registrar General to issue instructions to all the subordinate Courts, directing them to ensure that before the records are sent to the appellate Court, the same are properly indexed and paged in accordance with the Rules as mentioned above and it will not be sufficient compliance that only Exhibit numbers are marked without giving any detail regarding the documents in the index.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

State of HP and Ors. .....Petitioners

Versus

Sh. Ashwani Kumar ....Respondent

CWP No. 3111 of 2016
Date of Decision: 10.5.2018

Constitution of India, 1950- Article 226- Conferment of work charge status - Entitlement - Petitioner was engaged Beldar as a daily wager – He completed more than 8 years engagement with the department as a daily wager – Petitioner seeking conferment of work charge status – Administrative Tribunal by holding that existence of work charge establishment is not a condition precedent, directed department to confer work charge status after completion of 8 years of service with all consequential benefits – Petition against by State – State submitting before High Court that respondent worked as Class-III work inspector and in Class-III category, work charge status was abolished in Public Works Department, therefore, he could not be conferred work charge status - Held, Regularization has no concern with conferment of work charge status - There is an obligation upon the department to consider the case of daily wage workman for conferment of work charge status on completion of required number of years in terms of policy – Petition dismissed – Judgment of Administrative Tribunal upheld. (Paras- 3 to 8)

For the Petitioners: Mr. Ranjan Sharma and Mr. Adarsh Sharma, Additional Advocate Generals.

For the Respondent: Mr. A.K. Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(oral)*

Instant writ petition is directed against the judgment dated 30.6.2016, recorded by the learned HP State Administrative Tribunal (in short "the Tribunal"), in OA No. 412 of 2016, whereby the Tribunal below while setting aside order dated 23.6.2014 (annexed with OA as Annexure P-1), directed the appellant-respondent to reconsider case of the applicant-respondent herein, for conferment of the work charge status on completion of eight years service with all consequential benefits.

2. Facts as emerge from the record are that the respondent, who was engaged as Beldar on daily wage basis in HPPWD, in the year, 1994, after having completed eight years continuous service, prayed for conferment of work charge status in terms of norms laid down by

the Government of Himachal Pradesh. Since writ petitioner-State failed to accede to aforesaid prayer of the respondent, he approached this Court by way of CWP No. 8852 of 2013, which came to be disposed of with direction to the State to consider the representation filed by the respondent, however fact remains that representation made sequel to aforesaid direction issued by this Court, came to be rejected vide order dated 23.6.2014. Feeling aggrieved and dis-satisfied with order dated 23.6.2014, the respondent preferred an application bearing No. OA No. 412 of 2016, before the learned Tribunal. Learned Tribunal having taken note of the decision rendered by this Court in CWP No. 4489 of 2009, Ravi Kumar v. State of H.P. and Ors, decided on 14.12.2009, wherein work charge status was ordered to be conferred on daily wagers engaged in the year 1999, arrived at conclusion that the applicant being similarly situate person, deserves to be conferred with work charge status. Learned Tribunal further held that work charge establishment is not a pre-requisite for conferment of work charge status nor conversion of work charge employees into regular employees would make the existence of such establishment non-existent. The learned Tribunal below drawing strength from observations/finding rendered by this Court in CWP No. 2735 of 2010 titled Rakesh Kumar v. State of HP, dated 28.7.2010, that regularization has no concern with the conferment of work charge status after a lapse of time, proceeded to allow the original application and directed the State to re-consider case of the applicant (respondent) for conferment of work charge status on completion of eight years.

3. Having carefully heard the learned counsel for the parties and perused judgment passed by the learned Tribunal, wherein very innocuous direction has been issued to reconsider the case of applicant(respondent) for conferment of work charge status after completion of eight years, this Court finds no justification in filing the present petition on behalf of the petitioner-State, rather it ought to have examined/considered case of the applicant (respondent) for conferment of work charge status in terms of observation made in the impugned judgment and as such, it deserves to be rejected on this sole ground. Otherwise also, material adduced on record clearly suggests that there is no dispute with regard to the completion of eight years service as far as respondent is concerned, rather it stands duly established on record that respondent, who was appointed on daily wages in the year, 1994, had completed 240 days in each calendar year continuously before completion of eight years.

4. In nutshell, case of the petitioner-State is that the applicant/respondent had worked as Class-III Work Inspector, whose work charge status stood already abolished on 1.4.2011. As per petitioner-State, in the class-III category, work charge status was abolished in the Public Works Department on 1.4.2011, whereas in Class-IV category, it was abolished on 19.8.2005 and as such, respondent is not entitled for grant of work charge status automatically, when especially he had not completed eight years service, on or before abolition of work charge on 1.4.2011. As per the petitioner-State, respondent was regularized rightly on 21.12.2006, in terms of the Government Regularization Policy dated 9.6.2006.

5. Mr. Adarsh Sharma, learned Additional Advocate General, while making this Court to peruse the judgment rendered by this Court in Ravi Kumar's case (supra) made an attempt to persuade this Court to agree with his contention that Ravi Kumar's case pertains to condoning of break period of continuous service, whereas there is no break in the service of applicant/respondent till his regularization. He further stated that after 1.4.2001, when work charge establishment ceased to exist, daily wage service direct regularization was permissible as per policy of the Government that too prospectively and as such, no injustice has been caused to the respondent, rather issue in this regard, stands duly settled in Rakesh Kumar's case, by this Court in CWP No. 2735 of 2010 as well as the Hon'ble Apex Court in SLP (C) 8830 of 2011, decided on 15.1.2015.

6. Having carefully perused material available on record, especially judgment rendered by this Court in Ravi Kumar v. State of H.P. and Ors, as referred herein above, which has been further upheld by the Hon'ble Apex Court in Special Leave to appeal (C) No. 33570//2010 titled State of HP and Ors. v. Pritam Singh and connected matters, this Court has no hesitation to conclude that there is no error in the finding recorded by the learned Tribunal

that work charge establishment is not a pre-requisite for conferment of work charge status. The Division Bench of this Court while rendering its decision in CWP No. 2735 of 2010, titled Rakesh Kumar decided on 28.7.2010, has held that regularization has no concern with the conferment of work charge status after lapse of time, rather Court in aforesaid judgment has categorically observed that while deciding the issue, it is to be borne in mind that the petitioners are only class-IV worker (Beldars) and the schemes announced by the Government, clearly provides that the department concerned should consider the workmen concerned for bringing them on the work charged category and as such, there is an obligation cast upon the department to consider the case of daily waged workman for conferment of daily work charge status, being on a work charged establishment on completion of required number of years in terms of the policy. In the aforesaid judgment, it has been specifically held that benefits which accrued on workers as per policy are required to be conferred by the department.

7. Subsequent to aforesaid decision, this Court while disposing of CWP No. 2398 of 2016 titled HPSEB and Anr. V. Nanak Chand and Ors, (alongwith connected matters), upheld the decision rendered by the learned Tribunal, whereby the respondent-electricity board was directed to consider the case of the applicant for conferment of work charge status on completion of ten years of service with all benefits incidental thereto. It may be noticed that decision rendered by the learned Tribunal in OA No. 3207 of 2015 in Narotam Singh v. HPSEB Ltd. and Ors, dated 14.12.2015, which subsequently came to be assailed in CWP No. 3301/2016, was squarely based upon decision rendered by the Hon'ble Apex Court in Bhagwati Prasad v. Delhi State Mineral Development Corporation (1990) 1 SCC 361, as well as judgment rendered by this Court in CWP No. 9970 of 2012 titled Laxmi Devi v. State of H.P. and ors., decided on 26.11.2012.

8. Mr. A.K. Gupta, learned counsel representing the respondent has also brought factum to our notice with regard to the implementation of similar directions as issued in the present case by the various departments pursuant to the directions issued by the learned Tribunal as well as this Court in the case of other similarly situate persons. Mr. Gupta also invited attention of this Court to the judgments having been passed by this Court in CWP No.2735 of 2010, dated 28.7.2010, titled as Rakesh Kumar v. State of H.P. and others; 13.5.2013, passed in CWP No.1906 of 2013-A, titled as Hira Singh v. HPSEB Ltd. & anr.; 14.8.2014, passed in CWP No.2551 of 2014, titled as H.P. State Electricity Board and another v. Bhag Singh and others; 10.9.2014, passed in CWP No.179 of 2014, titled as Beg Dass and others v. HPSEB Ltd and anr.; and 20.11.2014, passed in LPA No.621 of 2011, titled as H.P. State Electricity Board Limited and others v. Jagmohan Singh, perusal whereof clearly suggests that benefit as prayed for in the instant petition stands duly accorded to other similarly situate persons.

9. Consequently, in view of the aforesaid discussion as well as law relied upon, we see no reason to interfere with the well reasoned judgment passed by the learned Tribunal and as such, present petition fails and dismissed accordingly.

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

Tara Devi ...Petitioner.

Versus

Susheel Kumar ...Respondent.

CMPMO No. 364 of 2017
Decided on: 11.05.2018

Code of Civil Procedure, 1908- Section 24- Transfer of Divorce Petition – Wife sought transfer of divorce petition filed against her by her husband from court of Additional District Judge,

Ghumarwin to Court of District Judge, Shimla – On finding that (i) marriage of parties had taken place at Shimla, (ii) Wife was residing at Shimla, (iii) she had already filed a complaint under Domestic Violence Act against husband at Shimla, (iv) parties last resided together at Shimla and (v) Wife had meagre salary vis-à-vis, husband High Court ordered transfer of petition to Court of District Judge, Shimla keeping in view the convenience of wife. (Paras-6 to 9)

Cases referred:

Sumita Singh versus Kumar Sanjay and another, (2001) 10 SCC 41
Soma Choudhury versus Gourab Choudhaury, (2004) 13 SCC 462
Rajani Kishor Pardeshi versus Kishor Babulal Pardeshi, (2005) 12 SCC 237
Kulwinder Kaur alias Kulwinder Gurcharan Singh versus Kandi Friends Education Trust and others, (2008) 3 SCC 659
Arti Rani alias Pinki Devi and another versus Dharmendra Kumar Gupta, (2008) 9 SCC 353
Anjali Ashok Sadhwani versus Ashok Kishinchand Sadhwani AIR 2009 SC 1374
Urvashi Rana versus Himanshu Nayyar, Latest HLJ 2016(HP) 925

For the petitioner: Mr. P.D. Nanda, Advocate.
For the respondent: Mr. Naresh K. Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

Petitioner herein is wife of respondent. They have solemnized marriage on 23rd April, 2015 at Shimla according to Hindu rites and ceremonies after falling in love with each other. On 6th January, 2017, petitioner-wife had approached Women Police Station, Shimla for lodging a complaint against her husband and in-laws under Domestic Violence Act. Her statement was recorded by the police and was referred to the Protection Officer, Totu, Shimla, for further action whereupon, on the basis of report, dated 15th February, 2017 filed by Protection Officer in an application filed under Section 12 of Domestic Violence Act in April, 2017, Learned Chief Judicial Magistrate, Shimla, has taken cognizance of the complaint filed on behalf of the petitioner-wife against the husband and his relatives including parents.

2. Respondent-husband, after filing reply to the said complaint, had preferred a petition before District Judge, Bilaspur, under Section 13 of the Hindu Marriage Act for dissolution of marriage by passing a decree of divorce. The said petition is now pending before learned Additional District Judge, Ghumarwin, District Bilaspur (Camp at Bilaspur). On receiving summon (Annexure P-4) in the aforesaid divorce petition, petitioner-wife has approached this Court for transfer of the said petition to Shimla.

3. This petition has been opposed by the respondent-husband on the ground that petitioner-wife is misusing the provisions of Section 23 (2) and Section 24 (1) (a) (b) (ii) of Code of Civil Procedure be taking advantage of her womanhood. It has been stated in the reply that petition, sought to be transferred, preferred by the respondent-husband has been filed in the competent Court having the jurisdiction to hear and decide the same and no ground for transfer of the same is made out.

4. Learned counsel for the respondent-husband also submits that in case the matter is transferred to District Court, Shimla, there is a threat to the life of the respondent-husband as on an earlier occasion, during the hearing of the case under Domestic Violence Act at Shimla, he was thrashed by the petitioner-wife, regarding which verbal complaint had been made to the District Judge. Learned counsel for the petitioner-wife has refuted the charges by stating that, in fact, both of them had quarreled with each other and it was the petitioner-wife who was the sufferer and, therefore, petitioner-wife had also lodged a complaint with regard to the said incident with the police.

5. Section 19 of the Hindu Marriage Act provides jurisdiction and procedure for filing the petitions under this Act, which reads as under:

> *"**19. Court to which petition shall be presented.** - Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction -*
>
> *(i) the marriage was solemnised, or*
>
> *(ii) the respondent, at the time of the presentation of the petition, resides, or*
>
> *(iii) the parties to the marriage last resided together, or*
>
> *(iii-a) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or*
>
> *(iv) the petitioner is residing at the time of the presentation of the petitioner, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive."*

6. In present case, it is undisputed that marriage was solemnized at Shimla and petitioner-wife, who is respondent in divorce petition, at the time of presentation of petition, was residing at Shimla. It is also undisputed that at the time of marriage also, petitioner-wife was in service at Shimla and occasionally visiting her matrimonial house in Village Balgard, Tehsil Jhandutta, District Bilaspur. Therefore, it cannot be said that parties to marriage have last resided together in the said village. In fact, parties, after marriage, ordinarily were residing within local limits of ordinary original civil jurisdiction of District Judge, Shimla. Sub-sections (iiia) and (iv) of Section 19 of the Hindu Marriage Act are not applicable in the present case. So, in present case, divorce petition should have been filed before the District Judge, Shimla.

7. Even otherwise, petitioner-wife has lodged a complaint under Domestic Violence Act against her in-laws in the Courts at Shimla and divorce petition, sought to be transferred, has been preferred thereafter.

8. Petitioner-wife is serving as an outsourced worker through contractor in RTO Office, Shimla on contract basis against a meagre salary. Respondent-husband is serving as a District Manager on contract basis in Common Service Center Project, Bilaspur. He is slightly on better footings than the petitioner-wife.

9. It is also settled law of the land that in proceedings, which are outcome of matrimonial discord, convenience of wife has to be looked at and not the inconvenience of husband. *{See : Sumita Singh versus Kumar Sanjay and another, (2001) 10 SCC 41; Soma Choudhury versus Gourab Choudhaury, (2004) 13 SCC 462; Rajani Kishor Pardeshi versus Kishor Babulal Pardeshi, (2005) 12 SCC 237; Kulwinder Kaur alias Kulwinder Gurcharan Singh versus Kandi Friends Education Trust and others, (2008) 3 SCC 659; Arti Rani alias Pinki Devi and another versus Dharmendra Kumar Gupta, (2008) 9 SCC 353; Anjali Ashok Sadhwani versus Ashok Kishinchand Sadhwani AIR 2009 SC 1374; and Urvashi Rana versus Himanshu Nayyar, Latest HLJ 2016(HP) 925.}*

10. So far as contention of the respondent-husband with regard to threat to his life at Shimla is concerned, he is at liberty to take police help by making an appropriate application to this effect, as has been held by the apex Court in case titled **Soma Choudhury versus Gourab Choudhaury,** reported in **(2004) 13 Supreme Court Cases 462.**

11. In view of above discussion, petition is allowed and accordingly, HMA No. 4-3 of 2017, titled as Susheel Kumar versus Tara Devi, preferred by the respondent-husband under Section 13 of the Hindu Marriage Act, which is pending adjudication before the learned Additional District Judge, Ghumarwin, District Bilaspur (Camp at Bilaspur), is ordered to be transferred to the Court of learned District Judge, Shimla.

12. Learned Additional District Judge, Ghumarwin, District Bilaspur (Camp at Bilaspur), is directed to transmit the record of the said case to the learned District Judge, Shimla, with immediate effect.

13. Parties are directed to appear before the learned District Judge, Shimla, either personally or through their counsel, on **31st May, 2018,** who shall proceed with the matter in accordance with law.

14. The petition is disposed of in the above terms alongwith all pending applications, if any. No order as to costs.

15. Registry to convey the order forthwith to the learned Additional District Judge, Ghumarwin, District Bilaspur (Camp at Bilaspur) as well as learned District Judge, Shimla.

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

H.P. State Co-operative Bank Ltd .....Petitioner.
Versus
Naresh Kumar & others .....Respondents.

CWP No. 1192 of 2010.
Reserved on : 8th May, 2018.
Decided on : 14th May, 2018.

Payment of Gratuity Act, 1972- Section 4- Forfeiture of gratuity – Permissibility – After departmental enquiry holding delinquent guilty of misconduct, Board of Directors ordering withholding of 1/3rd of his gratuity towards loss caused to bank – However, delinquent not terminated from service – Statutory Authority under Act setting aside order on ground that power to withhold gratuity can be exercised only in event of termination of services of employee – Statutory Authority also directing release of money – Said Authority also commenting upon merits of findings of Inquiry Officer as accepted by Disciplinary Authority – Petition against – Held, power conferred upon competent Disciplinary Authority by virtue of Section 4 of Act includes power of forfeiture of gratuity - Statutory Authority under Act has no authority to reverse order of Disciplinary Authority – Petition disposed of with direction to release the permissible gratuity to delinquent, if amount due to Bank stood redeemed. (Paras-4 and 5)

For the Petitioners: Mr. Sunil Mohan Goel, Advocate.
For Respondents No. 1 to 5: Mr. R.L. Chaudhary, Advocate.
For Respondents No.5 & 6: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition is directed, against, the impugned orders recorded, by the statutory authority concerned, while, exercising powers under the Payment of Gratuity Act, 1972.

2. Apparently, the exercise of statutory jurisdiction by the authority concerned vis-a-vis the respondents herein, who are, employed with the H.P. State Cooperative Bank Limited, does not yet render, the extant writ petition instituted by the employer, to be either mis-constituted, nor it is not maintainable herebefore, (I) given this Court, in a verdict rendered in a case titled as ***Sanjeev Kumar & Ors vs. State of H.P. & ors***, reported in ***Latest HLJ 2014 (HP)***

1061, verdict whereof, though, appertains, to non maintainability, of, writ petition(s), as, directed by employee(s), against the H.P. State Cooperative Bank, (ii) yet with a mandate being also encapsulated, in paragraph No.10 thereof, which stand extracted hereinafter, vis-a-vis orders rendered, by, any statutory authority, vis-a-vis any employee, of, any instrumentality or agency of the State, rather not debarring, the employer to rear agitation(s) in respect thereof, by its casting a writ petition, before this Court. Consequently, the instant petition, as, preferred by the employer, though, apparently an instrumentality or agency of the State, and, directed vis-a-vis an order made by the statutory authority, thereupon, the instant writ petition, is both properly constituted before this Court, and, also is maintainable herebefore. Paragraph No.10, of, the aforesaid judgment, reads as under:-

> "10. There would have been no dispute in case the orders impugned herein could be termed to have been passed by the statutory authority in exercise of powers conferred upon it by the Act and Rules, because in that event undisputedly the writ petition would be maintainable before this Court. However, the moot question again herein is as to whether the orders passed by the respondents i.e. Registrar and the State Government can be termed to be statutory orders."

3. Nowat, it is also imperative, to adjudge, the meritworthiness, of the impugned rendition. Before proceeding, to determine the validity, of the impugned order, it is imperative to bear in mind, the hereinafter extracted apt portions, of Annexure P-5:-

> "Whereas Shri R.K. Minhas, Officer Gr-I, posted at Branch Office Nerchowk (hereinafter called delinquent official) was charge sheeted vide memo No. Estt/371/13592/2001 dated 13.4.01 and again vide memo No. Estt/377/34426/2001 dated 8.10.01 for Major misconduct.
>
> Whereas, Shri R.K. Minhas denied all the charges framed against him and the Board of Directors of the Bank vide resolution No.52(2) dated 1.6.02 appointed Shri R.C. Kapil, Managing Direct Bank as Inquiry Officer to inquire into the charges framed against Shri R.K. Minhas.
>
> And whereas, the inquiry report submitted by the Inquiry Officer was placed before the Bord in its meeting held on 31.12.02. The Board of Directors carefully perused the chargesheet framed against the delinquent officer and the inquiry report submitted by the Inquiry Officer. After detailed discussion the Board concerned with the finding of the Inquiry Officer who had proved 8 charges of major misconduct against the said Shri R.K. Minhas out of 14 charges framed against him.
>
> Keeping in view the seriousness of the charges and the acts of major misconduct committed by the said Shri R.K. Minhas, the Board was of the view that Shri R.K. Minhas deserved the penalty of termination from service. But keeping in view the fact that the said Shri R.K. Minhas was retiring on supperannuation on 31st January, 2003, the Board passed the orders as under:-
>
> 1. Rs.78,905/- excess drawn by him as arrear of his pay fixation be recovered from the said Shri R.K. Minhas from his post retirement dues with interest @12% from the date of excess withdrawal to the date of payment but the time taken by the office to settle his post retirement dues after his superannuation should be deducted for the purpose of calculation of 12% interest. This amount is recoverable from him under Rule 73 of the H.P. State Co-operative Bank Employees (Terms of Employment and Working Conditions) Rule, 1979.
>
> 2. One third (1/3rd) gratuity of the said Shri R.K. Minhas be withheld to compensate the loss caused/likely to be caused to the Bank by irregular sanction/release of Rs.2.00 lakh as house repair loan in favour of Smt. Indu Gupta, R/o Ratti, Nerchowk on 11.07.2001, till the same is fully repaid by the

loanee. In case the loan is not fully repaid as per the terms of the loan on due date or the loan become NPA, the amount of gratuity withheld by adjusted to square/settle the loan. Though the penalty of termination of service has not been imposed on the said delinquent official yet for the purpose of withholding 1/3rd gratuity, it will be deemed as if penalty of termination from the service was imposed upon him."

4. The aforesaid extracted apt portion, of Annexure P-5, apparently, and, visibly makes echoings, of, upon culmination, of, disciplinary proceedings, drawn upon one R.K. Minhas, the delinquent official concerned, the apposite penalties, arising, from his proven misconduct, being hence imposed upon him. The aforesaid apposite order, borne in Annexure P-5, remains undisplayed, to beget its reversal, from, the apt Appellate authority concerned, thereupon, it acquires conclusivity. Despite conclusivity being hence enjoyed, by the apt order, borne in Annexure P-5, the statutory authority concerned, under Annexure P-8, rather proceeded to dwell upon besides delve into merits thereof, (i) besides proceeded to fathom the validity, of all penalties imposed, upon, one R.K. Minhas, the delinquent official, arising, from his committing, the proven misconducts, as embodied therein. The aforesaid, dwelling, upon the meritworthiness, of imposition of penalties, by the disciplinary authority, upon the delinquent official concerned, is per se hence beyond the domain, of, Section 4 of the Payment of Gratuity Act, 1972, especially vis-a-vis, the non obstante clause (6) occurring therein, (ii) wherein rather a empowerment is vested, in the apposite statutory authority, exercising, jurisdiction thereunder, to forfeit gratuity vis-a-vis the delinquent official, only, upon his service being terminated. However, hereat the services of the delinquent official, were not terminated, rather penalty(ies), as, unfolded in Annexure P-5, were imposed upon the delinquent official, visibly for his proven misconduct. Consequently, with the apposite non obstante clause, permitting, the statutory authority concerned, to, forfeit the apt accruable gratuity(ies) vis-a-vis any employee, only upon, his services being terminated, (iii) thereupon, with no mandate occurring therein, of it being also statutorily permissible, for the jurisdictionally empowered authority, to benumb, blunt or annul, the findings recorded by the competent disciplinary authority concerned, (iv) thereupon in the statutory authority concerned, hence rescinding Annexure P-5, and, its rather releasing sums, of, money vis-a-vis the contesting respondents, has, apparently transgressed the domain, of, Section 4 of the Payment of Gratuity Act. Even otherwise the aforesaid extracted apt statutory provision(s), specifically encompass therewithin, the apt exercisable jurisdiction by the authority concerned, hence with its defining, with, specificity the apt powers, of, forfeiting, of, gratuity vis-a-vis an employee, and, its not permitting, the statutory authority, to also, reverse the orders, made, by the apt disciplinary authority, (v) hence garners, an inference of the apt provisions specifically including therewithin, the apt powers of forfeiture, of, gratuity, and, also rather obviously specifically excluding, any, exercise, of, jurisdiction, for, begetting, any reversal, of, any order made by the competent disciplinary authority, (vi) thereupon express inclusion, and, express exclusion of apt jurisdiction(s) rather explicitly forbidding the authority concerned, to reverse, the order pronounced, by the competent disciplinary authority concerned. Consequently, Annexure P-6 and Annexure P-8 are quashed and set aside.

5. Be that as it may, for ensuring, the meteing(s), of, complete justice, to the contesting respondents,hence, if the apt hereinabove reproduced portion of Annexure P-5, are evidently nowat, meted their completest satisfaction or the apt amount(s) encapsulated, are, redeemed vis-a-vis, the appropriate authority, thereupon, the petitioner, is, directed to ensure, that the entire permissible gratuity is defrayed vis-a-vis the contesting respondents. The writ petition stands disposed of accordingly. All pending applications also stand disposed of.

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

Jai Kishan and others .....Appellants/defendants.
Versus
Sita Ram .....Respondent/Plaintiff.

RSA No. 131 of 2006
Reserved on : 11th May, 2006.
Decided on : 14th May, 2018.

Specific Relief Act, 1963- Section 38- Suit for permanent prohibitory injunction- Plaintiff seeking decree of permanent prohibitory injunction against defendants on allegations of their unauthorized interference in his possession over suit land – Defendants contesting suit and pleading that a motorable road actually passes through suit land – Trial court decreeing suit for permanent prohibitory injunction – First Appellate Court dismissing appeal of defendants- RSA- Defendants relying upon a photocopy signed by plaintiff and others for giving consent for construction of road through land – Original document not placed on record - Corresponding record not filed in evidence to show that recital in that document pertains to suit land only- Held, suit was rightly decreed for permanent prohibitory injunction – RSA dismissed - Decrees of lower courts upheld. (Paras- 8 to 10)

For the Appellants: Mr. N.S. Chandel, Advocate
For Respondent: Mr. N.K. Thakur, Senior Advocate with r. Nitesh Negi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for permanent prohibitory injunction, as well as in alternative, for, rendition of a decree for possession qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiff Sita Ram on 16.8.1999 had instituted a civil suit for permanent injunction against the defendants on the averments that he along with others is joint onwer in possession of land bearing Khata No.133 min, Khatoni No.134 min, Khasra No.3390, measuring 4 kanals, 18 marlas, situate in Tika Jajri, Mouza and Sub Tehsil Dhatwal, District Hamirpur. The defendants had no right, title or interest upon the suit land. The defendants had started interfering with the ownership and possession of the plaintiff over the suit land w.e.f. first week of August, 1999. The defendants had been cutting grass from the suit land. They had also started digging the same with a view to construct a road through the suit land. The defendants had been requested not to do so, but without any result and hence the suit for permanent injunction against the defendants. It is also averred that in case the defendants were successful in taking forcible possession of the suit land, a decree for possession be passed.

3. The defendants contested the suit and filed written statement, wherein, he has taken preliminary objections inter alia maintainability, non joinder of necessary parties and want of cause of action. On merits, the defendants had admitted the ownership and possession of the plaintiff and others over the suit land. It had been stated in the books of the Collector the description of the suit land had been recorded "Nullah". However, a road had been passing through the suit land. The road through the suit land had been constructed with the consent of the plaintiff, some times in 1995-96. The vehicles were stated passing through the suit land. It had also been averred that at the time of the consolidation operation, all the proprietors had agreed to contribute a portion of their holding for road. The plaintiff had also consented for such

contribution and the road had been constructed long back. The plaintiff was not entitled to any relief much less to the discretionary relief of permanent injunction.

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

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

1. Whether the plaintiff is entitled to the injunction prayed for? OPP.
2. Whether the plaintiff is entitled to a decree for possession as claimed? OPP.
3. Whether the plaintiff has a cause of action? OPP.
4. Whether the suit is not maintainable in the present form? OPD.
5 Whether the suit is bad for non joinder of necessary parties? OPD.
6. Whether there exists a road on the spot as alleged. If so, its effect? OPD.
7. Relief.

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

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 22.10.2014, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the first appellate Curt has acted with illegality while dismissing the appeal on the ground that those, who were affected by the suit had not been appealed and only few of them have filed the appeal?

b) Ether the first appellate court's finding that writing Mark-A being not signed by all the persons, who are recorded as joint owners of the suit land cannot be acted upon especially when such other persons (recorded as joint owners) re not even party to the litigation?

c) Whether the writing Mark-A is binding upon the respondents?

d) Whether the finding of the Courts below is contrary to the facts and erroneous?

Substantial questions of Law No.1 to 4:

8. The espousal addressed before this Court, by the learned counsel, for the defendants/appellants, is, anvilled upon Mark-A, and, with the plaintiff in his cross-examination, hence, admitting qua the signatures occurring thereon, in red circle, rather belonging to him, (i) thereupon, with recitals occurring therein, making bespeakings, of his, along with other co-signatories thereto, hence, meteing their respective consents, for, the construction of road, upon the suit land, AND, in consonance with the apt survey, and, also hence all signatories thereto, permitting qua carrying, of, road construction activity, upon their respective lands, (ii) whereupon, he, hence, contends, that, even if Mark-A, is, only a photo copy, and, hence remained not proved, from, its original, nor any application, for secondary evidence, hence, being adduced, for, tendering a photo copy of the original, (iii) rather not rendering, it, to either unreadable or inadmissible nor irrelevant, given, the plaintiff in his cross-examination, admitting, his signatures, occurring, thereon in red circle. The aforesaid contention, has immense force and palpably rather germinates, from, the factum of the plaintiff, admitting, his signatures, to occur, in red circle, of, Mark-A, (iv) thereupon, it is rendered admissible besides readable, dehors it

being merely a photo copy, of, the original besides dehors, contents thereof being not proved from its original or dehors no affirmative order being pronounced upon any apposite application, for tendering besides proving the apt photo copy, of, the apt original. However, even if this Court hence concludes, of, Mark-A being admissible besides readable in evidence, yet would not provide, any capitalization, to, any further argument, of the learned counsel, appearing for the defendants/appellants, qua on anvil thereof, hence, the concurrently rendered judgments and decrees, pronounced, by both the learned Courts below, rather being fallible. The reason for making the aforesaid conclusion, arises, from the factum of (a) there occurring a candid display, in Mark-A, of, all the signatories thereto including the plaintiff, agreeing, for construction of road, in consonance, with, the apt survey, (b) thereupon, it was imperative for the defendants, to place reliance thereon, and, thereafter to tender besides adduce, in evidence, the apposite survey, in consonance wherewith, the signatories to Mark-A, including the plaintiff, echoed in Mark-A, their apposite acquiescences vis-a-vis the construction, of, a road thereon, (c) whereas, with, the apposite survey rather remaining unadduced into evidence nor any precise or specific delineations, hence occurring in Mark-A, specifically appertaining, to the suit khasra number, owned and possessed, by the plaintiff, thereupon, the defendants, are, estopped, to stake any claim thereon.

9. Be that as it may, the learned counsel appearing, for the defendants/appellants, has also made an effort, to belittle the worth, of, the aforesaid inferences by his alluding to the cross-examination, of, the plaintiff, wherein he makes communication(s), of, Mark-A, hence, appertaining, to construction of a road, occurring in proximity, to the abode of the plaintiff, (i) hence, thereupon, he contends that the aforesaid echoings, are, in concurrence with Mark-A, hence the plaintiff's suit, was amenable, to dismissal. However, the aforesaid submission carries no force nor weight, reiteratedly given, the defendants not placing on record, the apt survey hence with depiction(s) therein, of it, bearing consonance, with, the aforesaid admission rather occurring, in the cross-examination, of, the plaintiff, besides with Mark-A not carrying any echoings therein, for hence, stirring any inference, of, its rather concurring, with, the aforesaid echoings, made by the plaintiff, in his cross-examination, reiteratedly, hence renders it, to warrant its rejection.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondent/plaintiff and against the appellants/defendants.

11. In view of the above discussion, there is no merit in the instant Regular Second Appeal and it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Nisha Chaudhary .....Petitioner.
Versus
Smt. Nirmla Devi ....Respondent.

Cr.MMO No. 368 of 2017.
Reserved on : 7th May, 2018.
Decided on : 14th May, 2018.

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque - Issuance of summons– Challenge thereto – Accused pleading that cheques were issued by sole proprietor 'R' and she had

no role in issuing those cheques – High Court finding clear allegation in complaint that she abetted 'R' to issue dishonoured cheques – Held, summoning order cannot be quashed. (Para-3)

For the Petitioner: Mr. P. S. Goverdhan, Advocate.
For the Respondent: Mr. Parveen Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition is directed, against, the orders recorded, on 26.05.2017, by the learned trial judge, whereby, he, after taking cognizance, upon, an offence punishable under Section 138, of, the Negotiable Instruments Act (hereinafter referred to as the Act), proceeded, to, order for issuance of summons, upon, the petitioner herein.

2. The learned counsel appearing, for the petitioner herein, has with much fervor, and, vehemence contended that, given the averments borne in the complaint, of, accused one Rajiv Malhotra, being, the sole proprietor, of, M/s Richman Consultant and Advisers, (i) thereupon, prima facie hence, when, the corporate entity aforesaid, is apparently averred in the complaint, to, be under the sole proprietorship of one Rajiv Malhotra, (ii) thereupon, ascription(s), of, any incriminatory role vis-a-vis the petitioner herein, wanting in legal strength, besides rendition, of, orders, for, issuance of summons upon her, after cognizance being taken, upon, the apposite complaint, being, also visited with a stain, of, gross illegality, (iii) unless averments, are, borne in the complaint, bearing consonance, with, the substantive provisions, occurring in Section 141, of, the Act, provisions whereof stand extracted hereinafter, (iv) comprised in the accused/petitioner herein, being averred to be responsible, for, the conduct of business of the aforesaid company. Provisions of Section 141 of the Act read as under:

> "**141 Offences by companies. —**
>
> (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

He submits that, given, a, bare reading of the complaint, its rather, not, within the domain, of, the hereinabove extracted substantive provisions, of, Section 141, of, the Act, hence ascribing vis-

a-vis the accused/petitioner herein, any role of hers managing the business, of, the company, thereupon, the impugned order warranting its reversal. However, the aforesaid submission, is, fully negated, by this Court pronouncing an order, on 15.3.2018, whereunder, on a submission made before this Court, by the learned counsel appearing, for, the petitioner, qua given respondent No.3, expiring, during the pendency of the instant petition before this Court, and, per se, thereupon, hence respondent No.2 headed by deceased respondent No.3, ipso facto hence dissolving, this Court proceeded to hence accept, the apt submission, and, also made an order in consonance therewith. Consequently, with, corporate entity, named, Richman Consultant and Advisers, being dissolved, hence, renders unattractable hereat the mandate, of Section 141 of the Act.

3. Be that as it may, the further sequel thereof, is that, with there occurring rather categorical averments, in the complaint, of, the petitioner herein, hence, aiding or abetting deceased Rajiv Malhotra, hence, to deliver the dishonoured negotiable amount vis-a-vis her, (i) thereupon, even if the dishonoured negotiable instrument, carries thereon, only, the signatures of deceased Rajiv Malhotra, (ii) nonetheless, with apt ascriptions, being borne therein vis-a-vis the accused/petitioner herein, qua hers abetting or aiding, deceased Rajiv Malhotra, in the latter committing the alleged offence, (iii) thereupon, despite, the negotiable instrument being signatured, solitarily, by deceased Rajiv Malhotra, does not ipso facto hence efface, the incriminatory role of the accused/petitioner, rather the order impugned before this Court is both, apt and tenable.

4. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed accordingly. The impugned order is maintained and affirmed. The parties are directed to appear on 28th May, 2018, before the learned trial Court. However, it is made clear that the observations made hereinabove shall have no bearings, on the merits of the case. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith.

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

Paras Ram and others .....Petitioners.

Versus

State of H.P. & others .....Respondents.

CWP No. 7869 of 2012.
Reserved on : 09.05.2018.
Decided on : 14th May, 2018.

Himachal Pradesh Land Revenue Act, 1954- Section 38(b)- Alteration of revenue entries - Decree of Civil Court –Pursuant to decree of civil court dated 12.12.1969, estate of 'C' devolved upon 'B' – 'B' gifted that property to petitioners – Settlement collector attesting mutation pursuant to gift deed in favour of petitioners – Order of Settlement Collector set aside by Commissioner Mandi and case remanded by him- Petition against – Held, decree dated 12.12.1969 determining question of succession to estate of 'C' by 'B' had attained finality – Gift of suit land by 'B' in favour of petitioners also not challenged by any one – Therefore, revenue entries were required to be altered in consonance with decree dated 12.12.1969 and gift deed of 'B' executed by her in favour of petitioners – Petition allowed – Order of Divisional Commissioner set aside (Paras-5 to 7).

For the Petitioners: Mr. Kuldeep Singh Patyal, Senior Advocate with G.K. Nadda, Advocate.
For Respondent No. 1: Mr. Yudhbir Singh Thakur, Deputy Advocate General.
For Respondents No.2 to 4: Mr. Sunny Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant petition, the petitioners claim a pronouncement, for, setting aside and quashing, of, the order recorded, on 16.05.2012, by the Commissioner, Mandi Division, whereby, he proceeded to reverse, the orders recorded, on, 28.10.2004 by the Settlement Collector, and, thereafter proceeded to remand case No. 193/2005 vis-a-vis the Collector Settlement, Kangra Division, Dharamshala, for rendering a fresh decision thereon in accordance, with, the pronouncement recorded, on 16.05.2012.

2. A bare reading of the order impugned, before this Court, makes, apparent underscorings, of the Commissioner, Mandi Division, while pronouncing it, his being aware of the factum, of, rendition of a judgment, and, decree, by the learned Sub Judge, Hamirpur, on 12.12.1969, in, Civil Suit No. 76 of 1968. The records, of the aforesaid, civil suit, were summoned from the Court concerned. A perusal thereof, discloses, that therein, rather the respondents herein, not, protesting vis-a-vis devolution, of estate, of one Chandu vis-a-vis one Bishan Devi, in consequence thereof, an apposite mutation, was, attested vis-a-vis Bishan Devi. Subsequent thereto, a gift deed was executed, by Bishan Devi qua the land, as, encapsulated in case No.193 of 2005, upon the petitioners herein, and, thereafter, the Settlement Collector hence proceeded, through, a fard badar, to, make apposite vestment of rights, in, consonance with the gift deed, made by one Bishan Devi, rather, upon the petitioners. However the aforesaid vestment, of rights vis-a-vis the donee(s) of Bishan Devi, was, purportedly challenged by the contesting respondents, and, their challenge, hence through, the impugned order rather succeeded. The petitioners being aggrieved therefrom, have instituted the instant petition before this Court, wherein, they make a prayer, for the quashing of the impugned orders.

3. The contesting respondents, and, the State of Himachal Pradesh, filed their respective replies, wherein, they concerted, to validate the impugned orders, on anvil, of, para 8.5.3(b) of the H.P. Land Records manual, and, on anvil of a revision petition pending, for disposal before the learned Financial Commissioner concerned, and, contended that awaiting any decision being rendered thereon, this Court hence not proceeding to pronounce, any decision, upon, the instant writ petition.

4. Be that as it may, with the judgment and decree pronounced, upon, Civil Suit No. 78 of 1968, by the learned trial Court concerned, being evidently at this stage, not displayed, to be reversed by any decision recorded, by the Appellate Court concerned, thereupon, it acquires, both conclusivity besides a binding effect. Consequently, with conclusivity being acquired by the judgment and decree, rendered by the trial Court concerned, in Civil Suit No. 78 of 1968, also renders hence the attestation of mutation in consonance therewith, by the Revenue Officer concerned, to be not suffering, from, any vice of any vitiation. Uncontrovertedly, the land acquired, by Bishan Devi, through, a conclusive judgement, and, decree rendered by the Civil Court concerned, and, in consonance therewith hence mutation No.232, was, thereafter, attested, subsequently came to be donated by her vis-a-vis the petitioners herein, (a) nowat, unless the validity of execution, of a gift deed, made, by Bishan Devi vis-a-vis the petitioners herein, was thrown a challenge, by befitting person(s), and, only upon the apposite challenge, rather achieving success, (b) thereupon, alone, the apt alienation(s) vis-a-vis the petitioners herein, through, the gift deed made by Bishan Devi vis-a-vis land(s) in respect whereof, mutation No.232, was attested, would be concluded, hence, to be not holding any optimum validity, nor, the gravest solemnity, (c) whereas, no challenge being evidently thrown thereto, by any befitting person, hence, renders the apt gift deed to be construable, to be validly executed, and , also it being vis-a-vis land(s) acquired by the donor, through, mutation No.232. In aftermath, the corrections, through, farad badar, made in consonance therewith, by the Settlement Collector, in the apt records appertaining vis-a-vis mutation No.232, also cannot be said to be suffering, from, any vice(s) of any entrenched vitiation(s) or illegality(s), (d) unless evidence was adduced, in respect of inappropriate vestment, of title being made thereunder, by the settlement collector, or evidence

stood adduced vis-a-vis the apt corrections rather being, in evident dis-concurrence(s) vis-a-vis mutation No.232. However, no such evidence rather exists on record. If so, with the alienation, made by Bishan Devi, of land(s), as, encapsulated, in validly drawn mutation No.232, upon the petitioners, did hence enjoin the Settlement Collector concerned, to, in consonance therewith, make the apt/appropriate corrections, in the revenue record concerned. Despite the Settlement Collector, meteing deference to the mandate, of, the decree of the Civil Court, and, vis-a-vis the validity, of alienation(s) made, by one Bishan Devi, through, a gift deed, upon, the petitioners herein, contrarily under the impugned order, (e) rather, the learned Divisional Commissioner, Mandi, on anvil of para 8.5.3(b), of the H.P. Land Records Manual, proceeded to rather pay reverence, to the mandate enshrined therein, (f) whereas the statute enjoining, the mightiest, and, the fullest legal clout or sway, is, the H.P. Land Revenue Act, and, the apt provisions borne, in Sections 38 and 46 thereof, provisions whereof, specifically appertain, to, the lis at hand, provisions of Section 38 and 46 of the H.P. Land Revenue Act read as under:-

> "**38. Restrictions on variations of entries in records.** - Entries in records-of-rights or in [periodical] records, except entries made in [periodical] records by patwaris under clause (a) of section 36 with respect to undisputed acquisitions of interest referred to in that section, shall not be varied in subsequent records otherwise than by -
>
> (a) making entries in accordance with facts proved or admitted to have occurred;
>
> (b) making such entries as are agreed to by all the parties interested therein or are supported by a decree or order binding on those parties; and
>
> (c) making new maps where it is necessary to make them.
>
> **46. Suit for declaratory decree by persons aggrieved by an entry in a record.** - If any person considers himself aggrieved as to any right of which he is in possession by an entry in a record of rights or in [a periodical] record, he may institute a suit for a declaration of his right under [chapter VI of the Specific Relief Act, 1963],"

Imminently, do as, but a natural corollary rather prevail upon, and, also undermine the vigour of Para 8.5.3(b), of, the H.P. land Records Manual.

5. The reasons, for coming to the aforesaid conclusions, are, (i) the hereinabove extracted provisions, of the preponderant statute (Himachal Pradesh Land Revenue Act), hence, containing an explicit mandate vis-a-vis the entries borne in revenue records or in the records of rights, rather not warranting their alterations, or corrections, unless, the conditions set forth therein, evidently beget satiation. Paramount condition whereof, is embodied vis-a-vis alterations, being supported by a decree or an order pronounced, by the Civil Court concerned. As aforestated, with, the judgment and decree pronounced, by the Civil Court concerned, acquiring conclusivity, whereafter, in consonance therewith the apt mutation No.232 stood attested vis-a-vis Bishan Devi, and, when in further sequel thereto one Bishan Devi validly alienated, through, a gift deed, land borne in mutation No.232 vis-a-vis the petitioners herein, (ii) thereupon, the petitioners herein were entitled, to obtain the apposite corrections vis-a-vis the apt therewith hence apposite revenue records. Conspicuously, when the judgment, and, decree rendered by the civil court(s), is, under the afore extracted provisions of H.P. Land Revenue Act, hence statutorily foisted, with, the apt binding and conclusive effect, and, more so, upon, the revenue officers concerned. The provisions, of, 8.5.3(b) of the H.P, Land Records Manual, as, relied upon by the Divisional Commissioner, Mandi, for his hence contravening the mandate, of, a conclusive and binding judgment and decree, rendered by the civil court, and, in consonance wherewith, the apposite corrections, through, "farad badar', were, made vis-a-vis the petitioners, (iii) hence, appears to erupt, from his, slighting the mandate, of, the apt provisions (supra), embodied in the H.P. Land Revenue Act, (iv) and, also appears to spur, from, his reading the relevant clause of the H.P. land Records Manual, dis-harmoniously vis-a-vis the mandate, of the afore extracted provisions, of, the H.P. Land Revenue Act, whereas, contrarily, it was incumbent

upon the Divisional Commissioner, to beget harmony inter se both, (v) more so, given the paramountancy, of, statutory provisions, obviously hence both undermining, and, blunting the effect(s), of aforesaid para 8.5.3(b), occurring, in the H.P. Land Records Manual. Moreover, the occurrence, of, apt provisions borne, in, the H.P. Land Revenue Act, are through a legislative enactment, whereas, the occurrence, of, apt provisions, borne, in the H.P. Land Records Manual, are, through a notification, approved by the Governor. Even if, assumingly para 8.5.3(b), of, the H.P. Land Records Manual, relied upon, by the Divisional Commissioner, Mandi, for his hence begetting infraction, of, the conclusive and binding decree, recorded by the learned Civil Court concerned, does prevail, upon, the apt statutory provisions, borne, in a valid legislative enactment, (vi) thereupon, also with an interdiction, existing therein, against, through a fard badar, contested corrections qua the rights, title or interest hence being made by the revenue officer concerned, (vii) thereupon with the apposite interdiction, embodied therein, being vis-a-vis contested corrections, whereas, visibly hereat the conclusive and binding judgment, and, decree rendered, by the civil court concerned, upon, Civil Suit No. 78 of 1968, rather terminated the contest, (viii) also, hence rendered the corrections, as, endeavoured by the petitioners, to be hence not contested, rather theirs being supported by a conclusive, and, binding judgment and decree, (ix) thereupon the mandate of Section 38(b), hence, acquires pre-significance and pre-imminence, and, was never amenable, to infraction, as untenably done, by the Divisional Commissioner, (x) unless evidence was adduced before him vis-a-vis the correction(s) being contested, on anvil, of invalidity, of, apposite mutation No.232, attested vis-a-vis Bishan Devi also evidence existed, of donation, of land(s) by Bishan Devi, as acquired by her, under a conclusive decree, and, in consonance wherewith, mutation No.232 stood attested, not demonstrably being valid, given it being attested in conflict therewith. Contrarily, when the aforesaid evidence, is amiss hereat, it was not either tenable nor appropriate, for the Divisional Commissioner, to, dis-concur with the mandate, encapsulated in Section 38(b) of the H.P. Land Revenue Act or to irrevere the mandate of the conclusive judgment and decree, rendered by the civil court concerned, upon, C.S. No. 78 of 1968.

6. The mere pendency of a revision petition, before, the Financial Commissioner concerned, would not also preclude this Court, to, pronounce an adjudication, upon, the instant writ petition, especially, when the mandate, of Section 38(b) of the H.P. Land Revenue Act, is, applicable vis-a-vis any renditions, made, by the learned Divisional Commissioner concerned, or vis-a-vis renditions made, by the Financial Commissioner, both whereof, are bound by judgments and decrees, rendered by Civil Courts, rather than converse thereof (i) besides when s a specific mandate, is encapsulated, in, Section 46 of the H.P. Land Revenue Act, vis-a-vis a person/persons aggrieved, by erroneous entry(ies), occurring, in the records of rights, his/theirs being entitled, to institute a suit, for declaration, (ii) thereupon with the aforesaid Act, also specifically prescribing, a specific mechanism, vis-a-vis the landowner(s), for, the redressal of his/their grievance, if any, arising, from, erroneous entry(ies), occurring, in the records of rights, (iii) hence also support (s), an inference of the judgment and decree, recorded by civil court(s) concerned, holding the fullest sway and legal clout, and, being amenable for meteing, of, the fullest reverence, by the revenue officers concerned, whereas, apparently, hereat reverence, remained unmeted thereto, (iv) rather the judgement and decree, rendered by the civil court concerned, is visibly flouted, under, the impugned orders, (v) besides the further effect of the aforesaid, is, of during, the pendency, of a civil suit, vis-a-vis subject matter(s), analogus, inter se the one borne in the civil suit, and, the one borne in petitions cast, before the revenue officer(s) concerned, (vi) thereupon, it being enjoined, upon, the revenue officer concerned, to await the outcome of the lis, pending, before the civil court concerned, (vii) rather than, his proceeding, to, earlier therewith, record a decision, whereupon rather, a legally interdicted obviable conflict inter se his verdict vis-a-vis the verdict, of, civil court, would occur, obviously also, would preclude inapt negation(s), of, all the statutory effects, of Section 38, and, Section 46 of the H.P. Land Revenue Act, whereunder exclusive statutory jurisdiction, for pronouncing, upon, the validity of entries, is rather bestowed, only, upon the civil court concerned.

7. For the foregoing reasons, the instant petition is allowed, and, the order impugned before this Court, is set aside. This court is deeply perturbed, with the manner in which an apt infraction, is, begotten, of, the conclusive and binding judgment and decree of the Civil Court concerned, by the authorities concerned. However, in future, in case, conclusive and binding mandates, of Civil Courts concerned, are irrevered, by the revenue officers concerned, and, despite the pendency, of, civil suit(s), in civil court(s) concerned, vis-a-vis alike matters, pending before the Revenue Officer(s), the later proceed to draw proceedings, and, hence attempt(s) to usurp, the jurisdiction of civil courts, this Court, may be constrained, to direct the Chief Secretary concerned, to record adverse entries in the ACRs, of, the officers concerned, or to may be draw appropriate proceedings against them. All pending applications also stand disposed of. Records be sent back forthwith. Records be sent back forthwith to the concerned quarter. The Registry is directed to forthwith circulate a copy of this order, to (i) The Financial Commissioner(Appeals); (ii) all the Divisional Commissioners and; (iii) All the Deputy Commissioners/Collectors within the State of H.P.

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

Sukhdev .....Appellant/defendant.
Versus
Smt. Satya Devi & Ors. .....Respondent/Plaintiff.

RSA No. 417 of 2005.
Reserved on : 08.05.2018.
Decided on : 14th May, 2018.

Himachal Pradesh Old Parents Maintenance Act- Held - Son having good salary is bound to maintain his mother. (Para-9)

Hindu Adoption and Maintenance Act, 1956- Section 18- Maintenance- Entitlement of wife - Wife living separately from husband since decades - Filing suit for maintenance against him – Husband admitting marriage but denying its consummation on ground that after first night wife left matrimonial house – Suit dismissed by trial court but in appeal, it was decreed by Additional District Judge – RSA by husband – Held, wife living separately is entitled for maintenance only on proof of her desertion or her having been meted with cruelty by husband – Plaintiff was found (i) living separately from defendant-husband since 1960 till filing of suit (ii) it was she who deserted defendant-husband (iii) defendant had no income from land recorded joint between him and his brother and (iv) being aged 70 years, defendant was not able to personally cultivate it – High Court allowed appeal and set aside decree of Additional District Judge – Suit dismissed.

(Paras-9 and 10)

For the Appellant: Mr. Dinesh Bhanot, Advocate.
For Respondent No.1: Mr. Dinesh Bhatia, Advocate.
For Respondents No.2 &3: Nemo

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit, for, rendition of a decree, for grant of maintenance @ Rs.500/- per mensem against defendant No.1/appellant herein, stood dismissed, by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the

plaintiff, the latter Court allowed his appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiffs had instituted a suit as indigent person for grant of maintenance at the rate of Rs.500/- per month against defendant No.1 with the allegations that the plaintiff is legally wedded wife of defendant No.1, and, a son namely Ram Kishan has been born to the plaintiff out of this wedlock. The plaintiff and defendant No.1 earlier resided at village Dhela and defendant No. got estranged with the plaintiff as he wanted transfer some land in his favour on the part of grand mother of the plaintiff to which she did not agree. Thereafter, the plaintiff started residing with her brother alongwith her son and she spent on the eduction of her son Ram Krishan. Shri Ram Krishan was settled in village Koli Majra. On the intervention of Ram Rakha a close relation of the parties in the year 1988, he constructed a residential house there. Thereafter, the defendants started harassing Shri Ram Krishan on one pretext or the other to compel him to leave his residential house and property which was ancestral. The plaintiff has been visiting the residential house of defendant No.1 and her son off and on and has been requesting defendant No.1 to secure conjugal home to maintain her as his wife. Defendant No.1 has been playing in the hands of defendants No.2 and 3 and is adamant and threatened to kill her. Defendant No.1 willfully neglected and abandoned the plaintiff without reasonable cause and efforts of the plaintiff and her relatives for the last more than 30 years to reconcile the matter have gone futile. The plaintiff has no source of income. Defendant No.1 has sufficient income from the land measuring 14 bighas 14 biswas i.e. (a) land measuring 9 bighas 12 3/5 bighas being 1/5th share of land measuring 48 bighas, 3 biswas, comprised in khewat No.43, Khatauni No. 45, Khasra Nos. 68(12-17) bighas, 89 (12-10) bighas, 69 (0-4) B, 132 (10-14) B, 265/142 (0-9) B, 268(0-11) B, 270/150(0-10) B, 148 (1-15)B, 149 (1-8) B, 154 (4-13) B & 153 (2-11)B, (b) land measuring 12 biswas being 1/5 th share of land measuring 3 bighas comprised in Kh/Kh NO. 40/41, bearing Khasra No. 285 (3-0) B and (c) land measuring 4 bighas 9 1/3 biswas being 1/3rd shar eof land measuring 13 bighas 8 biswas comprised in Kh/kh NO.42/43 bearing Khasra Nos. 390/229 (8-1) B & 259 (5-7) B, situate in the area of village Dasomajra, Prgana, Dharampur, Tehsil Nalagarh, District Solan, H.P. The plaintiff is entitled to maintenance at the rate of Rs.500/- per month. Defendant No.1 was threatening to alienate the suit land. So, the plaintiff has filed the suit for grant of maintenance at the rate of 500/- per month by creating charge on the suit land along with a decree for permanent injunction restraining defendant No.1 from alienating the suit land.

3. Defendant No.1 contested the suit and filed written statement, wherein, he averred that Shri Ram Kishan was not the son of defendant No.1. The plaintiff on the first night of marriage did not allow sexual access to him and no sexual relations ever took place inter se the plaintiff and defendant No.1 and the marriage was never consummated. After the marriage, the plaintiff always remained in village Dhela with her parents. Defendant No.1 did not reside with her and he was having land in village Koli Majra and there was o necessity for him to have eyes on the land of the grandmother of the plaintiff. Shri Ram Kishan was never born from the loins of defendant No.1 and it was incumbent on the parents of the plaintiff to give him education. Shri Ram Kishan was not settled in Village Koli Majra and he was working as Clerk in Jogindera Central Co-op Bank Nalagarh and drawing salary of Rs.8000/- per month and his wife was serving in Education Department and she was also drawing Rs.6000/- per month. They are living with the plaintiff. Shri Ram Kishan had also filed suit against defendant No.1 for getting the land on the grounds that the same was ancestral. Shri Ram Kishan and Ram Gopal got instituted the suit from the plaintiff. Defendants No.2 and 3 brothers of defendant No.1 were serving him. The plaintiff is living in village Dhela with her parents for the last 30 years on account of her sweet will. She did not have dispute with defendant No.1 Defendant No.1 was leading life like a bachelor and unmarried man. The price of the land around Baddi Industrial area had shot up and the plaintiff had dragged him to the litigation in order to obtain land from him. The plaintiff was not entitled to any maintenance and the suit of the plaintiff was not maintainable.

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

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

1. Whether the plaintiff is entitled to the maintenance from the defendant and if so what amount?OPP.
2. Whether the plaintiff has no cause of action to file the present suit? OPP.
3. Whether the plaintiff is estopped to file the present suit on her act and conduct and acquiescences ?OPP.
4. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence, dismissed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by the plaintiff/respondent herein, before, the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded, by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 12.8.2005, this Court, admitted the appeal instituted by the defendant/appellant, against, the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

(a) Whether in the facts and the circumstances of the case, the appellant can be said to be the guilty of treating the respondent No.1 with such cruelty as to cause reasonable apprehension in the mind and that it will be harmful or injurious for her to live with the appellant?

(b) Whether the son and the daughter-in-law of the plaintiff are primarily responsible for her maintenance in terms of the provisions of the H.P. Old Parents Maintenance Act?

Substantial questions of Law No.1 and 2:

8. The plaintiff, is, the wife of defendant No.1. The plaintiff's suit, for maintenance, cast under the provisions of Section 18 of the Hindu Adoption, and, Maintenance Act, 1956, would beget success, only upon, the hereinafter extracted apt provisions borne in Section 18 thereof, visibly begetting satiation:-

"**18 Maintenance of wife**. —(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance—

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion."

Even though, therein a peremptory obligation, is, cast upon a husband, to maintain his legally wedded wife, and, also the statutory liability, of, a husband to maintain his legally wedded wife, during, the latter's life time, obviously also does not enjoin any wrangle therewith. However, the staking(s), of, apt entitlement, of, the aforesaid provisions, would ensue vis-a-vis the plaintiff, hence only, upon evidence existing on record, in display, of her husband willfully deserting her, or abandoning her without any reasonable cause, and, without her consent or against her wish or his willfully neglecting her, besides his being proven to be perpetrating cruelty, upon his legally wedded wife, of such severity, whereupon, an apprehension is aroused in her mind, that, it will be harmful or injurious, for her, to live with her husband. However, evidence in respect of the aforesaid trite statutory parameters, rather remained unadduced. Consequently, with the aforesaid statutory parameters hence remaining grossly unproven, hence, it stood aptly concluded, by the learned trial Court, qua the plaintiff's suit rather warranting dismissal. Further strength, to, the aforesaid conclusion, is garnered, by the factum of the plaintiff, since 1960 till hers instituting the suit, remaining apart, from, the matrimonial company of her husband, (i) thereupon, with the belated institution of the extant suit by the plaintiff, since hers departing, from, the matrimonial company of her husband, in the year 1960, (ii)whereas, upon hers thereat, or hers in prompt sequel thereof, rather instituting the apposite suit, with, averments in consonance, with, the apt statutory parameters aforestated, besides upon hers making testification(s), in consonance therewith, may, rather have enabled her, to beget success. Contrarily, with hers, hence, belatedly instituting the suit, since, hers departing from the matrimonial company, of her husband, in the year 1960, (iii) per se, thereupon, it is manifest, of hers, being estopped, to, even plead of her husband, defendant No.1, during, the period of her stay in his matrimonial company, hence maltreating or illtreating her with cruelty, of such a nature, whereupon hence, hers staying with defendant No.1, stood rendered harmful and injurious, (iv) and, of, defendant No.1 being guilty of deserting her or his abandoning her, without, reasonable cause, and, without her consent or against her wish or his willfully neglecting her. Even the latter inference, gathers strength, given no evidence, in satiation thereof being adduced, comprised in the defendant rather evidently contracting an invalid second marriage, despite subsistence, of his, valid marriage with the plaintiff, (v) in sequel whereto, it may be inferable, of his deserting, the plaintiff or his abandoning her, without any reasonable cause, and, without her consent or against her wish or his willfully neglecting her, (vi) rather with the plaintiff, since, the year 1960 alienating herself, from, the matrimonial company, of defendant No.1, her husband, is a palpable display, of hers, rather without the consent and against, the wish of her husband, rather separating herself from his matrimonial company, and, also hers hence volitionally choosing to depart, from, the matrimonial company of her husband, rendering her hence disabled to claim maintenance, from, the defendant/appellant herein.

9. At the time of institution of the suit, defendant No.1 was aged 70 years, and, though, as revealed by jamabandis borne in Ex.P-1, and, in Ex.P-2, he along with his brothers, is, shown as co-owner in the suit land. However, though, the learned trial Court, given the age of defendant No.1, had concluded of his being disabled, to cultivate the joint land, and, also it revered, his testification, of his brothers on his behalf cultivating, his share ,in the undivided property. Contrarily, the learned first Appellate Court, ignored the effects, of, the factum of the age, of defendant No.1, and, it concluded that he may, dehors, his age, limiting his capacity, to personally cultivate his share in the undivided shareholdings, yet he given his being enabled, to cultivate it through deployment, of, labourers, thereupon, it computed, the estimated income derived by him, from, the undivided shareholdings, being comprised in a sum, of Rs.500/- to Rs.600/- per month. The aforesaid estimation, dehors any tangible evidence existing on record, has hence begotten the sequel, of, the learned first appellate Court, ignoring, the effects, of, the factum of the appellant herein/defendant No.1, being evidently dependent upon his brother, (i)

thereupon, unless evidence stood adduced qua the brothers of defendant No.1, after, receiving the price(s), for the crops reared, on the joint suit land, theirs preserving some part thereof, vis-a-vis defendant No.1, (ii) thereupon, alone it could be concluded, of, quantification of maintenance per mensem made by the learned first appellate, rather being meritworthy. However, with the aforesaid evidence being amiss, thereupon, it was insagacious, for, the learned first Appellate Court, to ignore all the effects, of, the age of defendant No.1 also hence his being disabled, to personally cultivate the suit land, besides of his hence being dependent upon his brothers .

10. Be that as it may, the learned trial Court, had on anvil, of, evidence available on record, in display of the plaintiff, staying with her son, who is evidently employed in a bank, hence, rears a handsome salary, from his employment, besides, also with the dependence, of, defendant No.1, upon, his brother(s), and, of his deriving no income, from, the undivided shareholdings, jointly held by him, with them, rather aptly concluded, of, with the son of the plaintiff, being also enjoined, to maintain his aged mother, hence aptly dismissed the plaintiff's suit, whereas, the learned first Appellate Court has, for fallacious reasons, rather inaptly decreed the plaintiff's suit.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Substantial questions of law No.1 and 2 are answered in favour of the appellant and against the respondent/plaintiff.

12. In view of above discussion, the instant appeal is allowed and the judgment and decree rendered by the learned Additional District Judge, Solan, in Civil Appeal No. 63-NL/13 of 2000 is set aside, whereas, the judgment and decree rendered by the learned trial Court in C.S. No. 8/1 of 97/99 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Devi Lal ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 518 of 2018
Decided on May 15, 2018

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 18- Regular bail – Accused seeking regular bail in case FIR registered against him for offence under Section 18 of Act for possessing 259 grams opium – Bail sought on grounds of ailment and old age – Bail resisted on ground of previous conduct of petitioner by alleging that he was engaged in drug peddling – However, no material was placed on record showing involvement of accused in drug trafficking – Recovered contraband was less than commercial quantity – Rigors of Section 37 of Act not attracted – Petitioner was found aged 75 years - Regular bail granted subject to conditions. (Paras- 7 to 13)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Manoranjana Sinh alias Gupta versus CBI, (2017) 5 SCC 218
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner Mr. Dalip K. Sharma, Advocate.

For the respondent Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.
SI Deepak Thakur, SHO, Police Station Reckong Peo, District Kinnaur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant bail petition filed under Section 439 CrPC, prayer has been made for grant of regular bail in FIR No. 94/2017 dated 21.11.2017 under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 registered at Police Station, Rekong Peo, District Kinnaur, Himachal Pradesh.

2. Sequel to order dated 1.5.2018, SI Deepak Thakur, SHO, Police Station, Reckong Peo has come present with the record. Mr. Dinesh Thakur, Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Close scrutiny of the status report reveals that on 21.11.2017, police party recovered opium weighing 259 grams from the packet being carried by the present bail petitioner, Since 21.11.2017, bail petitioner, who is 75 years old, is behind bars.

4. Mr. Dalip K. Sharma, learned counsel representing the bail petitioner, while referring to the record/status report vehemently argued that the bail petitioner, who is 75 years old, has been falsely implicated in the case because at the time of alleged recovery, no independent witness was ever associated and as such, it is quite apparent that the bail petitioner has been falsely implicated in the case. While inviting attention of this Court to the medical evidence placed on record, Mr. Sharma, contended that the petitioner had fallen ill and as such, he was taken to the hospital on the directions of the Superintendent of Police, as such, it would not be safe to keep him behind the bars for indefinite period. Mr. Dalip K. Sharma, learned counsel representing the bail petitioner further contended that otherwise also, contraband allegedly recovered from the bail petitioner is less than commercial quantity and as such, rigours of Section 37 of the Act *ibid* are not attracted in the present case and bail petitioner is entitled to be released on bail. Lastly, Mr. Sharma contended that the bail petitioner is a local resident and he shall always be available for investigation and trial, as and when called by the investigating agency.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly admitting the factum with regard to illness of bail petitioner contended that at present bail petitioner is hale and hearty, but, at one point of time, on his request, he was taken to hospital. Learned Additional Advocate General further contended that though the quantity recovered from bail petitioner is less than commercial quantity, but given his past conduct, bail petitioner is not entitled to be released on bail.

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

7. Having carefully perused the medical evidence adduced on record, this Court finds that bail petitioner is 75-76 years old and suffering from various ailments, as such, it may not be appropriate to keep him behind the bars for indefinite period. Otherwise also, contraband allegedly recovered from the bail petitioner is less than commercial quantity and as such, rigours of Section 37 of the Act *ibid* are not attracted in the present case, as such, prayer having been made in the present petition deserves to be accepted. Though Mr. Dinesh Thakur, learned Additional Advocate General has stated that the petitioner had been indulging in illegal trade of narcotics in the past also, but in this regard no material has been placed on record. Otherwise also, it is well settled by now that pendency of previous case(s) may not be a ground to reject the

bail petition filed in another case, rather same is required to be decided in the given facts and circumstances. Similarly, no material has been placed on record by the investigating agency from where it can be inferred that in the event of being enlarged on bail, there is likelihood of bail petitioner fleeing from justice.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his guilt has not been proved. It has been further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society."

9. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing

with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused and circumstances which are peculiar to the accused involved in that crime.

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

13. In view of above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the learned trial Court, besides following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by him.

14. It is clarified that if the petitioner misuses the liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of instant petition alone.

The petition stand accordingly disposed of.

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

Dot Ram ...Petitioner

Versus

Kisan Chand ...Respondent

Cr. Revision No. 15 of 2018
Decided on: May 15, 2018

Code of Criminal Procedure, 1973- Section 311- Additional Evidence – In a complaint case, complainant filing application for permission of Court to lead additional evidence to prove statement of his bank account indicating that he had made payments through cheques to accused and the 'dishonoured cheque' was issued by accused to discharge that liability – Trial Court allowing application of complainant- Petition against – Accused assailing order of Trial Court on ground that by way of additional evidence, complainant was filling lacuna – Held, it is duty of court to determine truth and render a just decision after discovering all relevant facts – Power conferred by Section 311 of Code can be invoked at any stage of the case – By way of additional evidence, complainant intended to show that payments were made to accused from his account through cheques – This evidence was relevant and proper for just decision of case - Petition dismissed – Order of Trial Court upheld. (Paras- 9 to 17)

For the petitioner: Mr. T.S. Chauhan, Advocate.
For the respondent: Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 18.12.2017, passed by the learned Chief Judicial Magistrate, Kullu Himachal Pradesh in Case No. 149-1/17, whereby an application under Section 311 CrPC, having been preferred by the respondent-complainant, seeking therein permission to lead additional evidence came to be allowed, petitioner has approached this Court in the instant proceedings, praying therein to set aside impugned order as referred to herein above.

2. Necessary facts without unnecessary details as emerge from the record are that the complainant filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as, "Act") against the petitioner-accused (hereinafter referred to as, "accused"), alleging therein that the accused vide agreement dated 11.8.2010 agreed to sell land to the complainant and one Mala Sood collectively for a consideration of Rs. 18,50,000/- and out of total sale consideration, Rs. 18,00,000/- was received by the accused from the complainant and Mala Sood on 11.8.2010 as earnest money, whereas remaining amount of Rs.50,000/- was to be paid at the time of registration of sale deed. However, fact remains that accused expressed his inability to get the sale deed executed in terms of agreement to sell executed between the parties on account of some family dispute and as such, with a view to discharge his liability, he issued cheque bearing No. 695029 dated 28.9.2011, for a sum of Rs.18,00,000/- drawn on State Bank of India, Bhunter Branch, from his account No. 11038722568. Since cheque referred to above was dishonoured, complaint under Section 138 of the Act (Annexure P-1) came to be filed in the court of learned Chief Judicial Magistrate, Kullu.

3. After conclusion of evidence, complainant preferred an application under Section 311 CrPC, seeking therein permission to lead additional evidence to prove statement of accounts. Complainant averred in the application that due to bona fide omission, he failed to prove statement of accounts of alleged payment made to the accused. He further stated that since accused denied the payments made by him through cheques of four different Banks, it is necessary for him to prove these transactions for the just decision of the case. Respondent prayed by way of application referred to herein above that he may be permitted to produce and prove the statement of accounts by examining Bank officials.

4. Application referred to herein above came to be resisted by the accused on the ground that statement of accounts is not necessary for the just decision of the case and present application has been filed just to delay the proceedings. Accused further submitted before the court below that the application filed at a belated stage can not be entertained as it would amount to filling up of lacuna.

5. Learned court below taking note of the pleadings adduced on record by respective parties allowed the application vide order dated 1812.2017, and permitted the complainant to prove documents by examining Bank officials. In the aforesaid background, accused has approached this Court in the instant proceedings.

6. Mr. T.S. Chauhan, learned counsel representing the accused, while referring to the impugned order, strenuously argued that there is no application of mind by the court below, while passing impugned order, as such, same deserves to be quashed and set aside. He further contended that power under Section 311 cannot be exercised by the court to permit the applicant to fill up lacuna. While referring to the application having been filed by the complainant, Mr. Chauhan, contended that explanation rendered in the application for examining Bank officials, is not at all plausible because documents intended to be placed on record, were very much in possession of the complainant but he purposely failed to place the same on record as such, permission at this stage, to prove same by examining bank officials would amount to filling up of lacuna, which is not permissible in law. Mr. Chauhan, further contended that omission on the part of the complainant to prove statement of accounts has necessarily weakened the case of complainant to the benefit of accused and as such, aforesaid omission, which is not bona fide could not be allowed to corrected /rectified by the learned Court below by permitting complainant to examine bank officials to prove bank transactions.

7. Mr. Sunil Mohan Goel, learned counsel representing the respondent, while supporting impugned order, passed by learned Court below vehemently argued that bare perusal of provisions contained in Section 311 CrPC clearly suggests that the court enjoys vast power to summon, re-examine or recall a witness at any stage of proceedings, provided that the same is necessary for proper adjudication of the case. Learned counsel further contended that while exercising power under Section 311 CrPC, paramount consideration of the court is to do justice to the case and court can examine a witness at any stage, even if same results in filling up lacuna

or loop holes. While placing reliance upon judgment rendered by this Court in CrMMO No. 209 of 2017 titled **Sardar Singh** vs. **State of Himachal Pradesh** and CrMMO No. 313 of 2017 titled **Sunder Lal** v. **Urmila Thakur** decided on 16.3.2018, learned counsel contended that it has been categorically held by this Court as well as Hon'ble Apex Court that Section 311 CrPC casts a duty upon the Court to summon, re-examine or recall a witness at any stage, if his/her evidence appears to be essential for just decision of the case. Mr. Goel, further contended that in the case at hand, with a view to discharge his liability, accused issued cheque bearing No. 695029 dated 28.9.2011 in the sum of Rs. 18,00,000/- drawn on State Bank of India Branch Bhunter, as such, statement of accounts is required to be produced and proved for the just decision of the case. He further stated that inadvertently, complainant failed to submit statement of accounts regarding transaction with the accused, production whereof may be very relevant and necessary for the just decision of the case.

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

9. Before ascertaining correctness of aforesaid submissions having been made by the learned counsel for the parties vis-a-vis impugned order passed by the learned court below, this Court deems it proper to take note of the provisions of law contained under Section 311 CrPC:

> "“311. Power to summon material witness, or examine person present:-. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case."

10. Close scrutiny of aforesaid provision clearly suggests that the court enjoys vast power to summon any persons as witness and reexamine him/her provided the same is essentially required for the just decision of the case. It is also not in dispute that such exercise of power can be at any stage of inquiry, trial or proceedings in a Court, meaning thereby applicant can file an application at any time before conclusion of trial. It has been repeatedly held by this Court as well as Hon'ble Apex Court that very object of Section 311 CrPC is to bring on record evidence not only from the point of view of accused and prosecution but also from the point of view of the orderly society. This Court, while dealing with scope and power of trial court to recall, re-examine a witness, while exercising power under Section 311 CrPC, has elaborately dealt with the issue in its judgment in **Sunder Lal** (supra), relevant paragraphs whereof are reproduced hereunder:

> “9. Careful perusal of aforesaid provision clearly suggests that court enjoys vast power to summon any person as a witness or recall and re-examine a witness provided same is essentially required for just decision of the case. Moreover, such exercise of power can be at any stage of inquiry, trial or proceedings under the Code, meaning thereby applicant can file an application at any time before conclusion of trial. Very object of Section 311 is to bring on record evidence not only from the point of view of accused and prosecution but also from the point of view of the orderly society. Otherwise also, it is well established principle of criminal jurisprudence that discovery, vindication and establishment of truth are main purposes of underlying object of courts of justice. It is also well settled that wider the power, greater the responsibility upon court, which exercises such power and exercise of such power cannot be untrammeled and arbitrary, rather same must be guided by object of arriving at a just decision of case. Close scrutiny of aforesaid provision of law further suggests that Section 311 has two parts; first part reserves a right to the parties to move an appropriate application for re-examination of a witness at any stage;

but definitely the second part is mandatory that casts a duty upon court to re-examine or recall or summon a witness at any stage if his/her evidence appears to be essential for just decision of case because, definitely the underlying object of aforesaid provision of law is to ensure that there is no failure of justice on account of mistake on the part of either of parties in bringing valuable piece of evidence or leaving an ambiguity in the statements of witnesses examined from either side.

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

> "27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.
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> 28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.
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> 29. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross- examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness

who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jamat Raj Kewalji Govani v. State of Maharashtra, (AIR 1968 SC 178).

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

11. Hon'ble Apex Court in Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461, has held that power under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be profitable to take note of the following paras of the judgment:-

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

exercise of such power should be made judicially and also with extreme care and caution.

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

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

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

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

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

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

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

be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person." (Emphasis added)

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

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

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

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

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

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

"6. ...In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice,

particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

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

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

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

"15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.

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

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any

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

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

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

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

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

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

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

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and

circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

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

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

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

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

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

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

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

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

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

12. At this stage, this Court deems it proper to place reliance upon judgment rendered by Hon'ble Apex Court in **Mannan SK and others** vs. **State of West Bengal and another** AIR 2014 SC 2950, wherein the Hon'ble Court has held as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of

> a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

13. Aforesaid exposition of law clearly suggests that a fair trial is main object of criminal jurisprudence and it is duty of court to ensure such fairness is not hampered or threatened in any manner. It has been further held in the aforesaid judgments that fair trial entails interests of accused, victim and society and therefore, grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. Hon'ble Apex Court has categorically held in the aforesaid judgment that adducing evidence in support of the defence is a valuable right and denial of such right would amount to denial of a fair trial.

14. Hon'ble Apex Court in **Raja Ram Prasad Yadav** vs. **State of Bihar and another**, (2013)14 SCC 461, while culling out certain principles required to be borne in mind by the courts while considering applications under Section 311 has held that exercise of widest discretionary powers under Section 311 should ensure that judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts. Hon'ble Apex Court has further held that if evidence of any witness appears to be essential for the just decision of the case, it is the duty of the court to summon and examine or recall and re-examine any such person because very object of exercising power under Section 311 is to find out truth and render a just decision. Most importantly, in the judgment referred to herein above, Hon'ble Apex Court has held that court should bear in mind that no party in trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

11. It is quite apparent from the aforesaid exposition of law that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person since the very object of exercise of power under Section 311 is to find out the truth and render just decision.

12. In the case at hand, complainant has filed complaint under Section 138 of the Act on the allegations that accused with a view to discharge his liability had issued cheque amounting to Rs.18,00,000/- drawn on State Bank of India Branch Bhunter, and in this regard,

he intends to prove statement of accounts by examining officials of State Bank of India, which may be relevant and necessary for the just decision of the case.

13. No doubt, in the case at hand, applicant had filed a similar application earlier as is evident from impugned order itself, but same was withdrawn and no finding on merit was ever returned by the court below. Complainant, by way of summoning bank officials intends to prove that he alongwith Mala Sood had issued cheque amounting to Rs. 18,00,000/- in favour of respondent-complainant towards sale consideration in terms of the agreement to sell. Since, respondent-complainant failed to execute the sale deed in terms of agreement to sell, on account of some family dispute, he issued cheque amounting to Rs.18,00,000/- towards discharge his liability. In case, complainant succeeds to prove on record transaction amounting to Rs.18,00,000/- allegedly paid by him at the time of agreement to sell, that may be relevant and proper for the just decision of the case.

14. Having carefully perused averments contained in application under Section 311 CrPC and omission on the part of complainant to place on record statement of accounts, this Court is inclined to agree with Mr. Sunil Mohan Goel, learned counsel representing the complainant that relevant material could not be brought on record inadvertently. As has been observed herein above words, "essential to the just decision of the case" are the key words and in this regard, the court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary or not.

15. Hon'ble Apex Court in **Rajendra Prasad** vs **Narcotic Cell**, has categorically held that a lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. Corollary of such lapses or mistakes during trial/case can not be understood to be lacuna, which a court can not fill up.

16. It is quite apparent from aforesaid exposition of law that lacuna in prosecution must be understood as 'inherent weakness' or 'latent wedge' in the matrix of the prosecution. It has been further categorically held that if proper evidence was not adduced or relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court and this Court, there appears to be no illegality or infirmity in the impugned order passed by court below, rather, same appears to be based upon proper appreciation of the provisions of Section 311, as such, same is upheld. Present petition is dismissed.

18. This court also finds that the learned Court below has granted opportunity to the complainant to produce statement of accounts and to prove the same by examining bank officials, subject to costs of Rs.500/-, however, this Court deems it fit to enhance the same to Rs.2500/-. The costs shall be paid to the accused by the complainant.

19. In order to obviate further delay, this Court further directs that the complainant shall be afforded only one opportunity to examine the bank officials to prove statement of accounts and in this regard, with the consent of the parties, matter is ordered to be listed on **25.5.2018**, before the learned Court below, on which date, trial court shall issue notice to the official witnesses intended to be produced by the complainant.

20. Registry to send a copy of this order to the trial court forthwith, enabling it to do the needful within stipulated period, in terms of this judgment.

Pending applications, if any, are disposed of.

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

H.P. State Electricity Board Limited & anr. ...Appellants.

Versus

Sh. Amir Singh Negi. ...Respondent.

LPA No. 336 of 2011.
Date of decision: May 15, 2018.

Constitution of India, 1950- Article 226- Regularization – Entitlement, when workman is not having requisite educational qualification – Since, engagement on 21.3.1989, Workman was working and discharging duties of Work Mistry/Supervisor - Hon'ble Single Bench directing that he be considered for regularization against post of Supervisor and not against post of Beldar – Letter Patent Appeal – State arguing that minimum educational qualification for the post of Supervisor was matric and workman was not possessing requisite qualification – Held, minimum educational qualification prescribed for post is relevant but it is for initial entry into service – Once appointment is made and person is permitted to work for many years, then it would be harsh to deny him confirmation on ground of lack of requisite educational qualification – Workman was found working as Supervisor/work mistry since his engagement, Order of Hon'ble Since Bench upheld – LPA dismissed. (Paras-2 to 6)

Case referred:
Bhagwati Prasad versus Delhi State Mineral Development Corporation, AIR 1990 Supreme Court 371

For the appellants : Mr. T.S. Chauhan, Advocate.
For the respondent : Mr. Ravinder Thakur, Advocate.

The following judgment of the Court was delivered:

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

Judgment dated 1.9.2010 passed by learned Single Judge is under challenge in the present appeal. The respondent-Board is in appeal before us.

2. The complaint is that the petitioner-workman being not eligible for want of requisite educational qualification was not entitled to seek regularization as Work Mistry/Supervisor. It is seen that learned Single Judge after taking note of the facts that the petitioner-workman right from his initial engagement i.e. 21.3.1989 was working and discharging the duties of Work Mistry/Supervisor, ordered that he was required to be considered for regularization against the post of Supervisor and not against the post of Beldar. The writ petition, as such, was disposed of with a direction to the respondents to consider the case of the petitioner for regularization against the post of Supervisor.

3. When this judgment was not complied with the petitioner-workman had sought the execution thereof by way of filing execution petition(T) No. 14 of 2013. Learned Standing counsel representing the respondent-Board has apprised this Court that the instructions to implement the judgment stood already issued to the competent authority. The execution petition, as such, was disposed of with the observation that on compliance of all the codel formalities the judgment be fully implemented. Learned Standing counsel has stated at Bar that consequent upon the order passed in the execution petition the impugned judgment now stands implemented, of course subject to the outcome of the present appeal.

4. We are in agreement with the findings recorded by learned Single Judge for the reasons that the petitioner-workman who throughout remained working as Work

Mistry/Supervisor was rightly ordered to be regularized as such. The educational qualification may be matric for the post in question, however, the petitioner-workman having sufficient experience, was entitled to regularized as Supervisor instead of Belder.

5. A larger Bench of the Hon'ble Apex Court in ***Bhagwati Prasad*** versus ***Delhi State Mineral Development Corporation, AIR 1990 Supreme Court 371*** has held as under:

> *".....Practical experience would always aid the person to effectively discharge the duties and is a sure guide to assesss the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed education qualifications....."*

6. Otherwise also, in the Recruitment & Promotion Rules in the matter of educational/technical qualification in respect of persons engaged on daily wage/muster-roll basis at the time of their regularization, the relaxation in educational qualification can be granted. We are also of the considered opinion that when a person like the petitioner was working as Work Mistry/Supervisor with under matriculation qualification how he could have not worked as such on regularization of his services with that very qualification.

7. We, therefore, find no merits in this appeal and the same is accordingly dismissed. Pending application(s), if any, shall also stand dismissed.

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

Ram Kali & others .....Petitioners.
Versus
Ram Chand .....Respondent.

CMPMO No. 521 of 2017
Decided on :15.5.2018

Code of Civil Procedure, 1908- Order XXXIX Rules 1 & 2- Temporary injunction- Grant of - Plaintiffs seeking temporary injunction pending suit against defendant, for restraining him from selling suit land or evicting them from residential house built over part of such land – Plaintiffs being wife and children of defendant, claiming coparcenery interest in the said property – Trial court declining injunction to them – Appeal of plaintiffs also dismissed by first appellate court – Petition against – No documentary evidence in the shape of mutation orders was filed on record showing that land was ancestral in hands of defendant – Held, plaintiffs have no prima facie case and thus not entitled for temporary injunction – Orders of lower courts upheld – Petition dismissed. (Paras-3 and 4)

For the petitioners: Mr. Ashwani Kaundal, Advocate.
For the respondent: Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Plaintiff No.1 Ram Kali, is, the wife of the defendant, and, co-plaintiffs No. 2, 3 and 4, are, born out of the wedlock inter-se co-plaintiff No.1, with, the defendant. The plaintiffs

instituted a suit, claiming therein hence rendition, of, a decree of permanent prohibitory injunction, for thereupon restraining the defendant, from, evicting them, from, the residential house or alienating the suit property comprised in khevat No.3, khatauni No.3, khasra No. 20, 25, 26, 29 total kita 4 measuring 1-11-13 bighas and land comprised in khata/khewet No.2, khatauni No.2, khasra Nos. 19, 33, 34, 42, 44, 35, 87, 93, 104, 293/124, 130, 295/131, 137, 139, 140, 141, 145, 147, 149 and 156 total kita 20, measuring 71-17-19 bighas, situated village Gummu, (Plach) P.O. Jagijit Nagar, Tehsil Kasauli, District Solan, H.P.

2. The gravamen of the pleadings, cast in the plaint, is qua the suit khasra numbers hence carrying the status of coparcnery property. However, no, apposite documentary evidence/material comprised, in preceding two mutations, appertaining, to the suit khasra numbers being attested, respectively, vis-a-vis two preceding vis-à-vis predecessors-in-interest of the defendant, came to be hence tendered/adduced. Consequence thereof is of the aforesaid plea being not founded upon apt befitting therewith, any, documentary evidence/material.

3. During the pendency of the civil suit, before, the learned trial Judge, the plaintiffs, cast, an application, under, Order 39 Rules 1 and 2 CPC, seeking therein rendition, of, an order of ad-interim injunction, for, restraining the defendant, from, alienating the suit property or against his evicting them, from the apt portion, of, the residential house. The aforesaid application was dismissed, by the learned trial Judge, and, the order of dismissal, was affirmed, by the learned Appellate Court, hence being aggrieved therefrom, the plaintiffs have instituted the instant petition, before this Court.

4. The learned counsel for the plaintiffs, has, fairly conceded, that the relevant two aforesaid documents, remained, unappended with the plaint nor are reflected in the apposite list relied upon. Even the aforesaid concessions', of the learned counsel, for, the plaintiffs', hence, were considered by the learned courts below, whereupon the learned courts below concluded, qua the averment cast, in the plaint, vis-à-vis, the suit property, being ancestral coparcnery property, hence wanting, in, legal vigor. Consequently, when, hence for rendering, a, valid order, of, ad-interim injunction, it, was imperative for the plaintiffs, to prima facie establish, theirs' purported coparcnery interest, in, the suit property, whereas, the aforesaid, sine-qua-non remaining not established, thereupon it cannot be said, that, the learned courts below have committed any error, in dismissing plaintiffs application, cast under the provisions, of, Order 39 Rules 1 and 2 CPC.

5. In view of the above, there is no merit in the instant petition, and, the same is accordingly dismissed, so also all pending applications, if any.

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

Shri Ashok Pal Sen ...Plaintiff/Applicant

Versus

Shri Khub Ram and another ...Defendants/Respondents

OMP No. 252 of 2015 in
Civil Suit No. 4 of 2007
Date of order: 16.05.2018

Code of Civil Procedure, 1908- Order XXXIX Rule 2-A- Contempt of injunction order - Proof of – High Court by way of temporary injunction restraining respondent from alienating, encumbering, transferring land or changing its nature – Respondent however executing agreement to sell in respect of same land in favour of third party – Applicant submitting that respondent had received full amount of consideration from vendee and transaction amounts to 'transfer' of land – Held, no sale deed in terms of Section 54 of Transfer of Property Act for valid transfer of land has been

executed – Agreement to sell creates no title or charge on such land – Disobedience of temporary injunction order of High Court not proved – Application dismissed. (Paras-7, 8, 10 and 11)

For the applicant: Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisth, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

This application has been filed under Order 39 Rule 2A read with Section 151 of the Code of Civil Procedure (for short 'CPC') for taking action against respondents herein, i.e. Khub Ram and Gopal Singh Thakur, for willful contempt of the Court and disobedience of injunction order, dated 30th July, 2010, passed by this Court in OMP No. 13 of 2010 in Civil Suit No. 4 of 2007, on the ground that respondent No. 1-Khub Ram has executed agreement(s) to sell with respondent No. 2-Gopal Singh Thakur and one Subhash Thakur with respect to the suit land.

2. Respondents have contested the application by stating that there is no violation of the order passed by this Court on the part of the respondents and the agreement(s) to sell entered into between the parties is subject to final outcome of Civil Suit No. 4 of 2007.

3. Learned senior counsel for the applicant submits that as evident from application Ex. A-1 filed by Subhash Thakur, under Order 1 Rule 10 CPC for his impleadment as defendant in the Civil Suit, the said Subhash Thakur was claiming his right on the property as a transferee and also as claimed in term and condition No. 3 of the agreement(s) to sell, Ex. A-2 and A-3, full and final amount of consideration has also been received by respondent-Khub Ram and, thus, the agreement(s) to sell amount(s) to alienation of the suit property in violation of the interim order passed by this Court.

4. Learned counsel for the respondents has reiterated that the suit property has neither been alienated nor its nature and possession has been altered and mere agreement to sell does not amount to transfer or alienation of the suit property.

5. On 8th January, 2010, following order was passed in OMP No. 13 of 2010:

> *"Let reply to this application be filed by the defendants within next four weeks. In the meanwhile, the defendants are restrained from alienating, encumbering, transferring or changing the suit property in any manner whatsoever till further order."*

6. OMP No. 13 of 2010 was disposed of on 30th July, 2010 with following order:

> *"The parties shall maintain status quo with respect to nature and possession as well as alienation of the suit property till the disposal of the suit. Application stands disposed of."*

7. In Section 54 of the Transfer of Property Act, contract for sale of immovable property has been defined as a contract that a sale of such property shall take place on terms settled between the parties which does not, of itself, create any interest in or charge on the such property. Agreement(s) to sell, in present case, is/are nothing but contract(s) for sale.

8. Though, in terms and conditions No. 3 of the agreements, Ex. A-2 and A-3, receipt of ₹ 50 lacs, as a full and final sale consideration, has been stated, but, respondent No. 1-Khub Ram, while appearing as a witness in present proceedings, in his cross-examination, has categorically stated that the fact mentioned in the agreement to sell in portion 'A' to 'A' that he has received entire sale consideration amounting to ₹ 50 lacs is incorrect. Therefore, it is also

doubtful as to whether any sale consideration has ever been paid and received between the parties to agreement(s) to sell or not.

9. Further, in term and condition No. 4 of the agreement(s), it has specifically been mentioned that sale deed of the property in question shall be executed and registered after decision of Civil Suit No. 4 of 2007. Term and condition No. 5 also provides default clause that on failure to execute and register the sale deed after the decision of the Civil Suit, referred to above, respondent-Khub Ram will be liable to pay double of the amount received by him.

10. So far as application Ex. A-1 filed by Subhash Thakur is concerned, there is nothing in the said application from which it can be construed that the suit property has been either alienated, transferred, encumbered or changed in any manner. Crux of the application is that as the fate of agreement to sell depends upon the outcome of Civil Suit No. 4 of 2007, applicant-Subhash has acquired interest in the suit land and thus, required to be impleaded as defendant for proper and effective adjudication of the suit. Therefore, this application also does not establish any violation of order passed by this Court in any manner.

11. On the basis of material placed on record and also in view of the definition of contract for sale in Section 54 of the Transfer of Property Act and specific terms and conditions of the agreements, Ex. A-2 and A-3, it cannot be said that respondents have committed willful contempt of the Court or disobedience of injunction order, dated 30th July, 2010, passed by this Court as there is no legal alienation, encumbrance, transfer or change in the suit property, in any manner.

12. In view of above discussion, present application is dismissed. No order as to costs.

13. Record of this application be tagged with the case file of Civil Suit No. 4 of 2007.

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

Bimla Sharma .....Petitioner.

Versus

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

Criminal Revision No. 163 of 2012
Decided on: 17.05.2018

Negotiable Instruments Act, 1881- Sections 138 and 139- Dishonour of cheque – Trial Court convicting and sentencing accused for offence under Section 138 of Act- Her appeal was dismissed by Sessions Judge – Revision against – Accused arguing before High Court that presumption stipulated under Section 139 of Act doesn't absolve complainant from discharging initial onus to prove that cheque was issued for any outstanding amount – On facts, High Court found that accused had given work of construction of her house to the complainant, estimated cost of which was Rs.7,00,000-8,00,000/- - She admitted her outstanding liability towards complainant - Her plea of having discharged that liability is not substantiated on record – Held, cheque was issued by accused for consideration - Judgments of conviction and final order of sentence of Lower Courts upheld – Petition dismissed. (Paras- 6 to 9)

Case referred:

Sampelly Satyanarayana Rao V. Indian Renewable Energy Development Agency Limited, (2016) 10 SCC 458

For the petitioner: None.

For the respondents: Mr. Narinder Guleria, Addl. A.G with Mr. R.P. Singh and Mr. Kunal Thakur, Dy.A.G for respondent No.1.
Mr. K.D. Sood, Sr. Advocate with Mr. Rajnish K. Lall, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Judgment dated 28.06.2012, passed by learned Sessions Judge, Shimla in Criminal Appeal No. 46-S/2010 of 2010, whereby the judgment passed by learned Judicial Magistrate 1st Class, Court No.3, Shimla was affirmed, is under challenge in this Court on the grounds *inter-alia* that both Courts below have completely ignored the evidence available on record. The evidence available on record suggests the only inference that charge against the petitioner (hereinafter referred to as the 'accused') was not proved beyond all reasonable doubt. Also that, inherent defects have been overlooked. The factum of respondent No.2 (hereinafter referred to as the 'complainant') having failed to prove his accounts has also been erroneously overlooked. The improvements and discrepancies in the evidence produced by the complainant which go to the very root of the case have also been ignored without assigning any reasons. The evidence available on record rather has been misread and misappreciated. Both Courts below allegedly erred in appreciating the provisions of Section 139 of the Negotiable Instruments Act, as in the case in hand, the presumption to be drawn under the Section ibid, does not absolve the complainant from discharging the initial burden to prove the factum of any outstanding amount due to him from her.

2. Admittedly, the accused approached the complainant to execute the construction work of her house in the area of Kasumpati in the year 2003. He agreed to do so. On the completion of the construction work of the house, a sum of Rs. 3,00,000/- was outstanding amount in his favour and payable by the accused. He requested her to clear his dues, but of no avail. Ultimately, on 3.9.2007, she issued a post dated (22.1.2008) cheque Ext. CW-1/A in the sum of Rs. 3,00,000/- of her accounts with State Bank of India, Shimla. The cheque was payable on and after 22.1.2008. When the accused failed to clear his dues on or before 22.1.2008, he presented the cheque Ext. CW-1/A for payment in the bank, however, the same was returned vide memo dated 22.1.2008, Ext. CW-1/C on the ground of insufficient funds. The complainant had served the accused with legal notice Ext. CW-1/D through registered post and also under the certificate of posting vide postal receipts Ext. CW-1/E to Ext. CW-1/F. The accused when found to have avoided to receive the notice and also to clear the liability within the stipulated period, the complaint was instituted on 1st March, 2008.

3. Learned trial Judge on holding full trial and taking into consideration the material available on record has arrived at a conclusion that a sum of Rs. 3,00,000/- was payable by the accused to the complainant. She issued the cheque Ext. CW-1/A, however, the same got dishonoured due to insufficient funds. Also that, the complainant has discharged the initial burden upon him to prove that he was entitled to recover Rs.3,00,000/- from the accused and as she failed to pay the same as well as issued post dated cheque and as she failed to discharge the onus upon her by producing the evidence to prove otherwise that neither the amount in question was payable by her nor she issued the cheque has, therefore, concluded that she has committed an offence punishable under Section 138 of the Negotiable Instruments Act. Consequently, she has been convicted to undergo simple imprisonment for three months and also to pay Rs.3,50,000/- to the complainant as compensation qua the loss he suffered.

4. Learned lower appellate Court has affirmed the judgment passed by learned trial Court and maintained the conviction and sentence passed against the accused.

5. As pointed out at the out set, the legality and validity of the impugned judgment though has been questioned on several grounds, however, she failed to substantiate the same

because neither she nor learned counsel representing her has put in appearance, not only today, but also on three dates previously fixed i.e. 12.04.2018, 08.03.2018 and 03.01.2018 in this matter. Therefore, on hearing learned counsel representing the respondent-complainant, this Court has proceeded to decide this petition finally.

6. At the out set, it is worth mentioning here that the concurrent findings recorded by both Courts below on appreciation of the facts and evidence available on record should normally do not call for interference by this Court in the exercise of its limited revisional jurisdiction. Such power, of course, can be exercised but only in a case of miscarriage of justice on account of illegality or irregularity committed by Courts below, if there is an error apparent on the face of the record. The present is not a case of this nature as both Courts below have neither committed any illegality or irregularity while allowing the complaint and recording the findings of conviction against the accused. The oral as well as documentary evidence produced by the complainant leads to the only conclusion that a sum of Rs.3,00,000/- was recoverable by him from the accused towards full and final payment of the work of her house executed by him. She has herself admitted that work of construction of her house was executed by the complainant and the estimated cost of the work was Rs.7,00,000-8,00,000/-. She also admits her outstanding liability towards the complainant while stating that his dues were cleared by her on 3.9.2007. As a matter of fact, cheque Ext. CW-1/A issued on 3.9.2007 was in dispute. It is so claimed by the complainant in the complaint. Although, she made an effort to dispute her signature and handwriting on Ext. CW-1/A and also filed an application under Section 73 of the Indian Evidence Act to forward the same to handwriting expert for comparison with her admitted signature and hand writing, yet the said application was also dismissed by learned trial Judge vide a speaking order dated 23.5.2009. This order has never been assailed by her including in the present petition. Meaning thereby that the cheque Ext. CW-1/A was post dated and issued by the accused alone and none-else under her signatures. The cheque was presented for encashment on 22.1.2008, as is apparent from the pay-in-slip Ext. CW-1/B. The same, however, was returned vide memo of the same date with the remarks "insufficient funds" vide memo Ext. CW-1/C.

7. If coming to the legal notice dated 23.1.2008, the same is also established beyond all reasonable doubt from the perusal of postal envelop Ext. CW-1/E, which contains an endorsement on its reverse:

"प्राप्तकर्ता घर पर नहीं मिला। घर में सूचना दे दी गई है।
sd/-
25.01.2008"

8. The certificate of posting is Ext. CW-1/F. The postal receipt qua the posting of the registered AD is Ext. CW-1/G. Such evidence available on record makes it crystal clear that the accused had due knowledge of issuance of legal notice Ext. CW-1/D, however, she avoided its receipt, deliberately and intentionally to defeat the just and legitimate claim of the complainant. The plea so raised in her defence that the disputed cheque Ext. CW-1/A was issued by her in the year 2004 as security and date of it is forged by the complainant on 22.1.2008 is also false because DW-2 P.N. Negi has proved the statement of the cheques she issued of her accounts Ext. DW-2/A and the disputed cheque, which bears No. 682262 was never issued by her as per this document in the year 2004. Otherwise also, even if the cheque is issued towards the security ultimately dishonoured, the same also constitutes an offence under Section 138 of the Negotiable Instruments Act as per ratio of the judgment of Hon'ble Apex Court in ***Sampelly Satyanarayana Rao*** V. ***Indian Renewable Energy Development Agency Limited, (2016) 10 SCC 458***. The relevant portion of this judgment is reproduced as under:-

> "10. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways (supra) with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for

"discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

11. Reference to the facts of the present case clearly shows that though the word "security" is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability."

9. In view of what has been said hereinabove, there is no merit in this petition and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

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

Devinder Kumar. ...Petitioner

Versus

Smt.Shakuntla Devi. ...Respondent.

Cr.MMO No. 237 of 2016
Date of Decision: 17.5.2018

Protection of Women from Domestic Violence Act, 2005- Section 12- Interim maintenance- Judicial Magistrate granting interim maintenance @ Rs.2,000/- per month to wife – Appeal of husband against that order, dismissed by Sessions Judge – Petition against before High Court – Petitioner/husband alleging that he belongs to BPL family and had no means to provide maintenance to wife as directed by Lower Courts – High Court found that BPL Certificate relied upon by petitioner/husband was issued on basis of survey conducted in 2002-03 and its validity was only for six months – Whereas, complaint under Section 12 of Act against him was filed in 2016 – Further, husband had stated in his reply that after withdrawal of divorce petition , he was engaged in business of tent house – In these circumstances, orders of Lower Courts not interfered with – Petition dismissed. (Para- 3 to 5)

For the Petitioner: Mr.Parveen Chandel, Advocate.
For the Respondent: Mr.Devender Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

This petition has been filed against the order passed by learned District Judge, Shimla in Cr. Appeal No. 21-S/10 of 2014, titled Devinder Kumar Vs. Smt. Shakuntla Devi, whereby order dated 17.4.2014 passed by learned Judicial Magistrate, 1st Class, Court No. 5, Shimla in case No. 53/3 of 2013, titled Smt. Shakuntla Devi Vs. Devender, awarding interim maintenance of Rs.2,000/- per month payable by petitioner/husband to respondent/wife during pendency of proceedings under Section 12 of the Protection of Women from Domestic Violence Act (herein after referred to as the Act) before learned Judicial Magistrate 1st Class, Court No. 5, has been affirmed.

2. Learned District Judge, in his judgment, has referred the reply to the report filed by petitioner/husband, wherein he has pleaded that after withdrawal of divorce petition, he started business of tent house, with observation that there was no material on record at that stage to reflect that respondent/complainant/wife had any source of income to maintain herself and learned District Judge, on the basis of material on record, has affirmed the order passed by learned trial Court.

3. Present petition has been based upon a document i.e. BPL certificate (Annexure P-3) filed with petition in this Court. As per this certificate petitioner Devinder Kumar and his wife Smt.Shakuntla have been shown belonging to a BPL family, but at the same time, this certificate also states that petitioner Devinder Kumar is related to a family living below poverty line, as per BPL survey conducted in the year 2002-03 and this certificate has been stated to be valid for 6 months from the date of its issuance. Though date of issuance of this certificate has been shown as 18th July, 2016, but the fact remains that certificate has been issued on the basis of BPL survey conducted in the year 2002-03, which creates doubt as to whether the said certificate depicts the present status of the petitioner Devinder or not. Even otherwise this certificate is not valid since 18.1.2017. Be that it may be. No such certificate or document was ever placed before the trial Court or learned Appellate Court, rather it appears from the impugned order that there was positive admission of the petitioner that after withdrawal of divorce petition, he started business of tent house. Running the business of tent house and belonging to BPL family is irreconcilable. Without further commenting upon the genuineness and validity of BPL certificate produced by the petitioner in this Court, I am restricting only to say that this certificate cannot be taken into consideration in this petition for alteration/modification or setting aside the order passed by the trial Courts, as the same was never placed before the Courts below and on the basis of material placed before them, no material irregularity or illegality has been committed by learned Courts below in awarding the maintenance amount of Rs.2000/- per month in favour of respondent/wife.

4. Needless to say that parties can approach the trial Court for alteration/modification or vacation of interim order, in case there is change in circumstances or for other grounds, as provided under the Act.

5. In view of aforesaid discussion, I find no merit in the petition and accordingly, the same is dismissed. Interim stay passed at any stage of the petition shall also stand vacated.

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

Virender Singh & Another ...Petitioners.

Versus

Shreshtha Devi & Others ....Respondents.

CMPMO No.403 of 2017.
Decided on: 17th May, 2018.

Indian Evidence Act, 1872- Section 65(c)- Leave to adduce secondary evidence - Trial Court permitting plaintiffs to place on record copies of Will and other documents – Plaintiffs then moving another application under Section 65(c) of Act seeking leave of Court to lead secondary evidence to prove aforesaid Will by averring that they were students when Will was produced before Revenue Officers for attestation of mutation and could not get it back from them – Trial Court summarily rejecting this application by observing that existence of original Will as well as its loss is not proved – Petition against – Held, without recording evidence, Trial Court had no occasion to conclude non-existence of Will or its loss – Order of Trial Court set aside – Matter

remanded with direction to provide opportunity to parties to lead evidence and then decide application afresh. (Paras-3 to 6)

For the petitioners	Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam, Advocate
For the Respondent	Mr. Ravi Kant & Ms. Sheetal Kaul, Advocate for respondent No.1. Mr. Sanjay Jaswal, Advocate for respondent No.3. Respondent No.2 already exparte.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

In this petition, order dated 18.8.2017, passed by learned Civil Judge, Jawali, District Kangra in an application filed under Section 65 of the Evidence Act (Civil Suit No.64/15) is under challenge.

2. The impugned order reveals that learned trial Judge thereby has disposed of two applications, one under Section 65 of the Evidence Act and the other under Order 7 Rule 14 read with Section 151 CPC. While allowing the application under Order 7 Rule 14 read with Section 151 CPC, the petitioners herein (Plaintiffs in the trial Court) have been permitted to place on record the photocopy of the Will dated 25.6.2018, service certificate and two photographs of Harbans Lal and his wife Sunnela Kumari and also photocopy of certificate issued by the Purohit at Haridwar regarding performing the last rites on the death of deceased Harbans Lal by Budhi Singh, the father of the petitioners-plaintiffs. The application under Section 65 of the Evidence Act, however, has been dismissed on the ground that they have failed to prove the execution, existence and loss of the original Will.

3. In the application under Section 65 of the Evidence Act Annexure P-2, it is specifically averred that the original Will dated 25.6.2008 got misplaced at such a stage when the same was produced before revenue authorities for the purpose of sanction and attestation of the mutation on the basis thereof in favour of the petitioners-plaintiffs. They both were students at that stage, hence being not mindful, forgot to collect the original Will from the Revenue Officer. The photocopy of the Will was annexed to the application.

4. In reply Annexure P-3, filed by the respondents-defendants their specific stand is that the party seeking to produce secondary evidence is required to plead and prove the existence and execution of the original documents. In the absence of original Will the permission to produce the secondary evidence cannot be granted. It is denied that the Will was misplaced. Had it been so, the petitioners-plaintiffs should have lodged the report in this regard. It is pointed out that the deceased Harbans Lal never executed any Will. It is rather the petitioners-plaintiffs, who themselves prepared a forged document and they themselves destroy the same to escape from criminal liability. The scribe and witnesses of the Will allegedly are facing criminal trial under Section 468 of the Indian Penal Code in FIR No.5/10 with the allegations of having prepared a false document.

5. In view of the claims and counter claims, it can easily be gathered that the document i.e. the so called Will of deceased Harbans Lal was in existence, however, whether it was a genuine document or forged and fictitious, nothing can be said at this stage. Otherwise also, the onus to prove that the original was in existence and the same is lost by the petitioners-plaintiffs, is upon them.

6. Undisputedly, learned trial Judge has not framed any issue qua this aspect of the matter nor afforded any opportunity to the petitioners-plaintiffs to show that the so called Will in existence was the last and final Will of deceased Harbans Lal and that the same is lost in the manner as they claimed in the application filed under Section 65 of the Evidence Act. Therefore, without affording the opportunity of being heard to the parties on both sides, learned trial Judge

had no occasion to conclude that the original of the photocopy ordered to be taken on record was not in existence nor had misplaced. Therefore, that part of the impugned order, which deals with the dismissal of the application under Section 65 of the Evidence Act is not legally and factually sustainable and the same is accordingly quashed. Consequently, the case is remanded to learned trial Court with a direction to decide the application under Section 65 of the Act afresh after framing the issues qua existence and lost of the Will in question and affording opportunity of being heard to the parties on both sides. The question qua its execution by Harbans Lal, the testator, however, will arise at a subsequent stage and to be decided in accordance with law, after affording the opportunity of being heard to the parties on both sides. This petition is accordingly allowed and stands disposed of.

An authenticated copy of this order be sent to learned trial Judge for compliance.

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

Sh.Manjeet Kumar. ....Petitioner.

Versus

Krishan Chand & ors. ....Respondents.

CMPMO No.181 of 2018.
Date of decision: May 18, 2018.

Code of Civil Procedure, 1908- Order 6 Rule 17- Amendment of pleadings – Permissibility of – Plaintiffs filing suit for declaration and challenging Will dated 14.2.1995 executed by one R, as a forged and fictitious document – And also on ground that suit land was 'Joint Hindu Property' and parties being governed by Mitakshara School of Hindu Law, they were entitled to inherit same by way of succession – Suit at pre-trial stage –Plaintiffs filing application for amendment of plaint on ground that when husband of plaintiff No.2 visited Dharamshala and met advocate of R, he (Advocate) gave a copy of Will dated 22.10.2015 of 'R' – Plaintiffs further want to incorporate pleadings to the effect that they brought this Will dated 22.10.2015 to the notice of defendants and made an effort to settle dispute before Lok Adalat but defendants refused to admit this Will – Trial Court allowing application for amendment – Petition against - Held, amendment in plaint was essential in view of existence of later Will dated 22.10.2015 - Denial of amendment would result in serious legal complications and multiplicity of litigation – The genuineness of Will dated 22.10.2015 is to be determined during trial- Suit is at stage of framing of issues – Petition dismissed – Order of trial court upheld. (Paras– 2 to 5)

For the petitioner : Mr. Harish Sharma, Advocate.
For the respondents : Nemo.

The following judgment of the Court was delivered:

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

Order dated 7.3.2018 passed by learned Civil Judge (Junior Division), Baijnath, District Kangra in an application under Order 6 Rule 17 (Civil Suit No. 107 of 2016) is under challenge in this petition.

2. Petitioner herein is one of the defendants (defendant No. 2). The respondents No.1 and 2 are the plaintiffs in the trial Court. They have filed the suit (plaint Annexure A-1) for seeking declaration that 'Will' dated 14.2.1995 purported to be executed by deceased Rama Ram bequeathing thereby the property i.e. land entered in Khata No. 79, Khatauni No. 169, 170, Kita 19, measuring 00-61-75 hectares situated at Mahol Matian Khurd, Khata No. 60, Khatuani No.

128, Kita, measuring 00-36-96 Hects. situated at Mohal Matial Kala; Khata No. 75min, Khatauni No. 161, Khasra No. 297, measuring 00-00-90 hects. Situated at Mohal Matial Khurd, Khata no. 10 Min, Kita 3, measuring 00-02-88 Hects., Khata No. 107, Khatauni No. 263, 264 Kita 5, measuring 00-07-49 hects. situated at Mohal Chadhiar Khas and Khata No. 10 Min, Khatauni No. 27Min, Khasra Nos. 4,9 and 10 Kita 3, measuring 00-02-88 Hects, situated at Mohal Thehad Burli is a forged and fictitious document. The suit property being the property of joint hindu family and the parties governed by the Mitakshara school of hindu law, as such, are entitled to inherit the same by way of succession.

3. On filing of written statement and replication etc. the suit according to learned counsel for the petitioner presently is at the stage of framing issues meaning thereby that trial is not yet commenced. The plaintiffs before that have filed the application for amendment in the plaint on the ground that the husband of plaintiff No. 2 (Sudershan Kumar) when recently went to Dharamshala came to know from Shri J.S. Rana Advocate, who had been representing deceased Rama Ram in the litigation instituted by or against him after inquiring well being of said Shri Rama Ram and on this said Sudershan Kumar having disclosed the factum of death of Rama Ram, Mr. Rana disclosed that the deceased during his life time has executed a 'Will' on 22.10.2015. it is said Shri J.S. Rana Advocate supplied a copy of the 'Will' also to Sudershan Kumar. The plaintiffs allegedly produced the 'Will' before the defendants and made an effort to settle the dispute at pre-litigation stage before lok adalat but of no avail as they refused to admit the said document and it is thereafter the application came to be filed for seeking amendment in the plaint.

4. This Court at this stage is not concerned as to whether the 'Will' now propounded by the plaintiffs is a genuine document or not. However, when it is brought to the notice of the Court and that too at a stage when the trial is not yet commenced, the factum of existence thereof is essentially required to be brought on record and for that the amendment in the plaint is necessary. In the event of this document is ignored and the prayer for amendment in the plaint is refused, it may result in multiplicity of litigations and the other legal complications more serious in nature in due course of time. In that event the controversy between the parties cannot also be decided more effectively and judiciously. Above all, the petitioner(defendant) shall have the opportunity to file written statement to the amended plaint and also the right of being heard in due course. Therefore, no prejudice is likely to be caused to them by allowing the prayer made by the plaintiffs for amendment in the plaint.

5. Therefore, learned trial Court has not committed any illegality or irregularity while allowing the application for amendment of the plaint. The present petition being devoid of any merit is, therefore, dismissed.

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

7. An authenticated copy of this judgment be supplied to learned trial Court for record. Copy Dasti.

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

Rakesh Kumar & anr. .....Petitioners.

Versus

Vishal Priaya. .....Respondent.

Cr. Revision No. 242 of 2017.
Date of decision: May 18, 2018.

Code of Criminal Procedure, 1973- Section 408- **Protection of Women from Domestic Violence Act, 2005**- Section 12- Transfer of complaint - On application of complainant, Sessions

Judge ordering transfer of complaint filed by wife in a Court at Dehra to Court of CJM, Dharamshala – Husband challenging order of transfer on ground that wife was already pursuing another case filed by her under Section 23 of the Act at Dehra and there was no reason for her to get only one case transferred to Dharamshala – High Court found that wife was pursuing an appeal under DV Act at Dehra, which she had withdrawn – It was found convenient for wife to pursue case at Dharamshala than at Dehra vis-à-vis husband – Order of Sessions Judge upheld – Petition dismissed. (Paras-4 to 6)

Cases referred:

Rajani Kishore Pardeshi v. Kishore Babulal Pardeshi (2005) 12 SCC 237

Anjali Ashok Adhwani v. Ashok Kishnichand Sadhwani AIR 2009 SC 1374

For the petitioners : Mr. Surender Sharma, Advocate.

For the respondent : Mr. Ashok K. Thakur, Advocate.

The following judgment of the Court was delivered:

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

Order dated 13.7.2017 passed by learned Sessions Judge, Kangra at Dharamshala in an application under Section 408 Cr.P.C. registered as Criminal T.A. No. 7 of 2016 is under challenge in this petition. It is seen that while passing the impugned order learned Sessions Judge had transferred the complaint titled Vishal Priya versus Rakesh Kumar and another filed by respondent-wife under Section 12 of the Protection of Women from domestic violence Act, 2005 against the petitioners herein.

2. The legality and validity of the impugned order has been questioned on several questions of law and facts, however, mainly that another case under Section 23 of the Domestic Violence Act is being pursued by her at Dehra. The arguments qua this aspect were addressed on 14.3.2018 when the following order came to be passed in this petition:

> *"Heard for some time. Learned Counsel representing the petitioner has pointed out that one more application filed under Section 23 of the Domestic violence At is pending in the Court of Additional Chief Judicial magistrate, Dehra and that respondent is prosecuting the said application at Dehra. The contention therefore, is that when she is prosecuting one of the case she instituted at Dehra against her husband, the petitioner, there was no occasion to seek the transfer of another application under Section 12 of the Act from Dehra to Dharamshala. Learned Counsel representing the respondent prays for and is granted two weeks time to have instructions in the matter. List on* ***18.4.2018.****"*

3. On the next date i.e. 18.4.2018 learned Counsel representing the respondent-wife on instructions apprised this Court that it was an appeal pursued by her at Dehra which now stands withdrawn on 11.4.2018. This order also reads as follow:

> *"Learned Counsel representing the respondent, on instructions, submits that another matter being pursued by her at Dehra was an appeal, which now stands withdrawn on 11.4.2018. Also that now only this case transferred to Dharamshala is pending disposal between her and her husband, the petitioner. It is in this backdrop, learned counsel for the petitioner seeks time to have instructions. Allowed. List on 4th May, 2018."*

4. Learned Counsel representing the petitioner was granted time to obtain instructions in the matter. He has not disputed the pending case between the parties at Dehra, which now stands withdrawn. This being the factual position, it is now to be seen from the record that the impugned order is legally sustainable or not. The answer to this poser in all

fairness and in the ends of justice would be in affirmative for the reasons that the respondent is presently residing at Dharamashala.

5. In the nature of the allegations and counter allegations, the parties levelled against each other, it can reasonably be believed that for her it is not possible to pursue the case at Dehra. The petitioners are no doubt the residents of village Mangarh, Tehsil Dehra, however, in a better position as compared to the respondent to pursue the case at Dharamashala. Keeping in view that the women are recognized as victims in our legal set up, the apex Court in ***Rajani Kishore Pardeshi*** v. ***Kishore Babulal Pardeshi (2005) 12 SCC 237*** and ***Anjali Ashok Adhwani*** v. ***Ashok Kishnichand Sadhwani AIR 2009 SC 1374*** has held that as and when there is a prayer on their behalf qua transfer of a case from one place to another, the discretion should be exercised in their favour and the case transferred. Similar is the view of the matter taken by this Court while placing reliance on the judgment ibid in ***Cr.MMO No. 41 of 2017, title Dr. Des Raj versus Dr. Bharti Kapoor & anr., decided on 18.8.2017.***

6. In view of what has been said hereinabove, this petition being devoid of any merit is though dismissed, however, with the expectation that the respondent-wife shall associate with the proceedings pending in the Court at Dharamshala and not delay the same in any manner whatsoever.

7. The petition is accordingly disposed of, so also the pending application(s), if any.

8. An authenticated copy of this judgment be supplied to learned Chief Judicial Magistrate, Kangra at Dharamshala, the transferee Court, for record and compliance.

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

Mr. T.K. Sibal and others ... Petitioners

Versus

Food Inspector and others ... Respondents

CrMMO No. 116 of 2012
Decided on: May 21, 2018

Prevention of Food Adulteration Act, 1954- Sections 16(1)(a)(i) and 17(1) & (2)- Offences by companies – Impleadment of Directors as co-accused – Grounds for – Food Inspector taking sample of 'Dal Chini' for public analysis from hotel run by a company – Sample found adulterated by public analyst – Complaint for offence under Section 16(1)(a)(i) of Act filed against 'A', Manager of the hotel – During trial, Food Inspector filing application under Section 17(2) of Act for impleading Directors of Company as co-accused – Application filed after 11 years of filing of complaint – CJM allowing application for impleadment of Directors mentioned in the application, as co-accused – Petition against summoning order – State justifying order of impleadment on ground that prima facie their involvement in commission of offence is established as no person responsible for the conduct of business of company was nominated by it – Held, if no person has been nominated by Company under Section 17(1) of the Act, then every person only who was incharge and responsible for conduct of business of the company when the offence was committed, can be impleaded as co-accused – There was no averment in complaint-application that persons sought to be arrayed as co-accused being Directors, were responsible for conduct of business at the time alleged offence was committed - Petition allowed – Order of CJM, summoning petitioner as co-accused set aside. (Paras-9 to 16)

For the petitioners Mr. R.L. Sood, Senior Advocate with Mr. Arjun Lal, Advocate.

For the respondents Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG, for respondent No. 1.

Mr. G.S. Rathore, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Being aggrieved and dissatisfied with order dated 24.1.2012, (Annexure PD), passed by the learned Chief Judicial Magistrate, Shimla in case No. 86/3 of 11/02, whereby petitioners herein have been ordered to be arrayed as co-accused, petitioners have approached this Court in the instant proceedings filed under Section 482 CrPC read with Article 227 of the Constitution of India, praying therein to set aside the impugned order referred to herein above.

2. Precisely, the facts as emerge from the record are that a complaint under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954, (hereinafter, 'Act') came to be filed against respondent No. 2-Atul Lal, General Manager, Wildflower Hall, Chharabra, Shimla, on the allegations that on 14.3.2000, Food Inspector visited the premises of Mashobra Resorts Limited, Chharabra and found above named accused No. 1 conducting the business therein. Food Inspector after disclosing his identity purchased *Dal Chini* powder for the purpose of analysis against payment and thereafter prepared samples in accordance with the provisions of the Act. Food Inspector after drawing sample, sent the same for analysis to the Public Analyst. Public Analyst, Kandaghat vide report No. 125, dated 27.6.2001, reported that the batch number, month and year upto which the product was best for consumption have not been mentioned on the label. Food Inspector after having received aforesaid report, obtained written consent from the Chief Medical Officer, Shimla, District Shimla, under Section 20 of the Act to launch prosecution and in this background, a complaint under Section 16(1)(a)(i) of the Act (Annexure PB) came to be instituted against the accused Shri Atul Lal, who at the relevant time was General Manager of Wildflower Hall, Chharabra. Subsequently, during the pendency of the aforesaid complaint, an application came to be filed on behalf of the Food Inspector for impleadment of the Directors of M/s Mashobra Resorts Limited, Chharabra (respondent No.3). Learned Court below, taking note of the averments contained in the application referred to herein above, ordered for impleadment of the persons named in the application i.e. present petitioners.

3. Being aggrieved and dissatisfied with their impleadment, petitioners have approached this Court in the instant proceedings.

4. Mr. R.L. Sood, learned Senior Advocate duly assisted by Mr. Arjun Lal, Advocate while inviting attention of this Court to the application having been filed by Food Inspector, for impleadment of Directors (Annexure PC), strenuously argued that no reason whatsoever has been assigned for impleadment of persons named in the application and as such, there was no occasion for the court below to allow the application and as such, same being not sustainable in the eye of law, deserves to be set aside. Mr. Sood, while referring to the documents available on record, further contended that respondent No.3 is a tourist resort being run by the company i.e. Mashorba Resorts Limited and Mr. Atul Lal was General Manager of the company and he was discharging his functions in this capacity on 9.5.2001. He further stated that licence to sell food articles under the Act for the financial year 20010-02 was issued by the competent authority in the name of an employee of the Company i.e. one Smt. Swathshree Bhutani wife of Shri Avneet Singh Bhutani (Annexure PA) and as such, court below erred in accepting the prayer having been made in the application filed by Food Inspector, who out of personal vendetta proceeded to falsely implicate respondent No.3 in the case registered under the provisions of the Act. Mr. Sood further contended that respondent No. 3 , Wildflower Hall, commenced its commercial operation on 29.3.2001 and on 5.9.2001, Mr. Atul Lal, respondent No. 3 i.e. the then General Manager, ceased to be an employee of Wildflower Hall as he had resigned from the services of the Company. Mr. Sood, further contended that complaint under Section 16 (1)(a)(i) of the Act was filed by the Food Inspector against Atul Lal and M/s Mashobra Resorts Limited, Chharabra and bare perusal of Form-VI, spot memo and cash receipt relating to the alleged sale, speak only of and identify Mr. Atul Lal, as the person, who was conducting the business of the resort. While

referring the prosecution sanction by Chief Medical Officer, Mr. Sood further contended that the documents relating to alleged purchase of *Dal Chini* clearly reveal that same mentions Atul Lal alone. While specifically referring to the averments contained in para-10 of the complaint, Mr. Sood contended that in the past also, similar case titled Food Inspector vs. Sameer Miglani and other being Case No. 6-3 of 2004 was registered, wherein principal accused was declared as proclaimed offender and Food Inspector had moved an application for impleadment of Directors stating therein that petitioner were responsible for day-to-day conduct of business and management of Wildflower Hall, Chharabra. Trial court had issued summons against the Directors and they had filed CrMMO No. 12 of 2009 titled as David Mathews and others Vs. State of H.P. and others, against their summoning. This Court, vide judgment dated 30.3.2010 (Annexure PE), while allowing the petition having been filed by the Directors, held that in the absence of any averments made in the complaint that any of the Directors sought to be impleaded was in-charge or responsible for conduct of business of the Company, their summoning as accused was wrong and illegal. Lastly, Mr. Sood, contended that bare conduct of the Food Inspector, who was hell-bent to implead Directors, speaks volumes about his bias towards the petitioner, because as per agreement/Memorandum of Association placed on record, persons named in the application are not the only Directors of the respondent No.3 Hotel, rather, there are three other government nominees on the Board of Directors of respondent No.3 Hotel i.e. Chief Secretary to the Government of Himachal Pradesh, Secretary (Tourism) and Secretary (Finance), to whom, Food Inspector has purposely not sought to be arrayed as accused and as such, application ought to have been dismissed by the court below on this sole ground.

5. Mr. S.C. Sharma, learned Additional Advocate General, while refuting the aforesaid contentions having been made by the learned senior counsel appearing for the petitioners, supported the impugned order passed by the court below and contended that there is no illegality or infirmity in the impugned order and same is based upon correct appreciation of material adduced on record and as such, same deserves to be upheld. Mr. Sharma, strenuously argued that under Section 17 of the Act, any person responsible to the Company for conduct of business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Mr. Sharma, further contended that there is no denial of the fact that Atul Lal was General Manager of Wildflower Hall, Chharabra, Shimla (respondent No. 3) but, Directors named in the application rightly came to be impleaded as accused as they are responsible for the conduct of business of the company. However, Mr. Sharma, learned Additional Advocate General was unable to refute the contention put forth by Mr. R.L. Sood, learned Senior Advocate that apart from the persons named in the application, there are three other government nominees on the Board of Directors. He stated that since day-to-day functioning of the Company is run by the Directors named in the application, there is/was no occasion for the Food Inspector to pray for impleadment of other Directors, who had no connection with the day-to-day working of the Company. Mr. Sharma was also unable to dispute the judgment rendered by this Court in CrMMO No. 123 of 2009, titled as David Mathews and others vs. State of H.P. and others.

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

7. Careful perusal of complaint under Section 16 (1)(a)(i) of the Act clearly suggests that on the date of alleged incident i.e. 14.3.2000, Food Inspector found Mr. Atul Lal, respondent No. 2 conducting business of the resort. Similarly, it is apparent from record that Food Inspector purchased *Dal Chini* powder from Mr. Atul Lal, whom he found conducting business of resort. Para-6 of the complaint Annexure PB clearly suggests that the Food Inspector requested Chief Medical Officer, Shimla to give consent under Section 20 of the Act to launch prosecution against Mr. Atul Lal, General Manager of Mashobra Resorts Limited, Chharabra, in the court of law. Complaint as referred to herein above came to be filed in the year 2000, whereafter, an application for impleadment of Directors of M/s Mashobra Resorts Limited, Chharabra (present petitioners) came to be filed on 5.12.2011 i.e. after ten years. In the application having been filed by the Food Inspector, it has been nowhere mentioned that how the persons, who are Directors

and proposed to be arrayed as accused are/were responsible for conduct of business of respondent No. 3 i.e. Mashobra Resorts Limited. In the application, it has been simply stated that inadvertently, names of Directors of the Resorts could not be added earlier in the complaint. It has been further averred in the application that at the time of taking sample, no person was nominated under Section 17 of the Act with the Local Health Authority, Shimla, District Shimla.

8. Having carefully perused the averments contained in the application, this Court finds considerable force in the arguments of the learned senior counsel representing the petitioners that no cogent and convincing reason for impleadment of Directors of Mashobra Resorts Limited has been assigned in the application, rather, same has been filed in a very cursory manner.

9. Close scrutiny of the impugned order passed by the court below compels this Court to observe that the trial court, while considering the application referred to herein above, failed to apply its mind, rather, it simply, on the basis of averments that the persons named in the application being Directors of the company need to be arrayed as accused, proceeded to allow the application and summoned the petitioners as accused. Court below in a very slipshod manner and by way of a cryptic order, ordered for impleadment of present petitioners, who happened to be the Directors, without verifying/ ascertaining the role, if any, played by them, in the conduct of day-to-day business of respondent No. 3.

10. At this stage, it would be profitable to take note of the provisions of Section 17(1) of the Act, which are reproduced as under:

> 17. Offences by companies.—(1) Where an offence under this Act has been committed by a company—
>
> (a) (i) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as the person responsible), or
>
> (ii) where no person has been so nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and
>
> (b) the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence."

11. Careful perusal of aforesaid provision of law i.e. Section 17 sub-section (1) of the Act reveals that where an offence under the Act is committed by a person nominated under sub-section (2) to be in-charge or responsible to the company for conduct of its business, or where no person is so nominated, other person, who at the time of commission of offence was in-charge and was responsible for the conduct of business of the company, shall be deemed to be guilty of having committed offence under the Act and shall be liable to be proceeded against and punished accordingly. Having perused aforesaid provision of law, this Court finds considerable force in the arguments of the learned senior counsel representing the petitioners that prior to initiation of action, if any, for the commission of offence under this Act, there has to be determination that the company/firm is guilty and thereafter question of punishing the person under the categories referred to in clause (a) of sub-section (1) would arise.

12. Also, a co-ordinate Bench of this Court has specifically and elaborately dealt with the issue in question in CrMMO No. 123 of 2009 titled **David Mathews and others** vs. **Stat of H.P. and others**, and held as under:

> "As a matter of fact Section 17 (1) of the Act is a deeming provision which provides that where an offence under the Act is committed by a Company/Firm, the person Incharge and responsible to it, is held to be guilty, and to be liable

should be proceeded against with a view to fix culpability, where offence is committed by a company. Sub-section (2) provides for a nomination so that there is no difficulty in fixing responsibility. Where, however, no person has been nominated, liability is extended to any person who was in-charge of or responsible to the company/firm in the conduct of its business. The prosecution is under obligation to find out whether any person has been nominated in terms of Section 17 (2) of the Act and if a person has been nominated, to proceed against him so that he can be punished if the Company is found guilty. There has to be a determination that a company/firm is guilty, where after the question of punishing the person of any of the categories indicated in clause (a) of sub-section (1) arises. However, reverse is not necessary to be established. The section does not provide that the person in-charge of the company should be found guilty before the company is held liable. Merely because a person is not nominated, the liability does not vanish and along with the company the person who was in-charge of or responsible to the company in the conduct of the business is rendered liable. Sub-section (1) of Section 17 of the Food Act makes all the persons in-charge of or responsible to the company in the conduct of business liable to the company in the conduct of the business liable to the procedure and process, in case there is no indication in terms of sub-section (2). Where a person is nominated, that person is made liable in terms of clause (a) of subsection (1) of Section 17 of the Act.

The scope is wider where there is no nomination and the person who is in-charge of or responsible to the company in the conduct of business is liable subject, of course, to the proviso which casts onus on the person who claims that the offence was committed without his knowledge and he exercised all due diligence to prevent the commission of such offence.

In the instant case, there is no averment made in the complaint that any of the directors or General Manager sought to be impleaded are the Incharge or the responsible person of the Company, in the conduct of the business, therefore, their summoning as the accused persons in the instant case, is wrong and illegal.

Precisely, the reading of Section 17 of the Act shows that the Legislature has an intention to proceed against the person responsible at the first instance and only if it is proved that the offence has been committed with the consent etc. of any Director and/or other persons named in sub-section (4), it is thereafter open to the court to proceed against him/them. The intention behind the amendment Act, 1976 which has given the present shape to this section, as it stands now, is apparent and is plainly discernable from its scheme that it is not open to the Court to work against it on any ground more specifically when it is not averred in the complaint that such a person was Manager, Secretary or other officer of the company/firm not being a person nominated under sub-section (2) of the Act, consented to or connived to commit the offence under the Act or is attributable to him/them on account of any neglect on his/their part. [Pl. see Raj Kumar v. Food Inspector. 2009 (1) Sim.L.C.(359)]

Thus, in view of the above position, when there is no allegation of the above nature against the petitioners, it would not be open for the learned trial court to summon them as an accused under the Act. Therefore, summoning them in this case without any such allegation or in absence of any prima facie proof is unsustainable in the eyes of law. The petition is, therefore, allowed and summoning order and proceedings against the petitioners are hereby quashed. However, it would be open to the trial court to implead any such persons whether the Director(s) or the partner(s) of the Company as an accused qua whom the consent, connivance or neglect would be proved within the indictment of sub-section (4) of Section 17 of the Act aforesaid.

The petition is accordingly allowed and stand disposed of."

13. It is quite evident from the aforesaid law laid down by coordinate Bench of this Court that a person responsible under Section 17 can only be proceeded against if it is proved that the offence has been committed with the consent of any of the Directors and /or other persons named in sub-section (4). Leaving everything aside, there is not even a whisper in the complaint that persons proposed to be arrayed as accused being Directors had either consented or connived to commit offence under the Act or same is attributable to him/them on account of any neglect on his/their part.

14. At this stage, it may be noticed that aforesaid judgment has attained finality, as has been fairly admitted by the learned Additional Advocate General during the arguments of the case since no appeal, whatsoever, has been filed against the judgment rendered by this Court.

15. In para-10 of the present petition, factum with regard to passing of aforesaid judgment stands duly mentioned but interestingly, respondent No. 1, while filing reply, has not refuted the same and has virtually admitted the same.

16. Precisely, respondent No. 1 in its reply has denied the averments contained in this para that the Chief Secretary to the Government of Himachal Pradesh, Secretary (Finance) and Secretary (Tourism) are nominees of the Government on the Board of Directors. Respondent No.1 has further stated that there is no authorization/nomination of company under Section 17(3) of the Act and as such, all the Directors, Managers and other persons are deemed to be guilty of offence but there is no explanation that why government nominees i.e. Chief Secretary, Secretary (Finance) and Secretary (Tourism) have not been proposed to be arrayed as accused being Directors of the Company. Once applicant seeks impleadment of Board of Directors on the ground that they being over all in-charge of the company are required to be impleaded as party, all the Directors including government nominees are/were required to be impleaded as accused and in this regard no pick and choose policy can be adopted by the Food Inspector. Affidavit filed by respondent No.1 is totally contrary to the material available on record, rather, there appears to be an attempt on the part of respondent No.1 to mislead this Court by concealing material facts. Though this Court, having perused affidavit, which is totally contradictory to the record, would have proceeded to issue notice to the officer concerned, however, on the persuasion of Mr. Dinesh Thakur, learned Additional Advocate General, this Court restrains itself from taking any harsh action at this stage but the officer concerned is warned to be more cautious and careful in future while dealing with court cases.

17. Consequently, in view of detailed discussion made herein above, present petition is allowed. Order dated 4.1.2012 passed by Chief Judicial Magistrate, Shimla in Case No. 86-3 of 11/02 is quashed and set aside as also the proceedings consequential to the aforesaid order. Pending applications, if any, are disposed of. Interim directions, if any, also stand vacated.

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

Anil Kumar .....Petitioner.

Versus

State of H.P. ....Respondent.

Cr.MMO No. 153 of 2018
Decided on : 22.5.2018

Code of Criminal Procedure, 1973- Section 205- Exemption from personal appearance – Grant of- Petitioner was facing a trial before trial court – On his failure to personally appear before Court, it cancelled bail bonds and directed issuance of Non-Bailable Warrant against him and proceedings under Section 446 of Code, even though his counsel filed an application seeking his

exemption – Counsel was also ready to examine the witness present in the Court on that day – Petition against – Held - When accused was consistently present in court throughout trial, his exemption from personal appearance on that day ought to have been allowed particularly when only last witness was to be examined in trial and his counsel was ready to cross-examine the said witness – Order of Trial Court set aside – Petition allowed. (Paras-2 to 4)

For the Petitioner:	Mr. Rajender Sharma, Advocate.
For the Respondent:	Mr. Hemant Vaid, Additional Advocate General with Mr. Yudhveer Singh Thakur, Deputy Advocate General and Mr. Vikrant Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The accused/petitioner herein (for short "the accused') alongwith other accused, is, facing trial before the learned Special Judge II Solan, H.P., for, his committing an offence punishable under Section 20, of, the Narcotic Drugs and Psychotropic Substances Act, 1985. Upon the accused preferring an application under Section 439 Cr.P.C, he was granted bail, by the learned trial Judge. The prosecution has led into the witness box, all witnesses', except one. At the stage, when the last prosecution witness was to be led into the witness box, the accused/petitioner herein, by preferring an application, cast, under Section 205 Cr.P.C, provisions whereof stand extracted hereinafter, sought his exemption from personal appearance. The ground for the apposite exemption, stands, comprised in the factum of his being bed ridden, hence, being disabled to record his appearance before the learned Court concerned. However, the learned trial Court declined the averred relief, and, also proceeded, to, draw proceedings, against, the accused/petitioner herein, under Section 446 Cr.P.C, besides, also ordered for issuance of NBWs, for ensuring the presence, of, the absentee accused/petitioner herein, before it, on 10.5.2018.

Section 205 in The Code Of Criminal Procedure, 1973

205. Magistrate may dispense with personal attendance of accused.

(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.

2. On 4.4.2018, the last prosecution witness, was available for his deposition being recorded, and, after declining of relief vis-a-vis, the, petitioner upon his application, cast, under Section 205 Cr.P.C, the learned trial Court concerned rather discharged PW Durga Dutt Sharma. Even if the learned trial Court, was not, satisfied with the ground, as, meted in the application aforesaid, wherein, the petitioner, sought, his exemption from personal appearance, on 4.4.2018, yet, it was grossly improper for the learned trial Court, to, thereafter proceed to initiate proceedings under Section 446 Cr.P.C, and, also, to, order for issuance, upon him, of NBWs returnable, for 10.5.2018. The reason for making the aforesaid conclusion arises, from (a) with the accused being represented by counsel, and, his prior to, the pronouncement of the order of 4.4.208 rather consistently recording his appearance before, the trial Court concerned (b) AND the proceedings under Section 313 Cr.P.C yet remaining to be drawn, in proceedings whereof, the appearance of the accused before the trial Court concerned, was rather imperative, also, obviously when the personal appearance, of, the accused before the trial Court concerned was peremptory , only, at the stage of pronouncement of a verdict of conviction upon him and conseqeunt imposition , of, sentence upon him. (c) reiteredatedly, when, both the aforesaid stages remained un-arrived, it appears, that learned trial Court concerned, has committed ,a, gross

error, to, despite the accused being represented, by Counsel, hence proceed to draw proceedings, under Section 446 Cr.P.C, especially when prior thereto there was no apt derelictions, on, the part of the accused nor as afore-stated his personal appearance, was necessary nor also with his being duly represented by counsel, it was yet open, for the latter, to, proceed to cross-examine, the, last prosecution witness. Moreso, It was also inappropriate, for the learned trial Court, to, proceed to discharge, the PW aforesaid, his being the last prosecution witness, given want, of, personal appearance of the accused before him, conspicuously when his counsel, was rather enabled to cross examine, the PW aforesaid.

3. Be that as it may, the, drawing of proceedings, under Section 446 Cr.P.C, and, also, ordering qua issuance of NBWs, upon, the absentee accused, as arise, from failure of accused, to, record his personal appearance before the Court concerned, would be both tenable and appropriate, only, when the personal appearance, of the accused, before the learned trial Court concerned is imperative (i) imperatively, for his facing proceedings, drawn, under Section 313 of Cr.P.C (ii) AND at the time of pronouncement of verdict, stages whereof, remained un-arrived hereat. Consequently, when, he is represented by counsel, who, may proceed, even for want of personal appearance of the accused, hence, cross-examine the PW aforesaid, it is not appropriate for the learned trial Court, to, proceed to discharge the witness concerned or to draw the aforesaid proceedings or to order for issuance, of, NBWs upon him.

4. In view of the above, the present petition is allowed and the impugned order is quashed and set aside. The accused is directed to appear before the learned trial Court concerned, on 26.6.2018, and, in case there is a good reason meted by him, through his counsel, qua exemption, from, personal appearance being afforded to him, and, also in case the relevant apposite exemption, is granted to the accused, thereafter the trial Court concerned may proceed , in case, thereat the last prosecution witness, is present, to record his deposition AND, not to discharge him, rather, permit the counsel for the exempted accused, to, cross-examine him. However the learned trial Court, may insist, upon the personal appearance, of, the petitioner/accused, upon, drawing of proceedings under Section 313 Cr.P.C, and, at the time of its pronouncing verdict.

All pending applications, stand disposed of accordingly.

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

Bharti Kuthiala & another .....Petitioners.

Versus

Vipin Chhibar .....Respondent.

CMPMO No. 453 of 2017
Decided on : 22.5.2018

Code of Civil Procedure, 1908- Order III Rule 4 Sub-Rule (2)- No instructions – Effect of – Counsel of defendant pleading 'no instructions', when suit was fixed for defendants evidence – Trial Court insisting upon production of correspondence between counsel and client regarding 'no instructions' and granting time for that – Petition against – Plaintiff contending that Trial Court ought to have determined 'vakalat' forthwith when counsel of defendant pleaded no instructions – Held, trial court committed no illegality by insisting upon production of correspondence between client and counsel to ascertain the veracity of bestowment of authorization before its determination – Petition dismissed (Paras- 2 to 4)

For the petitioners: Mr. Suneet Goel.
For the respondents: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

A perusal of the relevant zimani orders, appended with the petition, make disclosures, qua upon closure of the plaintiff's evidence, in the affirmative, on, 10.6.2016, thereafter the relevant opportunities for adduction of defendants' evidence, being afforded to the latter. However, since 11.8.2016 upto 29.8.2017, the apposite opportunities remained un-availed, by the defendant, besides when the matter was listed on 9.11.2017, for adduction, of, defendants' evidence, thereat rather, an application was moved, cast under the provisions Order 8 Rule 1 (A) (3) read with Section 151 CPC, seeking therein, hence leave of the Court, to, place on record certain documents. The learned counsel for the petitioner, contends with vigor that (i) the granting, of, apt repeated apposite opportunities vis-à-vis the defendant, for, the relevant purpose, from 10.6.2016 upto 9.7.2017, being improper, (ii) significantly, when the apposite non-availment(s), was, prima facie, a, sequel, of, a clever mechanism, adopted by the defendant concerned, to prolong and protract the litigation, hence, the learned trial Judge, in, granting, the apposite opportunities, to the defendant concerned, she has rather facilitated the aforesaid endeavour.

2. The learned counsel, for, the petitioner has also brought, to, the notice of this Court, the provisions of Order 3 Rule 4 Sub-Rule (2), the relevant extract whereof, is, extracted hereinafter

> "(2) every such appointment shall be [filed in Court and shall, for the purposes of sub-rule (1), be] deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client."

Whereupon, he makes a submission, that, with on 5.8.2017, the counsel for the defendant, pleading no instructions, hence, in consonance with the apposite provisions borne, in, Order 3 Rule 4 CPC, the learned trial Court was enjoined to determine, the, apt authorization bestowed vis-à-vis the counsel concerned, whereas her permitting him, to, thereafter rather make the requisite prayer, hence has resulted in, a, gross illegality.

3. Apparently, the granting of consistent opportunities, by the learned trial Judge vis-à-vis the defendant, to adduce his evidence, on the relevant issues, does tantamount, to the learned trial Judge prima facie committing improprieties, yet, (i) it appears, that, the paramount consideration, which hence weighed with the learned trial Judge, was, of ensuring, a, fair trial of the suit (ii) AND concomitantly for facilitating a fair trial, thereupon the defendant was enjoined, to be granted, the requisite opportunities, to adduce evidence, on the relevant issues. However, even if, repeated opportunities were granted, to the defendant to adduce his evidence, on the relevant issues, yet, it was incumbent upon the learned trial Judge, to impose exemplary costs, upon, the defendant for precluding, the, defendant from availing any further opportunity(s) besides other befitting deterrents, were enjoined to be beset upon the defendant. Even if the aforesaid imposition of costs, is, not ordered to be made upon the defendant, by the learned trial Judge, yet this Court deems, it fit, that rather with the learned trial Judge, hence apparently bearing in mind, the paramount consideration, of, ensuring a fair trial of the suit, thereupon hence hers affording the apposite opportunities to the defendant, whereupon when the aforesaid apt non-imposition, is, curable by this Court, by its imposing exemplary costs, of, Rs. 15,000/- upon the defendant hence for want thereof, it is deemed not fit to interfere with the impugned order.

4. The learned counsel, for the petitioner has also contended with vigor, that with the learned counsel, for, the defendant, making on 5.8.2017, hence submissions before the learned trial Court, vis-à-vis a non-meteing, of, instructions, hence the learned trial Judge was thereat enjoined, to forthwith determine, the, apt authorization bestowed upon him, by the

defendant concerned. However, even if the learned trial Judge, has omitted to do so, rather thereafter has proceeded, to offer opportunities, she yet has not committed any illegality, (i) as apparently she has ensured, that before the apposite order hence determining, the, bestowment, of, apposite authorization by the defendant, upon his counsel, is rendered, ascertainments, be made, vis-a-vis veracity thereof, by apt insistence qua, the, relevant correspondence(s) occurring inter-se both being placed on record. The apt insistence of the learned trial Judge vis-à-vis, the aforesaid correspondence(s), being placed on record, is an endeavour thoroughly ingrained, with, a holistic justice oriented spirit (ii) besides has ensured obviations, of, hence the defendant rather contriving pretexts, to, prolong, and, protract, the, trial of the suit.

5. There is no merit in the instant petition and the same is accordingly dismissed, with costs of Rs. 15,000/- being imposed upon the defendant. All pending application(s) also stand disposed of. The parties are directed to appear before the learned trial Court on **7.6.2018**. The learned trial Court is directed to complete the trial of Civil Suit No. 268-10 of 15/12, within nine months hereafter.

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

Dinesh Handa .....Appellant.

Versus

Inter Communion House Development and Finance Co. Ltd. & others. ....Respondents.

RFA No. 290 of 2005
Decided on : 22.5.2018

Specific Relief Act, 1963- Section 10- Suit for specific performance – Plaintiff company filing suit for specific performance of agreement to sell land – Trial Court partly decreeing suit but for refund of amount with interest and proportionate costs – Appeal by defendant – High Court found that the plaintiff/company stood dissolved in the year 2010 and was struck off from rolls by Registrar of Companies – Held, the juristic personality of company stood extinguished in the year 2010, therefore, decree of trial court had become unexecutable – Appeal allowed – Decree of Trial Court set aside – Suit dismissed. (Paras-1 to 3)

For the appellant: Mr. Janesh Mahajan, Advocate.

For the respondents: Mr. Imran Khan, Advocate, for respondent No.1.
Mr. Divya Raj Singh, Advocate, for respondent No.3.
Mr. Anand Sharma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff company, instituted, a suit for specific performance, against, the defendants. The learned trial Court partly decreed the suit of the plaintiff company, by its, ordering for realization from the defendants' concerned, an amount of Rs. 2,30,000/- along with proportionate costs, and, interest at the rate 6% p.a., from, the date of institution of the suit, till, realization of the decretal amount. The defendants being aggrieved therefrom, hence instituted, the, instant appeal before this Court. However, during the pendency of the instant appeal before this Court, an application cast under the provisions of Order 41 Rule 27 CPC, was moved before this Court by the aggrieved defendants, wherein they sought the leave of this Court to place on record Ext. DW-3/A, Ext. DW-3/B, and, Ext. DW-3/C, (i) wherein unfoldments, are, borne vis-à-

vis the decree holder plaintiff company being no longer in existence, given, it being struck off, from, the rolls, in, the year 2010, by the Registrar of Companies. The apposite leave as asked, for, by the aggrieved defendants from this Court, was, hence granted. Thereafter, one Anil Kumar, employed, as a Junior Technical Assistant, in, the office of the Registrar of Companies, rendered a testification, on, 12.8.2018, wherein he has proven, the, apt contents, borne, in the aforesaid exhibits. His testification, was, subjected, to, an ordeal of an exacting cross-examination, yet, in the apposite ordeal, the counsel for the defendants', was, unable to elicit any articulation from him, for hence ripping apart, the veracity, of, the afore exhibits. Nowat with the plaintiff, being a juristic person, and, also acquiring, a, juristic personality, in pursuance to it being registered, with, the Registrar of Companies, (ii) whereas in the year 2010, after a pronouncement in the affirmative, being made upon the plaintiff's suit, for, specific performance, and, during, the, pendency of the instant appeal before this Court, hence, the, apt dissolution besides extinguishment, of, its corporate, and, juristic personality has occurred, thereupon, the sequel thereof, is qua the decree being hence rendered unabled, for, its efficacious execution.

2. In aftermath, with the apposite decree being rendered inefficacious besides with the plaintiff company being no longer in existence, whereupon even if the appeal fails, it is still not amenable, for its being put into coercive execution, thereupon the plaintiff, is, non-suited, and the appeal rather enjoins its being allowed.

3. In view of the above observations, the appeal is allowed. All pending applications stand disposed of accordingly.

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

Indu Bala .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No. 548 of 2018

Decided on: 22.5.2018

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- Petitioner, sister-in-law(Nanad) of deceased was named as one of the accused in an FIR registered for offences under Sections 304-B, 498-A read with 34 IPC and Section 4 of Dowry Prohibition Act – The allegations against petitioner being that she used to torture deceased whenever she (petitioner) visited her parental house – Deceased died because of burn injuries received on 13.4.2018- Petitioner seeking pre-arrest bail on ground that her involvement in the case is not made out – High Court found that petitioner was married to one 'R' in 2010 and since then she was residing with her husband - She used to visit her parental house occasionally – Petitioner was not present in her parental house when incident had happened – Her custody was not required by police for further investigation - She had joined the investigation – Petitioner enlarged on pre-arrest bail but subject to conditions.

(Paras-8 to 12)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49

Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218

Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496

For the Petitioner Mr. T.S. Chauhan, Advocate.

For the Respondent Mr. S.C. Sharma and Mr. Dinesh Thakur, Additional Advocate Generals with Amit K. Dhumal, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Indu Bala, has approached this Court in the instant proceedings, filed under Section 438 of Cr.PC, for grant of anticipatory bail in respect of FIR No. 38/18 dated 13.4.2018, under Sections 498-A, 304-B & 34 IPC and Section 4 of Dowry Prohibition Act, registered at PS Nadaun, District Hamirpur, H.P.,

2. Sequel to order dated 8.5.2018, SI Rajesh Kumar, I/O P.S. Nadaun, District Hamirpur, H.P., has come present along with records. Record perused and returned. Mr. Dinesh Thakur, learned Additional Advocate General, has also placed on record status report prepared on the basis of investigation carried out by the Investigating Agency.

3. Careful perusal of record/status report reveals that complainant namely Rajesh Kumar, alleged that he had solemnized marriage of his daughter namely Kanchan Sharma, in the month of August, 2016, with one Pardeep Kumar, S/o Dhani Ram, as per Hindu Rites. In December, 2017, Kanchan Sharma, gave birth to one baby boy, whereafter she came to her maternal house and disclosed to her parents that her in-laws harass/torture her for dowry. Complainant further alleged that his daughter also disclosed to him that her father-in-law, mother-in-law, sister-in-law and brother-in-law, not only mentally torture her but persistently, ask her to bring dowry. On 13.4.2018, complainant gave a telephonic call to the father-in-law of his daughter (Kanchan Sharma), to know the well being of his daughter, but he was informed that his daughter (Kanchan Sharma), has been burnt. On the basis of aforesaid, complaint, FIR detailed herein above, came to be lodged against the accused persons named in the FIR including the present bail petitioner, who happened to be sister-in law of the deceased Kanchan. As per investigation, present bail petitioner was married in October, 2010, and since then, she has been residing with her husband namely Raman, who works in M.E.S at Yol Cantt. Investigation further reveals that bail petitioner though resides at Yol Cantt, District Kangra, but she oftenly visits her parents house at Kotla. Lastly, present bail petitioner had come to her maternal house on 27.12.2017, at the time of delivery of the deceased Kanchan.

4. Mr. T.S. Chauhan, learned counsel representing the petitioner while referring to the record/status report vehemently argued that no case, if any, is made out against the bail petitioner, because there is nothing in the investigation, from where, it can be inferred that on the date of alleged incident, bail petitioner was at Kotla with her parents. He further stated that there is no specific evidence available on record suggestive of the fact that present bail petitioner ever harassed/tortured the deceased for dowry. He further contended that since bail petitioner has already joined the investigation in terms of order dated 8.5.2018, there is no occasion for her custodial interrogation and as such, she may be released on bail.

5. Mr. Dinesh Thakur, learned Additional Advocate General, on instructions from Investigating Officer, who is present in Court, though fairly admitted that bail petitioner has joined the investigation in terms of order dated 8.5.2018, but opposed the prayer for grant of bail made on her behalf by stating that keeping in view the gravity of offence allegedly committed by the bail petitioner, she is not entitled to be released on bail. Mr. Thakur, further stated that though it has come in the investigation that present bail petitioner was married and staying at place called Yol Cantt, District Kangra, H.P., but used to visit her parental house frequently and during this period, she had been harassing the deceased Kanchan, for not bringing appropriate dowry. Mr. Thakur, fairly admitted that at this stage, nothing is to be recovered from the bail petitioner and in case, this Court intends to enlarge her on bail, she may be enlarged on bail subject to condition that she shall always make herself available for investigation as well as trial as and when required by the Investigating Agency.

6. Having heard the learned counsel for the parties and perused the record, this Court finds that present bail petitioner, who happened to be sister-in–law of the deceased Kanchan, resides at Yol Cantt. since year, 2010 with her husband Raman, who works in M.E.S at

Yol Cantt. Similarly, there is nothing on record suggestive of the fact that on the date of alleged incident, present bail petitioner was present at Kotla, where allegedly deceased Kanchan, was burnt. Though, aforesaid aspects of the matter are to be considered and decided by the court below on the basis of the evidence collected on record by the prosecution, but this Court taking note of the fact that bail petitioner has already joined the investigation as has been fairly admitted by the learned Additional Advocate General and nothing is required to be recovered from her, sees no reason for custodial interrogation of the bail petitioner and as such, she deserves to be enlarged on bail.

7. Needless to say, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by the prosecution by leading cogent and convincing evidence. It is well settled that till the time a person is not found guilty, one is deemed to be innocent. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh v**s. **State of Uttar Pradesh & Anr.,** decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court has further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to***

consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

8. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

9. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. In **Manoranjana Sinh Alias Gupta** versus **CBI** 2017 (5) SCC 218, The Hon'ble Apex Court has held as under:-

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

11. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

12. Consequently, in view of the above, order dated 8.5.2018, passed by this Court, is made absolute, subject to the following conditions:

a. She shall make herself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. She shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. She shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the Court or the Police Officer; and

d. She shall not leave the territory of India without the prior permission of the Court.

13. It is clarified that if the petitioner misuses her liberty or violates any of the conditions imposed upon her, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The bail petition stands accordingly disposed of.

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

Ram Lal ....Petitioner
Versus
Central Bureau of Investigation ....Respondent

Cr.MP(M) No. 60 of 2018
Decided on: 22nd May, 2018

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Grant of – CBI in its inquiry conducted on court orders, finding misconduct on part of applicant, a police officer – CBI also registering FIR against applicant under various penal provisions – Allegations against applicant being that he by threatening complainant 'R' to implicate him in a drug case, demanded Rs. 20 lacs – Accused-applicant submitting that he got many drug peddlers convicted and FIR aforesaid against him was result of enmity – CBI contesting bail on ground that custodial interrogation was necessary - On finding that applicant/accused is a police officer and there is no chance of his fleeing away or tampering with evidence, High Court granted conditional pre-arrest bail.

(Paras-5 and 8)

Case referred:
Virupakshappa Gauda and another vs. State of Karnataka and another, (2017) 5 SCC 406

For the petitioner: Mr. Peeyush Verma, Advocate.
For the respondent/State: Mr. Anshul Bansal, Advocate.
Shri R.D. Sharma, Deputy Superintendent of Police, ACB, CBI.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been moved by the petitioner under Section 438 of the Code of Criminal Procedure for releasing him on bail, in the event of his arrest, in case FIR No. RC0962017A0008, dated 15.12.2017, under Sections 167, 193, 195, 347, 389, 384 and 511 read with Section 120B IPC and Sections 7, 13(2) and 13(1)(D) of the Prevention of Corruption Act and Section 58 of the NDPS Act, Police Station CBI, ACB, Shimla, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be released on bail.

3. Police report stands filed. Pursuant to order dated 12.05.23017 passed by Co-ordinate Bench of this Court, inquiries were conducted in complaints so submitted by Ravi Kumar and Ramesh Chand, father of Ravi Kumar. Complainant, Ravi Kumar, has maintained a petition under Section 439 Cr.P.C. seeking his bail in case FIR No. 21 of 2016, registered at Police

Station, Sadar, District Mandi, H.P., registered under Sections 20, 61 and 85 of the Narcotic Drugs & Psychotropic Substances Act (ND&PS Act) and under Section 181 of the Motor Vehicles Act. On 12.05.2017 during the hearing of the bail petition of Ravi Kumar an inquiry was ordered to be conducted upon the allegations so made by Ravi Kumar and Ramesh Chand. Upon culmination of inquiry, including the present petitioner, the then ASI, PS Sadar, District, Mandi, H.P., three more persons i.e., Manjeet, son of Shri Ramphal, resident of Village Diluwala, District Jind, Haryana, Pradeep Kumar, the then Cosntable, PS Sadar, District Mandi, H.P., and Jai Lal, the then SI, PS Sadar, Distfict Mandi, H.P. were found to have done gross misconduct. Therefore, required permission from HO, CBI, New Delhi, was taken for conducting inquiry. On 01.12.2017 a detailed status report was submitted in this Hon'ble Court and pursuant to order passed on 01.12.2017 by Co-ordinate Bench of this Court, FIR No. RC 0962017A2017, dated 15.12.2017, was registered against the petitioner in the CBI, ACB, Shimla Branch. The allegations against the petitioner are precisely that he had demanded rupees twenty lac from Ravi Kumar and he threatened him that in case he fails to pay the money, he would be implicated in a false case of Narcotics. As per the investigation, there is involvement of the petitioner in the offence and in case the petitioner is released on bail, there is every possibility that the petitioner may influence the witnesses by threatening or inducing them and will try to dissuade the prosecution witnesses from disclosing facts to CBI, so it is prayed that the present bail application may be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Counsel for the respondent (CBI) and gone through the record, including the reply of the CBI, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner is innocent and he is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be released on bail. He has further argued that the petitioner has been instrumental in getting many persons convicted while he was posted as Investigating Officer and now in order to settle score with him he has been implicated falsely by those persons. Conversely, Mr. Anshul Bansal, learned counsel for the CBI, has argued that custodial interrogation of the petitioner is required, as the involvement of the petitioner has been clearly found in the inquiry conducted by the CBI. He has further argued that many recoveries are yet to be effected. There is every possibility that the petitioner may tamper with the prosecution evidence, in case he is released on bail. He has relied upon a judgment of Hon'ble Supreme Court rendered in ***Virupakshappa Gauda and another vs. State of Karnataka and another, (2017) 5 SCC 406.*** The petitioner has committed a serious offence, thus the bail application of the petitioner may be dismissed.

6. The Hon'ble Supreme Court in ***Virupakshappa Gauda and another vs. State of Karnataka and another, (2017) 5 SCC 406,*** vide para 15, has held as under:

> *"15. The Court has to keep in mind what has been stated in Chaman Lal v. State of U.P. ((2004) 7 SCC 525). The requisite factors: (i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (iii) prima facie satisfaction of the court in support of the charge. In Prasants Kumar Sarkar v. Ashis Chatterjee (((2010) 14 SCC 496), it has been opined that while exercising the power for grant of bail, the court has to keep in mind certain circumstances and factors. We may usefully reproduce the said passage:*
>
> *"9. … among other circumstances, the factors which are to be borne in mind while considering an application for bail are:*
>
> *(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
>
> *(ii) nature and gravity of the accusation;*
>
> *(iii) severity of the punishment in the event of conviction;*
>
> *(iv) danger of the accused absconding or fleeing, if released on bail;*

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail."

7. At the very outset, it is seen that the petitioner has successfully investigated many cases and in many cases accused were convicted. At this moment, this Court has considered the vital parameters for grant of bail, which have been enunciated by Hon'ble Supreme Court in ***Virupakshappa Gauda's*** case (supra).

8. As far as reasonable ground to believe that the petitioner has committed the offence or not, is concerned, in the present case, it is a matter of evidence. Considering the gravity of accusation, viz-a-viz other aspects of the case, which have come on record, including the sentence, which can be awarded to the petitioner in the event of conviction, and as far as the petitioner is concerned, he is not in a position to flee from justice, as from the last many years he is employee of Himachal Pradesh Government and nowadays he is posted at different place, this Court finds that there is subtle possibility that he may repeat the offence and he is also not in a position to influence the witnesses. Keeping in view the overall aspects of the case and analyzing the same with the law, as extracted above, the present is a fit case where the judicial discretion to admit the petitioner on bail, in the event of his arrest, is required to be exercised in his favour. Under these circumstances, it is ordered that the petitioner be released on bail, in the event of his arrest, in case FIR No. RC0962017A0008, dated 15.12.2017, under Sections 167, 193, 195, 347, 389, 384 and 511 read with Section 120B IPC and Sections 7, 13(2) and 13(1)(D) of the Prevention of Corruption Act and Section 58 of the NDPS Act, Police Station CBI, ACB, Shimla, H.P., on his furnishing personal bond to the tune of Rs.50,000/- (rupees fifty thousand only) with one surety in the like amount to the satisfaction of the Investigating Officer. The bail is granted subject to the following conditions:

(i) That the petitioner will join investigation of the case as and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner 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 Investigating Officer or Court.

9. In view of the above, the petition is disposed of. Copy *dasti*.

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

M/s National Hydroelectric Power Corporation Ltd. and others ....Petitioners.

Vs.

Shri R.C. Rana and others .....Respondents.

CWP No.: 710 of 2011
Reserved on: 22.03.2018
Date of Decision: 23.05.2018

Industrial Disputes Act, 1947- Section 2A- Reference to Labour Court- 'Appropriate Government'- Which is ? - State Government making a reference of industrial dispute concerning workmen of National Hydroelectric Power Corporation Ltd. (NHPC) to Labour Court – NHPC

contending before Labour Court that State Government was not Appropriate Authority for making reference – And reference, if any, ought to have been made by Central Government –NHPC also relying upon notification dated 30.5.2007 of Ministry of Labour and Employment, Government of India clarifying that Central Government would be 'Appropriate Authority' under the Act with respect to establishment of NHPC – However, Labour Court relying upon Industrial Disputes (Amendment) Bill, 2002 for holding that State Government would be 'Appropriate Authority' with respect to all industrial disputes arising within its territorial jurisdiction – On that premise, Labour Court entertaining reference and allowing claim of workmen – Petition against – Held, Industrial Disputes (Amendment) Bill, 2002 was never passed by the Legislature and made law of land – Therefore, 'Appropriate Authority' with respect to establishment of NHPC was the Central Government – Reference of Industrial Dispute, if any, was to be made by Central Government and not by State Government – Reference of dispute by State Government itself was illegal – Petition allowed – Award of Labour Court set aside. (Paras-13 to 16)

For the petitioners:	Mr. K.D. Shreedhar, Senior Advocate, with Mr. Samir Thakur, Advocate.
For the respondents	Mr. Ashwani Pathak, Senior Advocate, with Mr. Sandeep Sharma, Advocate, for respondents No. 1 to 3 and 7. Respondents No. 4 to 6 and 8 to 10 *ex parte.* None for respondent No. 11.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *:*

By way of this petition, the petitioners have challenged award dated 20.08.2010, passed by the learned Industrial Tribunal-cum-Labour Court, Dharamshala in Ref. No. 188/2002, titled as *Sh. R.C. Rana and others Vs. National Hydroelectric Power Corporation Ltd. And others.*

2. Respondents/workmen before this Court raised an industrial dispute, which culminated into the State Government of Himachal Pradesh seeking a determination of the following reference from the learned Labour Court:

> "*ki kya sarav Shri R.C. Rana, Ramesh Chand Sharma, Gurdev Chand, Gagan Singh, Om Parkash Sharma, Gandhi Ram, Jai Singh, R.K. Singh Thakur, Ramesh Kumar, Subhash Chand Sahotra, Bishan Charan, Ravinder Kumar, P.N. P. Nayar, Kishan Chand, Antoni Butt, Pyare Lal thatha Anil Kumar ko Chariman aum Prabandh Nideshak, National Hydroelectric Power Corporation Ltd. Sector 33, Karyala Complex, Faridabad, Haryana-121003 dwara Maha Prabandhak/Incharge, Manager Chamera Jal Vidyut Pariyojna Stage-1 Kheri, Zila Chamba ke madhyum se maangkarta Sahayak Grade-III ke pad par anya 40 karamcharayon jinehey dinank 15/5/1985 se Sahayek Grade-II ke pad par padonit/niyukt kiya gaya hai se warishit hone ke aadhar par dinanak 1/1/1985 se Sahayak Grade-II ke pad par padonit/niyukt nahi karne ki karyawahi uchit wa nayoyochit hai? Yadi nahi, to uproket mmmangkarta Kaamgar uproket Niyojak paksh se kis poorve waiten, sewa labhon, warishttha, samaya-samaya par deya warsh, 1985 ke pashchat padanotiyan aur rahat ke patar hai?*"

3. As per the claim petition filed by the respondents/workmen (hereinafter referred to as "the workmen"), they were appointed by the Management of National Hydroelectric Power Corporation Ltd. at Baira Siul Project Surangan and Chukhla Transmission System and Chamera Hydroelectric Project, respectively against the post(s) of Assistant Grade-III in the pay scale of Rs.260-430/- through a process of internal induction from work charge cadre to regular cadre. As per them, before their induction into regular cadre, they were performing the same duties in the

respective Projects as were being performed by the regular cadre Assistant Grade-III. Though they were allowed the benefits of earned leave, HPL, gratuity and EPF, however, the services rendered by them as work charge were not counted towards the minimum qualifying period for promotion against the post of Assistant Grade-III and Assistant Grade-II. Further, as per the workmen, before their transfer to Chamera Hydroelectric Project as Assistant Grade-III, the Project proponent had appointed 40 Assistant Grade-III by way internal induction from amongst the Work Assistants of Baira Siul Project. All these 40 persons were junior to the workmen/claimants. Said 40 workmen were appointed as Assistant Grade-II w.e.f. the date of their joining vide order dated 26.05.1995 and were promoted against the post of Assistant Grade-I w.e.f. 01.07.1990. As per the claimants, they were rendered junior to the said 40 persons.

4. In this background, in the claim petition, following prayers were made:

"(a) To direct the respondents to promote/place the petitioners in the pay scale 330-560 (pre revised) as Asstts. Grd.II w.e.f. 01.01.1985 or prior to the date of joining of these 40 Assistants Grd.II, whose names and their date of joining are mentioned in Annexure P-6.

OR

To direct the respondents to count the services of the petitioners rendered in same or higher pay scale in workcharged cadre towards the minimum qualifying period for promotion from the post of Asstt. Grd.III to Asst. Grd.II.

(b) To promote the petitioners in the pay scale of 1450-2440 w.e.f. 1.1.90 or 1.7.90 and place the applicants in senior position in the Seniority list than these 40 Assistants.

(c) To direct the respondents for production of records pertaining to case of petitioners, being custodian of records as employer.

(d) Any other relief as the Hon'ble Court may deem fit."

5. The same was resisted by the Management.

6. On the basis of the pleadings of the parties, the learned Labour Court framed the following issues"

"1. Whether the action of the respondent is not fair, proper and just in appointing/promoting 40 employees vide order dated 15.5.1985 as Assistant Grade-II over and above the seniority of the petitioners, who are entitled to be promoted as Asstt. Grade-II w.e.f. 1.1.1985, as alleged? OPP

2. If issue No. (1) is proved in affirmative, to what service benefits, the petitioners are entitled to? OPP

3. Whether the claim of the petitioners is highly belated and deserves dismissal on the ground?OPR

4. Whether the petitioners have not come to the Court with clean hands, if so is effect? OPR

5. Whether the claim of the petitioners is bad for non-joinder of necessary parties as alleged?OPR

6. Relief."

7. Said issues were answered as under by the learned Labour Court:

"Issue No. 1:	*Yes.*
Issue No. 2:	*As per the operative part of the award.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*

Issue No. 5: *No.*

Relief: *Allowed as per the operative part of the award."*

8. The reference was disposed of by granting the following reliefs in favour of the claimants:

> *"26. For all the reasons discussed hereinabove, the reference is allowed. The respondents are directed to grant the same benefits to the petitioners as were granted to the 40 workmen. The petitioners are liable to be placed as Assistant Grade-II in the scale of Rs.330-560 (pre revised) at least from the date the said 40 workmen were appointed as such, though keeping in view their inter se seniority in the Assistant Grade-III, with all consequential benefits. The reference is answered accordingly. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion consigned to the record room."*

9. While deciding Issues No. 1 and 2, learned Labour Court held that claimants being senior to the 40 workmen even as Assistant Grade-III, were entitled to the same benefits as their juniors were given. It further held that if not senior, then the claimants had to be placed as Assistant Grade-II in the pay scale of Rs.330-560 (pre-prevised) from the date 40 workmen were granted the said benefits. It further held that as the claimants were senior to the said 40 workmen in their Grade, the action of the respondents in promoting the said 40 workmen as Assistant Grade-II over and above them was illegal, arbitrary and unjust. Learned Labour Court held that the claimants were entitled to be placed as Assistant Grade-II in the pay scale of Rs.330-560 (pre-revised) at least from the date the said 40 workmen were appointed as such, taking into consideration the seniority of the claimants.

10. Feeling aggrieved, the employer-Corporation has filed the present writ petition.

11. Learned senior counsel for the petitioner has argued that the award in issue is not sustainable in the eyes of law, as learned Labour Court while passing the impugned award erred in not appreciating that the Reference made to the learned Labour Court was not maintainable in the eyes of law, as for the purpose of the present petitioner-Corporation, it was not the State of Himachal Pradesh, which was "Appropriate Government", but the "Appropriate Government" was the Central Government. In order to substantiate his contention, learned senior counsel has drawn the attention of this Court to a notification appended with the petition as Annexure P-10 (page-93), i.e., notification dated 30.05.2007 addressed by the Under Secretary, Government of India, Ministry of Labour & Employment, New Delhi to the Deputy Chief Labour Commissioner (C), Government of India, Ministry of Labour & Employment, on the subject *"Appropriate Government in respect of the National Hydroelectric Power Corporation Ltd. (NHPC) in view of the Hon'ble Supreme Court's Judgment dt.15.07.2002 in Case of 'Tajdin Vs. Chief Engineer-Incharge DHEP and another (Special leave to appeal (CRI) No. 557/2002)",* which reads as under:

> *"Sir,*
>
> *I am directed to refer to your letter No. 95(Gen)/2007/C dt. 2.2.2007 addressed to CLC (C), New Delhi regarding 'Appropriate Government' in respect of National Hydroelectric Power Corporation Ltd. (NHPC Ltd.).*
>
> *The matter has been examined in this Ministry, in the light of the judgment of Hon'ble Supreme Court in the cae of Tajdin Vs. Chief Engineer-Incharge DHEP and another (Special Leave to appeal (CRI) No. 557/2002) and in consultation with Chief Labour Commissioner (Central). It is clarified that the Central Government is the "Appropriate Government" for the establishment of National Hydroelectric Power Corporation Ltd. (NHPC Ltd.), under the Industrial Disputes Act, 1947, Contract Labour (Regulation & Abolition) Act, 1970 and Payment of Bonus Act, 1965.*
>
> *This issues with the approval of Joint Secretary (IR)."*

12. I have heard learned counsel for appearing parties and have also gone through the award passed by the learned Labour Court.

13. A perusal of the impugned award demonstrates that while holding that the Government of Himachal Pradesh was the appropriate authority qua the employer/National Hydroelectric Power Corporation Ltd. as far as Industrial Disputes Act is concerned, learned Labour Court relied upon the notification so issued by the Central Government dated 30.08.2001. Learned Labour Court did not refer to the subsequent notification issued by the Ministry of Labour & Employment dated 30.05.2007. Not only this, learned Labour Court overlooked the observations made by the Hon'ble Supreme Court in T*ajdin Vs. Chief Engineer Incharge, D.H.E.P. & Anr,* SLP No. 557/2002 by holding that neither the said judgment laid down any preposition of law nor the amended provisions of the Industrial Disputes Act as discussed were brought to the notice of the Hon'ble Supreme Court. Learned Labour Court while holding that appropriate Government for the purpose of workmen-Corporation was the State Government Himachal Pradesh, relied upon the Industrial Disputes (Amendment) Bill, 2002 in the following terms:

> *"13. From the perusal of the documents placed on record, it is amply clear that the Central Government in its wisdom has delegated the powers of the appropriate Govt. to the State except in respect of the industrial establishment falling clause 25-L(b) of the Act. Not only this the industrial disputes (amendment) Bill 2002, which has been duly published in the gazette of India on 9th May, 2002. Section 2 of the Industrial Disputes Act has been amended in respect of clause (a) to read thus:*
>
> > *"(a) Appropriate Government means, the government of all the States or Union territory, as the case may be in relation to all the industrial dispute concerning any industry or its unit in whose territorial jurisdiction that industry or units is situated."*
>
> *14. The bare reading of the Section shows that after the year 2002 it has been mandated that the State Governments shall be appropriate Government for the purposes all the industrial disputes arising in its respective territorial jurisdiction. The amendment discussed hereinabove was published in the gazette as far back as May, 2002. Unfortunately the amendment is not carried in any of the publications thereafter. No bare act carries the said amendment. In fact the said amended provisions came into force after the judgment rendered by the Hon'ble Supreme Court in Steel Authority of India Limited Vs. National Union water front Worker and Ors. Case. As such, the contention of the respondents that the State Government is not the appropriate Government to refer the dispute is devoid of any merit and is and unsustainable in the eyes of law. No doubt a subsequent judgment passed by the Hon'ble Supreme Court was also referred to by the respondents titled as Tajdeen Vs. Chief Engineer DHEP. The said judgment does not lay any preposition of law and moreover the amended provisions of the Industrial Disputes Act, discussed hereinabove was never brought to the notice of the Hon'ble Supreme Court."*

14. In my considered view, the findings returned by the learned Labour Court while holding that the State Government of Himachal Pradesh was Appropriate Government by relying upon the contents of an Amendment Bill, are totally perverse and not sustainable in law. It is a matter of record that Section 2-A of the Industrial Disputes Act, as it stands today, provides for the purpose of the petitioner-Corporation, the Central Government to be the Appropriate Government. Not only this, this fact is further fortified by notification dated 30.05.2007 (*supra*), wherein the Central Government has clarified that it is the Central Government which is the Appropriate Government for the establishment of National Hydroelectric Power Corporation Ltd. under the Industrial Disputes Act. It is pertinent to mention that the words used in this communication, which has been issued in the year 2007, are "it is clarified". In my considered view, because the words contained in this communication are "it is clarified", therefore, it has to

be assumed for all intents and purposes that it was the Central Government which was the Appropriate Government for the establishment of National Hydroelectric Power Corporation even before issuance of communication dated 30.05.2007. This is for the reason that neither the language nor the intent of notification dated 30.05.2007 is suggestive of the fact that the contents thereof were prospective in nature. Be that as it may, the statutory provisions of Section 2-A of the Industrial Disputes Act itself leave no ambiguity read with notification dated 30.05.2007 that it is the Central Government which is the Appropriate Government for the establishment of National Hydroelectric Power Corporation Ltd. under the Industrial Disputes Act.

15. Another important aspect of the matter which is needed to be highlighted is this that not only learned Court below passed the award on the basis of the proposed amendment, but then it justified, its placing reliance upon proposed amendment, by stating that the amendment being relied upon was published in the Gazette as far back as in May, 2002, but unfortunately, amendment has not been carried out in any publication thereafter. Learned Labour Court went on to hold that no bare Act carries the said amendment.

16. While returning these reasonings, learned Labour Court erred in not appreciating that till the time the Amendment Bill of 2002 became a law, it was a Bill for all intents and purposes and it could have had substituted the existing statutory provisions of Section 2-A of the Industrial Disputes Act.s This very important aspect of the matter has been ignored by the learned Labour Court, which has rendered the award passed by it as *void abinitio*. Therefore, in my considered view, as it was not the State Government which was "Appropriate Government" for the establishment of NHPCL under the Industrial Disputes Act, learned Labour Court erred in not appreciating that the Reference which made to it by the Appropriate Government, i.e., the State of Himachal Pradesh was no Reference in the eyes of law and findings to the contrary recorded by the learned Labour Court are completely unsustainable in law and, therefore, liable to be quashed and set aside. Ordered accordingly.

17. In view of above, this writ petition succeeds. As the Reference made by the Government of Himachal Pradesh was not a valid Reference, the award dated 20.08.2010 passed upon the same by the learned Labour Court is *void abinitio* and is hence quashed and set aside.

Petition stands disposed of, so also miscellaneous applications, if any. No order as to costs.

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

Sh. Parmodh Kumar and others ....Petitioners.

Vs.

Sh. Joginder Singh .....Respondent.

Civil Revision No.: 108 of 2018
Date of Decision: 23.05.2018

Code of Civil Procedure, 1908- Section 115- Order VI Rule 17 – Amendment of pleadings – Defendant filing application for amendment of written statement when it was third date for him to lead evidence – Defendant taking plea that purported mistake intended to be corrected by way of amendment came to his notice only at the time of preparing for evidence - Trial Court dismissing application of defendant by observing that explanation furnished by defendant was not cogent – Petition against - Held, application was nothing but an abuse of process of law as no evidence was produced on earlier dates – Application was filed to prolong the matter – Trial Court had not exceeded its jurisdiction nor it had not exercised jurisdiction vested in it – Further, order doesn't suffer from any material illegality – Petition dismissed. (Paras- 6 to 10)

For the petitioners: Mr. Shanti Swaroop, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Section 115 of the Code of Civil Procedure, the petitioners have challenged order dated 06.02.2018, passed by the Court of learned Civil Judge, Court No. II, Una, H.P. in CMA No. 242 of 2018 in Civil Suit No. 515 of 2013, vide which, an application filed by the petitioners/defendants for amendment of written statement stands dismissed by the learned Trial Court.

2. I have heard the learned counsel for the petitioners and have also gone through the records appended with the petition including the impugned order dated 06.02.2018.

3. A perusal of the impugned order demonstrates that what weighed with the learned Trial Court while dismissing the application so filed for amendment of the written statement was that issues in the case stood framed as far back as in the year 2013 and the recording of the evidence of the plaintiff was also complete on 06.05.2017. Thereafter, on two dates, no evidence was led by the defendants and on the 3rd date, an application was filed under Order 6 Rule 17 of the Code of Civil Procedure praying for amendment of the written statement. Learned Trial Court further held that the only explanation given as to why the application under Order 6 Rule 17 of the Code of Civil Procedure was filed at such a belated stage was that the purported mistake which was intended to be corrected by way of proposed amendment came into the notice of the defendants only at the time of preparing for evidence. Learned Trial Court held that no cogent explanation was furnished by the defendants as to why the application could not be filed at an early stage by the defendants and further, from the suggestions which were put forth to the plaintiff's witnesses in the course of their cross-examinations, it was difficult to accept the averments made by the applicants in the application.

4. During the course of arguments, learned counsel for the petitioners could not point out as to what was the perversity in the findings so recorded by the learned Trial Court.

5. In exercise of its powers under Section 115 of the Code of Civil Procedure, this Court has to see as to whether the impugned order has been passed by a Court either in excess of jurisdiction conferred upon it or by not exercising the jurisdiction conferred upon it or by exercising jurisdiction conferred upon it but with material irregularity.

6. In my considered view, it cannot be said that the impugned order which has been passed by the learned Trial Court is without jurisdiction. Neither it is the case of the petitioners that the Trial Court has not exercised jurisdiction conferred upon it, because admittedly, the application which was so filed before it, stands adjudicated by it. Now, as far as the issue of material irregularity is concerned, in my considered view, it cannot be said that the impugned order in any manner suffers from material irregularity.

7. Order 6 Rule 17 of the Code of Civil Procedure reads as under:

> *"Order VI, R. 17. Amendment of pleadings.-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*
>
> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*

8. Thus, it is apparent from the statutory provisions itself that in case an amendment is to be allowed by a Court of law, then the said Court has to be satisfied that in spite of due diligence, the party could not have raised the matter earlier.

9. It is by way of a reasoned order that learned Trial Court has held that the applicants could not demonstrate that despite due diligence the proposed amendment could not be sought by them at the earliest. Further, in my considered view, as the application was filed on the 3rd date when the matter was listed for recording of the evidence of defendants, filing of the said application was nothing but an abuse of the process of law as, admittedly, the defendants had failed to lead any evidence on the earlier date. Thus, filing of the application even otherwise appears to be an exercise which was undertaken just to prolong the matter.

10. Therefore, as this Court does not finds any infirmity with the impugned order dated 06.02.2018 and as there is no merit in the present petition, the same is dismissed. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

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

Smt. Tol Dassi .....Appellant

Versus

Smt. Nathi and others. .....Respondents

R.S.A. No. 85 of 2007
Reserved on: 15.5.2018
Date of decision:23.5.2018

Indian Succession Act, 1963- Section 63- Attestation of Will – Proof of – Held, examination of at least one attesting witness to will who is alive and subject to process of court, is necessary – Defendant No.1 relying upon Will executed by 'T' and attested by 'J' and 'R' – Defendant not examining 'J' or 'R' to prove execution and attestation of Will – One 'D' examined by defendant No.1, had actually signed the Will as 'identifier' and not as attesting witness – Execution of Will otherwise was surrounded by suspicious circumstances like (i) it was registered after three weeks of execution (ii) there was no explanation for delayed registration (iii) recitals of Will were incorrect regarding natural heirs of testator (iv) beneficiary took active part in execution of Will (v) No reason was given for excluding some of legal heirs from bequeath - Held, due execution of Will not proved – RSA of defendant No.1 dismissed – Decrees of lower courts upheld. (Paras-15 to 22)

Case referred:
H. Vekatchala Iyengar versus B.N. Thimma Jamma and others, AIR 1959 SC 443

For the appellants: Mr. K.D. Sood, Sr. Advocate with Mr. Rajnish K. Lall Advocate.

For the respondents: Mr. Sanjeev Kuthiala, Sr. Advocate with Mr. Manoj Bagga, Advocate, for respondents No.1 to 8.
Nemo for respondents No.9 & 10.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellant against the judgment and decree dated 19.01.2007, passed by the learned District Judge, Kullu, H.P., in Civil

Appeal No.46 of 2006, whereby the learned Appellate Court has affirmed the judgment and decree dated 31.5.2006, passed by the Civil Judge (Sr. Division), Lahaul & Spiti at Kullu, H.P., in Civil Suit No.68 of 2004, with the prayer to set aside the impugned judgment and decree passed by the learned Court below.

2. The brief facts giving rise to the present appeal are that the plaintiffs/respondents (hereinafter to be called as "the plaintiffs") maintained a suit that late Shri Thakur Chand son of Shri Shyam Sukh, who was predecessor-in-interest of the plaintiffs, was the owner in possession of land and houses, which have been described in para-1 of the plaint (hereinafter to be referred as the suit property). It has been alleged that Thakur Chand was initially married with one Smt. Katki and out of their wedlock, Smt. Nathi (plaintiff No.1)was born and then said Smt. Katki died and after her death, Thakur Chand got married with one Smt. Ishru (plaintiff No.8). Out of their wedlock, one son, namely Tot Ram and one daughter Aati Devi (plaintiff No.5) were born. It has been alleged that aforesaid Tot Ram pre-deceased Shri Thakur Chand, who expired on 22.3.1999 leaving behind his two sons, namely Sudershan Kumar and Surender Kumar (plaintiffs No.2 and 3) and his wife Smt. Baru (plaintiff No.4). It has been alleged that Shri Thakur Chand, predecessor-in-interest of the plaintiffs again married with Smt. Dassi and out of their wedlock, one son, namely Jyoti (plaintiff No.6) and one daughter namely Lalita (plaintiff No.7) were born and after the birth of the plaintiffs No.6, and 7, said Smt. Dassi contracted second marriage during the life time of Shri Thakur Chand. Shri Thakur Chand, during his life time had been residing with his sons, namely Shri Tot Ram and Shri Jyoti Singh and after the death of Shri Tot Ram, he lived with his grand-sons, namely Sudershan Kumar and Surender Kumar and son Jyoti Singh (plaintiffs No.2,3 and 6), who rendered their services to Shri Thakur Chand and managed his agricultural affairs during his life time and besides this, his daughter, namely Nathi (plaintiff No.1), Smt. Aati (plaintiff No.5), Smt. Lalita (plaintiff No.7) and widow of predeceased son of Sh. Tot Ram also rendered services to Sh. Thakur Chand during his life time and he had great love and affection towards the plaintiffs. It has been alleged that defendant No.1 and proforma-defendants No.2 and 3 are quite strangers having no nexus and relation in any manner with said Thakur Chand. It has been alleged that Shri Thakur Chand never contracted any marriage with defendant No.1 and proforma-defendants No.2 and 3 are not at all daughter of said Thakur Chand. Shri Thakur Chand died on 08.11.2003, leaving behind the plaintiffs, as his sole and exclusive legal heirs and after his death, they have inherited the suit property, as co-owners, in equal shares and they are in peaceful ownership and possession of the same. It has been averred that defendant No.1 in connivance with the revenue officials got mutation No.1656, dated 07.6.2004 qua the suit land entered on the basis of some forged and fictitious Will, dated 30.10.2000, which has been wrongly and illegally attested by the Revenue Officer and the mutation being wrong and illegal is null and void and the plaintiffs are not bound by the same. It has been averred that the plaintiffs are also not bound by wrong and illegal entries showing defendant No.1 as owner-in-possession of the suit land. Defendant No.1 was asked time and again to admit the claim of the plaintiffs, however, defendant No.1 did not listen at all and she has totally refused to admit the claim of the plaintiffs.

3. The defendants filed written statement and took preliminary objections to the effect that the plaintiffs are not in possession of the suit property and the suit for declaration is not maintainable and that the suit is not maintainable for want of Court fee. Further that the learned Court below has no jurisdiction to entertain and try the suit and the suit in the present form is not maintainable. On merits, it has been admitted that the land, as mentioned in sub-paras 1), (ii) and (iii) of the plaint was owned by Shri Thakur Chand. However, it has been submitted that Smt. Dassi abandoned Jyoti Singh at the house of Shri Thakur Chand and contracted second marriage and at that time, Shri Jyoti Singh was of tender age and defendant No.1, brought him up like her own son. It has been averred that Shri Thakur Chand deceased was not residing with Shri Tot Ram and Shri Jyoti Singh and he never resided with his grand-sons, namely Sudershan Kumar and Surender Kumar. In fact Shri Thakur Chand married defendant No.1, during the year 1973-74 and out of this wedlock, two daughters, namely Maya and Pushpa (proforma-defendants) were born to them. It has been averred that late Shri Thakur

Chand executed a legal and valid Will, dated 06.10.2000, which was registered on 30.10.2000 and as per the said Will, the entire estate of Shri Thakur Chand has been inherited by defendant No.1 and she is the absolute owner in possession of the entire estate. It has been stated that mutation No.1656, dated 07.06.2004 has rightly been sanctioned in favour of defendant No.1.

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

"1. Whether the plaintiffs are the joint owners in possession of the suit land, as alleged? ... OPP

2. Whether the plaintiffs are entitled to the prohibitory injunction as prayed for? ... OPP

3. Whether mutation No.1656 is wrong and illegal, as alleged ? ...OPP

4. Whether the plaintiffs have a cause of action? ... OPP

5. Whether the suit is not maintainable in the present form? ... OPD

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

7. Whether this Court has no jurisdiction to hear and decide the present suit? ... OPD

8. Whether late Sh. Thakur Chand executed a valid Will dated 06.10.2000 (registered on 30.10.2000) in favour of the defendant No.1 as alleged. If so, its effect? ... OPD

9. Relief."

5. The learned trial Court decided Issue No.1 partly in favour of the plaintiffs. Issues No.2, 3 and 4 in favour of the plaintiffs and Issues No.5 to 8 against the defendants and decreed the suit partly.

6. The defendants maintained the appeal in the learned lower Appellate Court, which was dismissed. Hence, the present regular second appeal, which was admitted on 17.5.2007, on the following substantial question of law:-

"1. Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence and wrong assumptions from the facts proved on record particularly the due execution of the Will Ext.DW-2/A?

2. Whether in the facts and circumstances of the case Shri Devi Chand in whose presence the Will was executed and he was also attesting witness of the Will and merely because he described as identifier to the due execution of the Will could be treated as a witness to the Will under Section 63 of the Indian Succession Act?

3. Whether alleged suspicious circumstances attached to the execution of the Will were rebutted and defendant legally inherit the estate of Thakur Dass?

4. Whether decree for injunction could be passed against the appellant when admittedly the appellant was found to be co-owner and in possession of the property?"

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

8. Learned counsel for the appellants has argued that the judgment and decree passed by the learned Trial Court is without appreciating the facts, which have come on record

and also taking into consideration the fact that the Will was proved and it is the defendants, who were beneficiaries under the Will. He has also argued that it is the defendants, who served Thakur Chand during his old age and Thakur Chand has also rightly made the Will in favour of the defendants, as the son of the Thakur Chand has not served him in his old age.

9. On the other hand, the learned counsel appearing for respondents No.1 to 8 has argued that the Will is not proved on record as none of the marginal witnesses were produced to prove the Will.

10. In rebuttal the learned counsel for the appellant has argued that one of the witnesses has appeared in the witness box to prove the Will.

11. To appreciate the arguments of the learned counsel for the parties, I have gone through the record of the case, in detail.

12. To prove the execution and attestation of the Will, the propounder of the Will is required to atleast examine one of the attesting witness, as per the provisions contained in the Indian Succession Act and the Will, as per Section 63 of the Indian Succession Act, is required to be attested by atleast two witnesses. The mode of proof of the Will has been prescribed under Section 68 of the Indian Evidence Act, which lays down that the Will can be proved by examining one of the attesting witnesses, who is alive and subject to the process of the Court. The propounder of the Will is not only required to prove the due execution and attestation of Will, but he is also required to dispel all reasons suspicions surrounding the Will. So, in this context, a reference can also be made to an authority of the Hon'ble Supreme Court in the case of ***H. Vekatchala Iyengar*** *versus* ***B.N. Thimma Jamma and others***, AIR 1959 SC 443.

13. To prove the Will, the defendants have produced DW-2 Sh. Chhering and DW-3, Sh. Devi Chand to prove the due execution and attestation of Will, dated 06.10.2000 (Ex.DW-2/B). DW-2, Sh. Chhering was Document Writer at Kullu, who in his affidavit, Ex.DW-2/A, has deposed that Will, Ex.DW-2/B, was scribed by him at the instance of deceased Shri Thakur Chand and the same was read over and explained by him to the testator, who after admitting the contents, put his signatures on the same in the presence of the witnesses.

14. DW-3, Devi Chand has stated that Will, dated 06.10.2000 was executed by deceased Thakur Chand in his presence and in the presence of Jindu Ram and Hari Sain and that he put his signatures on the same in the presence of the witnesses and that thereafter the witnesses also put their signatures on the Will in the presence of the testator.

15. On perusal of the Will, Ex.DW-2/B, it seems that DW-3, Devi Chand has not signed the Will, as an attesting witness, but as an identifier. On the other hand, this Will was attested by Shri Jindu Ram and Hari Sain, who have not been produced by the defendants. DW-3, Devi Chand, who, in his statement has claimed himself to be one of the attesting witnesses, has not explained as to why he had put his signatures on the Will only as an identifier and not as identifier as well as an attesting witness. In his cross-examination, he has admitted that he is facing a trial for preparing a forged document. Therefore, this witness appears to have somewhat dubious past. So, in these circumstances, the version deposed by him with regard to attestation of the Will in question by him does not inspire full confidence. The defendants have not produced Jindu Ram and Hari Sain, who had signed Will, Ext.DW-2/B, as attesting witnesses. It has been stated that Jindu Ram had died prior to the recording of evidence in this case. However, he could not produce any material to show that Jindu Ram had died prior to the recording of evidence in this case. Even if it is assumed that said Jindu Ram had died prior to the recording of evidence, in that event also, the defendants have not explained as to why they did not produce Hari Sain, who was other attesting witness of the Will. Therefore, in the absence of the evidence of atleast one of the attesting witnesses of the Will, the defendants have failed to prove the execution and attestation of the Will in the manner, as envisaged under Section 68 of Indian Evidence Act.

16. The first suspicious circumstance surrounding this Will is that the recitals contained in this Will are not true. This will recites that the testator had only one son Jyoti (plaintiff No.6) and four daughters namely, Smt. Nathi (plaintiff No.1), Smt. Maya (proforma-defendant No.2), Smt. Atti (plaintiff No.5) and Smt. Pushpa (proforma-defendant No.3). In the Will, in question, there is no reference of Sh. Tot Ram, the predeceased son of the testator and his widow and children (plaintiffs No.2 to 4) and daughter Smt. Lalita (plaintiff No.7). It the testator who had executed the Will in the sound state of mind and out of his free will, there was no reason that he would not have made any mention about his predeceased son and his widow and children and also one of his daughter in the Will. Further, the defendants have not explained as to why the recitals contained in the Will do not reflect the true position about the natural heirs of the deceased-testator, which creates reasonable doubt against the genuineness of the Will.

17. The second suspicious circumstance surrounding the Will is its registration after three weeks of its execution. It has come on record that the Will, Ex.DW-2/A was executed on 06.10.2000. DW-3, Devi Chand has stated that the Will could not be registered on 06.10.2000, because it was already 5.30 p.m. and the office of the Sub-Registrar was closed by that time. However, DW-2, Chhering Ram, scribe of the Will has contradicted him on this point and stated that he started scribing the Will at 4.00 p.m. and furnished at 4.30 p.m. Thus, the version deposed by DW-3 that the Will was completed after office hours on 06.10.2000 and as such the same could not be registered on that day appears to be somewhat doubtful. Even if it is assumed that the Will, in question was completed after office hours on 06.10.2000, in that case, the same could have been registered on the next working day. The defendants have not explained as to why the deceased testator did not register this Will for three weeks after its execution. This is also nothing on record to show that the deceased testator was prevented by any sufficient cause to visit Kullu between 07.10.2000 to 30.10.2000. Thus, the registration of Will after three weeks of its execution is a circumstance, which creates reasonable doubt against the genuineness of the Will.

18. The another suspicious circumstance surrounding this Will is that the deceased testator had no valid reasons to disinherit his son Jyoti and widow and children of his pre-deceased son Tot Ram. The Will, Ex.DW-2/A recites that Jyoti was not obedient to the testator nor he was residing with him. However, these recitals stand falsified by the document placed on record by the defendants themselves. Ex.D-3 is a copy of Parivar Register maintained by Gram Panchayat, Bandrol. In this document, Sh. Jyoti alongwith his wife and children have been recorded in the family of deceased testator. PW-1, Jyoti has categorically stated that the deceased testator had great love and affection towards the plaintiffs. DW-1, Smt. Tol Dassi (defendant No.1) has also remained silent about the relationship between the plaintiffs and the deceased testator. Therefore, the deceased testator had no valid reason to disinherit his son Sh. Jyoti (plaintiff No.6). Similarly, he had no reason to disinherit the plaintiffs No.2 to 4, who are sons and widow of the predeceased son of the testator. There is nothing on record to show that these plaintiffs had some property or any other source of income sufficient to maintain themselves. So, in these facts and circumstances, it appears somewhat doubtful that the deceased testator would have disinherited the plaintiffs No.2 to 4 without making any provision for their livelihood. Thus, the bequest made by the deceased through Will, Ex.DW-2/B was unnatural and as such this cannot be held to be genuine.

19. The another suspicious circumstance is that defendant No.1 had played a prominent role in the execution of the Will. It has also come in the statement of DW-1, Chhering Ram, scribe of the Will that the testator was ill and he was brought to him by lifting him and at that time, his wife (defendant No.1) was also present alongwith him. Thus, the defendant No.1 had carried the deceased testator to Kullu for execution of Will in her favour. It has been stated that she was present on the spot at the time of execution of the Will. However, there is no independent witness of the will under challenge. DW-2 has admitted that he alongwith Jindu Ram and Devi Chand (DW-3) are facing a criminal trial for preparing a forged document. He has also admitted that Hari Sain daily witnesses two or three documents. So, the scribe and two out

of the three witnesses of the Will are facing a criminal trial regarding preparation of a forged document and the third witness of the Will, namely Hari Sain is neither resident of the village of the testator nor related to him. Rather, he appears to be a professional witness, who is readily available at Kullu and witnesses two or three documents daily. Therefore, in these facts and circumstances, the presence of defendant No.1 on the spot at the time of execution of the Will, in question, raises strong suspicions against the genuineness of the Will especially when there is no independent and respectable witness of this will.

20. One more question arises for consideration is as to who are entitled to succeed to the estate of deceased Thakur Chand on the basis of his natural succession. There is also no dispute between the parties that plaintiffs No.1 to 7 are legal heirs and successors of deceased Thakur Chand. Smt. Ishru, plaintiff No.8 has also claimed herself to be heir of deceased Thakur Chand being his widow. However, she has not stepped into witness box to depose that at the time of death of Thakur Chand, she was his wife. On the other hand, PW-1, Jyoti Singh in his cross-examination, has admitted that Smt. Ishru had divorced Shri Thakur Chand. Therefore, in view of the admission made by PW-1, in his cross-examination, Smt. Ishru (plaintiff No.8) is not proved to be widow of deceased Thakur Chand and as such she is not entitled to inherit to his estate.

21. In the present case a very heavy onus is placed on the plaintiffs to prove that defendant No.1 is not a widow of late Thakur Chand and defendants No.2 and 3 are not his daughters. However, the plaintiffs have not produced any cogent and clinching evidence to discharge this onus. The plaintiffs have only produced PW-1, Jyoti Singh, plaintiff No.5, who has stated that defendants No.1 to 3 have no relation with deceased Thakur Chand. However, the oral testimony of this witness is neither corroborated by any other oral as well as documentary evidence on record. On the other hand, DW-1, Tol Dassi (defendant No.1) has stated on oath that she was a legally wedded wife of deceased Thakur Chand and out of this wedlock, defendants No.2 and 3 were born to them. The oral testimony of DW-1 also find corroboration from the documentary evidence on record. Ex.D-2 is a copy of rapt No.104, dated 25.11.2003 recorded in Roznamcha Vakiati by Patwari, Patwar Circle Bandrol. On perusal, this document would reveal that Jyoti Singh (plaintiff No.5) had made report to the Halqua Patwari on 25.11.2003 that Thakur Chand had died on 08.11.2003 leaving behind plaintiffs No.1 to 7 and defendants No.1 to 3, as his legal heirs. This documents further reveal that plaintiff No.5 had admitted defendant No.1, as widow of deceased Thakur Chand and defendants No.2 and 3, as his daughters. On the basis of this rapat, Mutation No.1656 (Ex.D-1) was entered by the Patwari in which defendant No.1 has been mentioned as widow of deceased Thakur Chand and defendants No.2 and 3, as his daughters. The copy of Pariwar Register maintained by Gram Panchayat, Bandrol shows that defendant No.1 has been recorded as wife of Thakur Chand and defendants No.2 and 3 as his daughters. Also, copy of voter list (Ex.D-4), pertaining to the year 2002, shows that defendant No.1 has been recorded as wife of Thakur Chand and defendant No.3 as his daughter. Date of birth certificate (Ex.D-5), which was issued by the Government Primary School, Bandrol reveals that defendant No.2 has been recorded as daughter of Thakur Chand. Thus, on the basis of the oral as well as documentary evidence produced by the defendants, it is duly proved on record that defendant No.1 is widow of late Thakur Chand and defendants No.2 and 3 are his daughters. Therefore, defendants No.1 to 3 are also entitled to succeed to the estate of deceased Thakur Chand alongwith plaintiffs No.1 to 7 on the basis of natural succession.

22. In view of aforesaid discussions, it is held that the Will dated 06.10.2000 (Ex.DW2/B), propounded by defendant No.1 is not proved to be legal and valid one of late Thakur Chand, consequently, mutation No.166 sanctioned on the strength of the aforesaid Will is also proved to be wrong, illegal, null and void and not binding against the rights of the plaintiffs.

23. Further, the plaintiffs have filed the suit for declaration that after the death of late Thakur Chand, they have inherited the suit land and are joint owners-in-possession of the same in equal shares. However, the learned trial Court in its findings has held that plaintiffs No.1

to 7 are proved to be joint owners-in-possession of the suit property alongwith defendants No.1 to 3 to the extent of their respective shares. However, it is pertinent to mention here that no cross appeal has been filed by the plaintiffs against the aforesaid findings returned by the learned Trial Court and during the course of arguments before the learned court below, it has been admitted by the learned counsel for the plaintiffs that he is not aggrieved by the aforesaid findings of the learned trial Court.

24. In view of the above conclusion and facts and circumstance of the case, the learned Courts below did not commit any error in partly decreeing the suit of the plaintiffs. Hence, the impugned judgment and decree passed by the learned trial Court are perfectly sustainable.

25. Thus, for the above said reasons, as has been discussed hereinabove, Substantial Questions of Law as framed by this Court on 17.05.2007 are answered holding that as the Will is not proved, the findings of the Court below are as per law and after appreciating the evidence documentary as well as oral to its true perspective, so, the Substantial Question No.1 is answered accordingly. Substantial Question of Law No.2 is answered holding that Sh. Devi Chand was not a marginal witness, the learned Court below has rightly held that the Will is not proved as per law. As the Will is full of suspicious circumstances, which are not dispelled by the propounder, so, the findings of the learned Court below are as per law and the Substantial Question No.4 is answered accordingly. The plaintiff is co-owner alongwith the other legal heirs of Thakur Chand, so, the decree passed by the learned Court below is in accordance with law and the Substantial Question No.5 is answered accordingly.

26. In these circumstances, as discussed hereinabove, the appeal, which sans merit deserves dismissal and is accordingly dismissed. However, in the peculiar facts and circumstances of this case, there is no orders as to costs.

27. Pending application(s) if any, also stands disposed of.

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

Sh. Chandresh Sharma ..Petitioner

Versus

State of H.P. ..Respondent

Cr. R No. 250 of 2017
Decided on: 24.05.2018

Code of Criminal Procedure, 1973- Section 216- **Indian Penal Code, 1860-** Sections 302 and 376- Framing of additional charge(s) – Stage - Trial Court ordering framing of additional charge for offence under Section 376 of I.P.C. – Petition against – Accused arguing that Trial Court had earlier dismissed an application of prosecution under Section 216 of Code for framing additional charge for offence under Section 376 of I.P.C. and it was not open to frame charges for the same offence particularly when there was no change in facts and circumstances of the case – And it was not the case of prosecution that accused had raped the deceased – High Court found that when earlier application under Section 216 of Code for framing additional charge was dismissed by Trial Court on 5.11.2016, there was only the DNA profiling report without any corroborating evidence – However, after recording statements of Assistant Director, DNA Reports and Medical Officer, there was corroborating evidence also to effect that DNA of accused was found in vagina of the deceased - Material on record prima facie indicates that accused had raped the deceased – Order of trial court framing additional charge for offence under Section 376 of I.P.C. upheld – Petition dismissed. (Paras-4 to 6)

For the petitioner: Mr. R.K. Bawa, Sr. Advocate with Mr. Ajay K. Sharma, Advocate.
For the respondents: Mr. Narinder Guleria, Addl. A.G with Mr. R.P. Singh and Mr.Kunal Thakur, Dy. A.Gs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Order dated 4.8.2017, passed by learned Additional Sessions Judge(II), Kangra at Dharamshala in an application under Section 216 of the Code of Criminal Procedure framing thereby additional charge under Section 376 IPC against the petitioner (hereinafter referred to as the 'accused'), is under challenge in this petition on several grounds, however, mainly that similar application was previously dismissed by learned trial Court, hence, there being no change in the facts and circumstances, no such order could have been passed.

2. On having gone through the entire record and also taking into consideration the submissions made on behalf of the accused as well as the prosecution, it is apparent that similar application filed by the prosecution with a prayer to frame additional charge for the commission of offence punishable under Section 376 of the Indian Penal Code against the accused was dismissed by learned trial Judge with the following observations:-

> ".....The evidence in the present case is near completion as the only Investigating Officer is to be examined. Accused had not done any cross examination against the charge under section 376 IPC, therefore, framing of additional charge is surely going to prejudice the defence of the accused. Moreover, there is no supporting oral evidence in this regard. Further the result of DNA profiling is not perfect science, there are possibility of error as well. As per Modi's Medical jurisprudence:-
>
> > The DNA is the generic material that makes every individual different, except for genetically identical twins. A pattern of chemical signals i.e. genetic code, has been discovered within the DNA molecule, which is very unique to each individual, just like their actual fingerprint. Thus, the DNA profiling, unique to each individual, is colloquially referred to as DNA fingerprint and it is also known as DNA typing. The companies who offer the DNA profiling claim that a DNA match of two individuals is as unlikely as 1 in 30 billion. One more estimation puts it as 1 in 780,000,000,000.
>
> There are still chances of the DNA profiling of two individuals matching, the benefit of which must be given to the accused. Taking the case in hand under section 216 Cr.P.C., I am of the view that the alteration or addition of charge is surely going to prejudice the case of the accused as he has already cross examined all the material witnesses except Investigating Officer and Scientific Officer. This will amounts to opening of the case once again. Moreover, also there is no oral evidence in this case regarding the offence u/s 376 IPC.
>
> For the foregoing discussion and observation, the present application is hereby disallowed. Application stands disposed of it after its due registration be tagged with main case.
>
> Let Investigating Officer be summoned and Scientific Medical Officer be examined through video conferencing, a letter in this regard be issued to Forensic Expert of SFL Junga, he will be examined at 03.00-PM through video conferencing. Put up on 02.12.2016."

3. Mr. R.K. Bawa, learned Senior Advocate assisted by Mr. Ajay K. Sharma, Advocate strenuously contended that when the application previously instituted with a prayer to frame additional charge against the accused was dismissed with the observations that no oral evidence to show that the deceased was subjected to sexual intercourse by the accused is available on record and that the DNA profiling is not a prefect science, the impugned order could have not been passed in a subsequent application, more particularly, there being no change in the circumstances and the evidence available on record.

4. Admittedly, the charge can be altered or modified at any stage of the proceedings in the trial. As noticed supra, the previously instituted application was dismissed vide order dated 5.11.2016 with the observations that the DNA profiling is not a perfect science and also that there is no supporting oral evidence in this regard. True it is that it is not the case of the prosecution that the deceased was subjected to sexual intercourse by the accused and even no investigation on these lines was ever conducted. In the report filed under Section 173 Cr.P.C also, there is no mention that the deceased was also subjected to sexual intercourse. The Medical Officer PW-22 Dr. Susheel Sharma, Assistant Professor, Department of Forensic Medicine, Dr. RPGMC, Tanda while conducting post-mortem, also preserved viscera, blood in gauze, nail clips, and two vaginal swabs for analysis for report by the expert in the State Forensic Science Laboratory. The DNA profiling in this regard was conducted by PW-43 Dr. Vivek Sehajpal. He has issued the report Ext. PW-43/A. On the basis of required tests, he concluded that the DNA of the accused was found in the vaginal swab of the deceased. This according to him is suggestive of the fact that there was sexual intercourse between the accused and the victim. On the day i.e., 5.11.2016, when the order in the previously instituted application was passed, only the DNA profiling report Ext. PW-43/A was available on record and no any other corroborative material thereto. Such material has come on record by way of the testimony of PW-43 Dr. Vivek Sehajpal, Assistant Director, DNA Reports, SFSL, Junga and on re-examination of PW-22 Dr. Susheel Sharma.

5. Therefore, this Court is not in agreement with the submissions that there being no change in the circumstances nor any material available on record, the impugned order could have not been passed when the similar application was dismissed vide order dated 5.11.2016 for the reason that PW-22 had preserved the vaginal swabs for DNA profiling and the blood sample also, whereas, the exhibits so preserved have been tested and analyzed by PW-43 Dr. Vivek sehajpal. Therefore, prima-facie there is evidence to show that sexual intercourse had taken place between the accused and the prosecutrix. Such evidence, in the considered opinion of this Court, is sufficient to frame the additional charge, even if it was never the case of the the prosecution right from the very beginning. The present is a case which hinges upon the circumstantial evidence and keeping in mind this aspect also, the additional charge is required to be framed so that the prosecution ultimately may not fail on any technical ground. On the other hand, no prejudice is likely to be caused to the accused as he has cross-examined the witnesses PW-43 and PW-22. He is still at liberty to recall any witness already examined for cross-examination or may produce any other and further evidence in his defence.

6. Such being the legal and factual position, this petition fails and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

Any observations made hereinabove shall remain confined to the disposal of the present petition and have no bearing on the merits of the case.

Send down the records.

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

RFA Nos. 159 & 160 of 2018.
Decided on: 24th May, 2018.

1. RFA No. 159 of 2018.

Natha Ram (Since deceased through LRs) ...Appellant.
Versus
LAC & Others ...Respondents.

2. RFA No. 159 of 2018.

Tiddu Ram (Since deceased through LRs) ...Appellants.
Versus
LAC & Others ...Respondents.

Code of Civil Procedure, 1908- Order XXII Rules 3 and 9- Substitution of legal representatives – Petitioners had filed appeals against common award of Reference Court – However, Petitioners N and T had expired during pendency of reference petitions – Reference petitions were decided without taking note of death of N and T – Respondent-State relying upon Collector Land Acquisition NHPC Versus Khewa Ram and others, Latest HLJ 2007 (HP) 217 and contending that substitution of legal representatives of deceased petitioners could be made by Appellate Court also - Held, Substitution of legal representatives of deceased petitioner at appellate stage can be made only when evidence has already been recorded by Reference Court in a 'lead file' and other claimants/petitioners are also on record alongwith deceased to pursue Reference petitions – This principle has no applicability, when death of sole petitioner takes place before Reference Court – Common award of Reference Court being nullity, set aside - Matter remanded with direction to decide question of substitution of legal representatives and proceed further. (Paras-3 to 6)

Case referred:
Collector Land Acquisition NHPC versus Khewa Ram & Others, Latest HLJ 2007 (HP) 270

For the Appellants : Mr. V.S. Chauhan, Advocate.
For the Respondents: Mr. Narinder Guleria, Addl. A.G. with Mr. R.P. Singh & Mr. Kunal Thakur, Dy. A.Gs. for respondents No.1 to 3.
Mr. Chandranarayana Singh, Advocate for respondent No.4.
None for remaining respondents in RFA No.160 of 2018.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

CMP (M) No.657 of 2018 in RFA No. 159 of 2018 & CMP (M) No.658 of 2018 in RFA No. 160 of 2018.

This judgment shall dispose of both the applications filed with a prayer to substitute the proposed legal representatives of deceased Natha Ram, petitioner-claimant in reference petition No.46-NL/4 of 2009 and Tiddu Ram, petitioner-claimant in reference petition No.47-NL/4 of 2008. While Natha Ram aforesaid has expired on 4.8.2009, Tiddu Ram has expired on 6.1.2010. They both, as such, expired during the pendency of the reference petition in the trial Court. Both the applications are supported by death certificates of the deceased petitioners-claimants and also the legal heirs certificates. The applicants in these applications, as such, are the legal heirs of deceased petitioners Natha Ram and Tiddu Ram.

2. Learned Additional Advocate General and learned standing counsel representing the respondents submit that in case it is concluded that the award is nullity and these cases remanded to learned trial Court for fresh disposal, the question of substitution of legal

representatives of the deceased petitioners-claimants and abatement of the references they preferred may be ordered to be decided after affording the respondents the opportunity of being heard.

3. On hearing learned counsel for the parties and going through the record available at this stage, admittedly both Natha Ram and Tiddu Ram had expired during the pendency of the reference petitions, they preferred in the trial Court. The petitions came to be decided vide common award without taking notice of their death and substitution of their legal representatives. They both, no doubt, were the sole claimant in the references they preferred, however, the references decided vide impugned award are not isolated cases and rather the same have been decided in a bunch, lead case whereof was the one filed by deceased-claimant Natha Ram.

4. The evidence, as such, perhaps was to be produced in the lead case filed by deceased petitioner Natha Ram. Since he had expired on 4.8.2009 and as the factum of his death was not brought to the notice of the Court, therefore, it is for this reason despite opportunities granted, no evidence could be produced. It is significant to note that in terms of the judgment of this Court in ***Collector Land Acquisition NHPC*** versus ***Khewa Ram & Others, Latest HLJ 2007 (HP) 270***, the substitution of legal representatives, in such cases is even permissible in the appellate Court also, however, only in a situation, where the evidence stood recorded in the lead case and other claimants-petitioners were also on record along with the deceased to pursue the reference petition further. The law laid down in the judgment supra is not applicable in this case for the reason that the deceased were the sole claimant-petitioner in the references they respectively preferred and the evidence could not be recorded because petitioner-claimant Natha Ram in the lead case had expired during the pendency thereof.

5. On the other hand, if coming to the law applicable, in such a situation, this Court has held in a recent judgment dated 11.4.2018, passed in ***RSA No.335 of 2016***, titled ***Swaroop Singh (since deceased) through LRs*** versus ***Manohar Lal & Others***, as follows:

> " True it is that learned Lower appellate Court has dismissed the appeal and the judgment and decree so passed is in favour of the respondents including the deceased. However, in view of the judgment of this Court in ***RSA No.304 of 2017***, titled ***Narain Dass*** versus ***Devi Ram & Others***, decided on 21st March, 2018, the judgment and decree passed either against or in favour of a dead person is nullity and the questions of abatement of the proceedings and substitution of LRs of deceased party have to be considered and decided by the Court where the lis was pending at the time of his/her death. A recent judgment of Hon'ble Apex Court in Gurnam Singh (dead) by legal representatives *(2017) 13 SCC 414*, has also been taken in consideration in the judgment cited supra."

6. Therefore, while relying upon the judgment of the apex Court (supra), it has been held in the judgment ibid that a judgment against or in favour of a dead person is nullity, hence deserves to be quashed and set aside. Such being the legal position, this Court is not left with any option except to quash the main award, which as a matter of fact has been passed against a dead person. Consequently, both the applications are allowed. The impugned award is quashed and set aside and both the cases are remanded to learned reference Court below with a direction to decide the same afresh after deciding the question of abatement and substitution of legal representatives of deceased petitioners-claimants Natha Ram and Tiddu Ram, in accordance with law and on hearing the parties on both sides. The parties, through learned counsel representing them are directed to appear before learned reference Court below on **27th June 2018**. Both the applications are accordingly allowed. Consequently, CMP(M) Nos.202 & 203 of 2018, filed under Section 5 of the Limitation Act with a prayer to condone the delay as occurred in filing the main appeal will also stand disposed of. The appeal, which is time barred, is also dismissed.

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

Sh. P.N. Khamboj ....Petitioners.

Vs.

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

Cr. Appeal No.: 554 of 2010
Date of Decision: 24.05.2018

Probation of Offenders Act, 1958 (Act)- Section 3- Admonition – Power of Court – Exercise thereof - In appeal, Additional Sessions Judge though upholding conviction of accused for offence punishable under Section 138 of the Negotiable Instruments Act as recorded by Trial Court, but ordering his release after due admonition subject to payment of compensation to complainant within stipulated period – Complainant in appeal against grant of benefit of Section 3 of Act – Held, grant or refusal of benefit of Section 3 of Act is in the discretion of Court - It has to be exercised by Court prudently after applying its mind on the facts of case – Appellate Court had given reasons for exercise of this discretion in favour of accused – It is not shown that accused had not complied with directions regarding payment of compensation within stipulated period – Order of Appellate Court upheld – Appeal dismissed. (Para- 3)

For the petitioner: Mr. K.D. Sood, Senior Advocate, with Mr. Rajnish K. Lal, Advocate, for the appellant.

For the respondent: Mr. Desh Raj, Additional Advocate General, with Mr. Kamal Kant, Deputy Advocate General, for respondent No. 1.
Mr. Vinay Mehta, Advocate, vice Mr. Anuj Gupta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this appeal, the appellant has challenged partially the judgment dated 23.10.2010, passed by the Court of learned Additional Sessions Judge, Shimla in Criminal Appeal No. 47-S/10 of 08, vide which learned Appellate Court while upholding the conviction imposed upon the respondent-accused by the learned Trial Court for having committed an offence under Section 138 of the Negotiable Instruments Act, ordered the release of the respondent-accused after admonition by giving him the benefit of Section 3 of the Probation of Offenders Act. While releasing the respondent after admonition, by giving him the benefit of Section 3 of the Probation of Offenders Act, directions were passed by the learned Appellate Court as to within what period amount of compensation had to be deposited by the respondent-accused. As of now, there is nothing on record to suggest that the said directions passed by the learned Appellate Court was not complied with.

2. I have heard the learned counsel for the parties and have also gone through the judgments passed by learned Courts below.

3. Having perused the impugned judgment, in my considered view, there is no infirmity in the same. The benefit of Section 3 of the Probation of Offenders Act has been granted by the learned Appellate Court in favour of the respondent-accused after assigning reasons. Even otherwise, whether or not benefit of Probation of Offenders Act has to be extended to an accused is the prerogative of the Court, which prerogative has to be exercised by the Court prudently after applying its mind on the facts of the case. Learned Appellate Court has done exactly the same while extending the benefit of Section 3 of the Probation of Offenders Act in favour of the respondent-accused, as reasons have been mentioned in the order for granting benefit to the convict. Therefore, as the judgment dated 23.10.2010, passed by the learned Appellate Court in

Criminal Appeal No. 47-S/10 of 08 does not suffers from any infirmity, in my considered view, there is no occasion to interfere with the same.

Accordingly, as there is no merit in the present petition, the same is dismissed.

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

State of Himachal Pradesh ...Appellant

Versus

Rohtash Singh ...Respondent

Cr. Appeal No. 515 of 2008
Decided on: 24.05.2018

Indian Penal Code, 1860- Sections 279, 337 and 338- Rash and/or negligent driving- Meaning and proof- Accused, a driver of bus squeezed 'H' between front portion of bus and railings installed by side of road – 'H' received grievous injuries in accident – Trial court acquitted accused of offences under Sections 279, 337 and 338 – State in appeal – In High Court, accused arguing that he was ascending on road, therefore could not have been rash – High Court found that accused was driving his bus on left extremity of road leaving enough space towards his right – Held, a person may be negligent in his driving without being rash – A pedestrian has a first right to use road – Driver of a vehicle is supposed to stop it, if he finds that vehicle cannot move ahead without hitting a pedestrian – Brakes are installed in vehicle for this purpose – Statement of 'H' that she was squeezed in between bus and railings finds corroboration from spot map and photograph as well as medical evidence – Appeal of State allowed - Accused convicted of these offences. (Paras- 15 to 21)

For the appellant: Mr. Raju Ram Rahi, Deputy Advocate General.
For the respondent: Mr. B.B. Vaid, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(oral)*

This appeal has been preferred by the State against acquittal of respondent-Rohtash Singh vide judgment, dated 31st March, 2008, passed by the learned Judicial Magistrate 1st Class, Court No. VI, Shimla, H.P. in Criminal Case No. 165/2 of 2006 in case FIR No. 265 of 2005, dated 1st October, 2005, registered under Sections 279 and 337 of the Indian Penal Code (for short 'IPC') in Police Station Sadar, District Shimla.

2. Prosecution case is that on 1st October, 2005, at about 11.00 a.m., respondent-Rohtash Singh had endangered human life and personal safety of complainant PW-1 Hemanti Devi, while driving bus bearing registration No. HR-37-1460 in rash and negligent manner, causing grievous hurt to the injured.

3. As per statement of PW-1 Hemanti Devi, Ex. PW-1/A, recorded under Section 154 of the Code of Criminal Procedure (for short 'CrPC'), on 1st October, 2005, at about 11.00 a.m., when she was walking on her left side of the road near State Bank at Longwood, Shimla, a bus, bearing registration No. HR-37-1460, being driven in rash and negligent manner by respondent-Rohtash Singh, came there whereupon she stood sticking to the railing, but the said bus crossed squeezing her abdomen between the railing and the bus resulting into injuries to her abdomen and waist. Further, that she came to know that driver was Rohtash Singh, s/o Jagdish Singh, whose rash and negligent act had caused the accident.

4. After registration of the FIR, investigation was conducted and statements of witnesses were recorded. On finding *prima facie* complicity of respondent-Rohtash Singh in commission of offence, challan was presented in the Court.

5. Prosecution has examined eleven witnesses to prove its case. After recording statement under Section 313 CrPC, respondent had chosen not to lead any evidence in defence. On conclusion of trial, respondent has been acquitted by the trial Court. Hence, the instant appeal.

6. I have heard learned Deputy Advocate General as well as learned counsel for the respondent and have also gone through the record.

7. Though, besides injured PW-1 Hemanti Devi, prosecution has examined PW-2 Ishma and PW-6 Roshan Singh as spot witnesses, but, PW-6 Roshan Singh had completely resiled from his earlier statement recorded under Section 161 CrPC and categorically stated in Court that he had not witnessed the incident. In his cross-examination, nothing material against the respondent could be elicited from him.

8. PW-2 Ishma has admitted his presence on the spot, but, immediately after the accident. Though, in examination-in-chief, he has deposed that the accident had taken place on account of rash and negligent act of respondent, but, in cross-examination, he has stated that he could not say that the accident had taken place on account of rash and negligent act of the respondent or for the reason that PW-1 Hemanti Devi herself had come in front of the vehicle. He had not witnessed the accident, but, he has stated that person on the spot were saying that rear portion of the bus had hit PW-1 Hemanti Devi.

9. PW-1 Hemanti Devi, in her statement, has reiterated the contents of her statement Ex. PW-1/A and has also categorically identified the respondent as driver of the offending bus. She has also identified the bus in the photograph which had caused injuries to her. In cross-examination, she has specifically stated that she had seen the driver, but, not the conductor of the bus and the driver was the accused present in the Court.

10. Learned counsel for the respondent has argued that in her statement, PW-1 Hemanti Devi has deposed that she was hit by front portion of the bus whereas the prosecution case is that she was squeezed between the bus and the railing, which could be possible only by the side of the bus and in case of a hit of bus from the front side, PW-1 Hemanti Devi would have received injuries on her entire body.

11. Scrutiny of the statement of PW-1 Hemanti Devi reflects that she has stated that she was squeezed by the front portion of the bus. She has not stated that she was hit by the bus from the front. Her statement stands substantiated by the photograph where the railing and front portion of the right side of the bus are in near contact with each other. Therefore, on the basis of her statement, it cannot be said that she was telling a lie that she was hit by the front portion of the bus.

12. The version of injured PW-1 Hemanti Devi is also substantiated by the medical evidence, i.e. MLC Ex. PW-5/A, wherein it was opined that the injuries found on the body of the injured were grievous in nature and could have been caused if a pedestrian was squeezed between a railing and the running vehicle. In cross-examination also, a positive suggestion has been put to PW-5 Dr. Aman Madaik, who had medically examined PW-1 Hemanti Devi, that it was correct to suggest that injuries suffered by patient examined by him could be caused if the accident had taken place from the side/rear portion of the bus, which was further explained by him by stating that injuries suffered by the patient were of such nature which could be caused only by slow squeezing and not by sudden hit. Admittedly, it was not the case of prosecution that the injuries were caused by sudden hit to PW-1 Hemanti Devi but, PW-1 Hemanti Devi had categorically stated that she was squeezed between the bus and the railing. As per opinion of the doctor, the injuries suffered by the injured were grievous in nature caused within two hours from the time of her medical examination, which was conducted at 11.30 a.m.

13. Other evidence on record is spot map Ex. PW-10/A and the photographs Ex. PW-9/A-1 to Ex. PW-9/A-3.

14. PW-10 SI Purshotam, the Investigating Officer, has proved the spot map Ex. PW-10/A and the contents thereof have not been disputed in his cross-examination. The spot map clearly indicates that there was 24 feet wide road on the spot and from the photographs, it is clearly evident that the bus was on its extreme left side. The width of a bus, in any case, cannot be more than nine feet. From the photographs as well as the spot map, it is evident that the bus was being driven on the extreme left side of the road leaving wide space on its right side despite the fact that there was a pedestrian either walking or standing with the railing.

15. From the trend of cross-examination as well as the answers to the questions under Section 313 CrPC by the respondent, it is clear that the accident has not been disputed. The defence taken is that there is an ascending gradient of the road on the spot; the bus cannot be driven with high speed on that spot and, therefore, it cannot be said that the accident had taken place due to rash and negligent act of the driver. There are suggestions put to the witnesses PW-1 Hemanti Devi as well as PW-2 Ishma that the injured was perplexed and she herself was responsible for the accident. A suggestion has been put to PW-1 Hemanti Devi that she herself had come in contact with the rear portion of the bus whereas it was suggested to PW-2 Ishma that PW-1 Hemanti Devi had come in front of the bus. Though, in statement under Section 313 CrPC, it has been pleaded by the respondent that he was falsely implicated in the case but there is nothing material on record to establish the said plea satisfying the touchstone of preponderance of probability, as required under law for him. There is no presumption that every time driver would be considered guilty for hitting a pedestrian, but, for establishing fault of pedestrian, there must be some cogent and reliable evidence on record, which is missing in present case.

16. From perusal of the judgment passed by the trial Court, it appears that it was swayed by the plea of respondent that at an ascending gradient of road, the bus could not have been driven in high speed and also that the doctor had opined that the injures could have only been caused by slow squeezing and, thus, it was held by the trial Court that as the bus could not have been driven in high speed, there cannot be rash and negligent driving on the part of the respondent.

17. The trial Court has failed to consider that for holding a person responsible for rash and negligent act of driving, speed may be a relevant factor, but, it cannot be only decisive factor in all cases. There may be case, where speed may not be so high but the driver, responsible to act as a prudent man while driving on a busy road having pedestrian on its side, has to take due care and caution at the time of driving of the vehicle.

18. In present case also, the pedestrian was trying to save herself, but, the driver has failed to take requisite care in driving the vehicle in such a situation. The pedestrian has the first right to walk on the road, especially on the side of the road, particularly, where no pedestrian path is available on the side of the road. The accident had taken place during day time where the road as well as pedestrian was clearly visible to the driver and it is expected from a prudent driver to stop the vehicle in case it is not possible to cross the vehicle without touching or hitting the pedestrian. It is also one of the purposes for providing brakes in vehicles. From the photographs, it is also evident that there is no pedestrian path on the spot and pedestrians as well as vehicles have to move on the road. In such circumstances, special care was required to be taken by the respondent. The respondent has failed to behave in a manner a prudent man is supposed to behave, which amounts to not only the negligence but the gross negligence on the part of the respondent as crushing of a pedestrian between the railing and vehicle may result into death of the pedestrian or serious permanent disability making life of injured miserable.

19. In view of above, I find that the trial Court has not considered the evidence on record completely and correctly and has committed a mistake giving undue weightage to the

speed of the vehicle at the relevant point of time and has ignored the overwhelming evidence on record proving the guilt of the respondent for driving the vehicle in a rash and negligent manner.

20. As discussed above, prosecution, by leading cogent, reliable, trustworthy and confidence inspiring evidence of injured/complainant PW-1 Hemanti Devi, duly corroborated with medical evidence and other material record, has successfully established its case against respondent.

21. Having said so, judgment passed by the trial Court acquitting the respondent is set aside and respondent is held guilty of commission of offence punishable under Sections 279, 337 and 338 IPC and hence, convicted accordingly.

22. At this stage, it would be in the interest of justice to consider plea of learned counsel for the respondent, who has also argued in alternative that in case respondent is found guilty for committing the charged offences, then, keeping in view the fact that the respondent, who was 33 years of age at the time of the accident, was the first offender; is not involved in any other case thereafter and that the incident, in present case, has taken place in the year 2005 and respondent has also suffered trauma of facing criminal trial for thirteen years and further that by passage of time, social and family responsibilities of respondent have also increased, benefit of Probation of Offenders Act be extended to the respondent.

23. Considering the submissions made by the learned counsel for the respondent and the facts of the case in entirety, in my opinion, instead of imposing substantive sentence after about thirteen years of the accident, it would be appropriate to consider extension of benefit of Probation of Offenders Act to respondent. But, prior to that, I deem it proper to call for report of the concerned Probation Officer. The respondent is permanent resident of Village Barwala, District Panchkula, Haryana. Therefore, Probation Officer, Panchkula, Haryana is directed to submit his report under Probation of Offenders Act on or before 28th June, 2018.

24. List on **4th July, 2018,** on which date the respondent shall remain present in the Court.

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

Oriental Insurance Company Ltd. .....Appellant

Versus

Ms. Chhama Devi and others .....Respondents

FAO No. 2 of 2013 a/w FAO No. 1/2013 and C.O. No.4027/2013, FAO Nos. 3, 4, 5 and 6 of 2013, FAO Nos. 133 and 134 of 2016.

Judgment reserved on: 9.5.2018

Date of decision: 25th May, 2018.

Motor Vehicles Act, 1988- Sections 149 and 166- Claim for compensation – Overloading – Effect - Claimants filing applications before Claims Tribunal for compensation on account of deaths/bodily injuries received in a motor accident – Owner of the vehicle pleading that accident had taken place because of sudden mechanical defect – Insurer taking defence that driver had no valid and effective driving licence and vehicle was also being plied in breach of terms and conditions of policy- Claims Tribunal allowing applications and fastening liability on insurer – Appeals and cross-objections against awards – Insurance Company submitting before High Court for the first time that risk of only 10 persons was covered, whereas the vehicle was being occupied by 14 persons at the time accident – Further submitting that this overloading had caused malfunctioning of steering wheel of the vehicle – Held, no evidence regarding mechanical defect

in the vehicle was adduced before Claims Tribunal – Plea of overloading was not taken before the Claims Tribunal – Overloading itself doesn't constitute fundamental breach of terms and conditions of the policy – Insurer held liable – However, awards modified in view of ratio laid in **National Insurance Company Vs. Parnay Sethi, 2017 ACJ 2700.** (Para- 8 to 11)

Code of Civil Procedure, 1908- Order XLI Rule 33- Cross-objections – Object of rule is to empower the Appellate Court to do complete justice between parties - Appellate Court can consider any objection to any part of the order or decree of Court and set it right – However, Appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal – In exceptional cases, rule enables Appellate Court to pass such decree or order even if such decree or order would be in favour of parties who have not filed any appeal.

(Paras- 18 to 21)

Cases referred:

Oriental Insurance Company Ltd. vs. Shri Hitender Singh and others Latest HLJ 2016 (HP) 1167
National Insurance Co. Ltd. versus Pranay Sethi and others 2017 ACJ 2700
Rajesh versus Rajbir Singh, 2013 ACJ 1403 (SC)
Reshma Kumari versus Madan Mohan, 2013 ACJ 1253(SC)
Sarla Verma and others versus Delhi Transport Corporation and another, 2009 ACJ 1298 (SC)
Pralhad and others vs. State of Maharashtra and another (2010) 10 SCC 458
Manjuri Bera vs. Oriental Insurance Company, 2007 (3) ACC 365
Kishan Gopal and another vs. Lala and others (2014) 1 SCC 244
Raj Kumar vs. Ajay Kumar and another (2011) 1 SCC 343
Jagdish vs. Mohan and others AIR 2018 SC 1347
ICICI Lombard General Insurance Company Limited vs. Ajay Kumar Mohanty and another (2018) 3 SCC 686
National Insurance Company Limited vs. Kusuma and another (2011) 13 SCC 306

For the appellant(s) :	Mr. Lalit K. Sharma, Advocate, in all the appeals.
For the respondents :	Mr. Naveen K. Bhardwaj, Advocate, for the respondents-claimants.
	Ms. Suchitra Sen, Advocate, for respondent-owner.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The common thread that connects all these appeals and cross objections are that, all arise out of an accident, which took place on 15.6.2010 wherein some of the passengers lost their lives, while some of them sustained injuries.

2. The claim petitions filed by the claimants were allowed by the learned Tribunal below and the awards so passed have been assailed by the Insurance Company. Except in FAO No. 1 of 2013, none of the claimants have preferred the cross-objections.

3. Apart from the above, the common case as pleaded by the claimants was that the accident in question was a direct result of rash and negligent driving on the part of its driver Tulsi Ram alias Pushp Raj, who also died in the accident.

4. As regards the owner of the vehicle, his defence was that there was no rash and negligent driving on the part of the driver and the same occurred on account of sudden malfunctioning of the steering wheel of the vehicle.

5. Insofar as the Insurance Company is concerned, it had resisted all the claim petitions on the ground that the driver of the vehicle was not having valid and effective driving licence at the time of the accident and the vehicle was being plied in violation of the terms and

conditions of the Insurance Policy as well as the provisions of the Motor Vehicles Act and, therefore, the claimants were also not entitled to be indemnified by the insurance company, even though, the vehicle in question was duly insured with it.

6. The Insurance Company has filed the instant appeals assailing the award mainly on the ground that in the FIR registered by Gauri Parshad, it was specifically mentioned that there were 14 persons travelling in the vehicle, whereas as per the Registration Certificate, the seating capacity of the vehicle was 10 (9+1). That apart, even the insurance policy indicated that the Insurance Company had covered the risk of 9+1 persons on board and thus on the face of this evidence, the learned Tribunal below could not have passed the impugned awards. It is further averred that the accident had occurred on account of malfunctioning of the steering wheel of the vehicle, which obviously was a direct result of over-loading of the vehicle and once this fact is proved, then the Insurance Company cannot be held liable for any liability exceeding over and above the insurance cover and the same is to be borne by the owner. Apart from that, it is averred that the award passed is excessive and, therefore, is required to be reduced so as to bring out in conformity with law.

7. Since the question of liability of Insurance Company is common in all the cases, therefore, I would first deal with this aspect of the matter and only thereafter consider the quantum of compensation as the same would have to be worked out individually in all the cases.

8. As regards the contention regarding the steering wheel of the vehicle having suddenly stopped working, this was the precise defence taken by the Insurance Company as also the owner of the vehicle. However, save and except for the bald statement of the owner of the vehicle, neither the owner nor the Insurance Company has led any clear, cogent and convincing evidence in furtherance of their defence. They did not even bother to place on record any mechanical report which could suggest or prove their defence, more particularly, when the onus to prove this fact was upon them.

9. On the other hand, the author of the FIR has stepped into the witness box and stated that the accident had taken place because of the rash and negligent driving on the part of its driver, who unfortunately died in the accident. This FIR was lodged promptly ruling out any manipulation or deliberation therein and in such circumstances, the learned Tribunal below has correctly concluded that the accident in question had taken place due to rash and negligent driving of the driver of vehicle No. HP-01M-4006.

10. As regards the contention that the Insurance Company would only be liable to indemnify the owner with respect to 9+1 claimants, suffice it to say that this was not the defence taken by the Insurance Company before the learned Tribunal below nor had it claimed any issue regarding the same.

11. Even otherwise, the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle. Reference in this regard can be made to a decision rendered by this Court in ***Oriental Insurance Company Ltd. vs. Shri Hitender Singh and others Latest HLJ 2016 (HP) 1167,*** wherein it was held as under:

> "*9. The insurer has failed to prove that the accident was outcome of overloading. It is beaten law of the land that overloading cannot be a ground to seek exoneration.*
>
> *10. The Apex Court in the case titled as* ***National Insurance Company Limited versus Anjana Shyam & others, reported in 2007 AIR SCW 5237*** *has laid down the same principles of law. It is also apt to reproduce para 15 of the judgment, herein:*
>
> > *"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are*

governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading.

11. This Court in batches of appeals, ***FAO No. 257 of 2006 titled as National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others****, being the lead case, decided on 10.04.2015,* ***FAO No. 224 of 2008, titled as Hem Ram & another versus Krishan Chand & another,*** *being the lead case, decided on 29.05.2015, and FAO No. 256 of 2010 titled* ***Oriental Insurance Company versus Smt. Indiro and others****, being the lead case, decided on 19.6.2015, has laid down the same principle, which is not disputed by the learned counsel for the insurer.*

12. The apex Court in case titled ***Lakhmi Chand versus Reliance General Insurance Co. Ltd. reported in (2016) 3 SCC 100***, held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle. It is apt to reproduce para 14 of the said judgment herein.

"14. The National Commission upheld the order of dismissal of the complaint of the appellant passed by the State Commission. The National Commission however, did not consider the judgment of this Court in the case of B.V. Nagaraju v. Oriental Insurance Co. Ltd Divisional Officer, Hassan[3]. In that case, the insurance company had taken the defence that the vehicle in question was carrying more passengers than the permitted capacity in terms of the policy at the time of the accident. The said plea of the insurance company was rejected. This Court held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle. This Court in the said case has held as under:-

"It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry six workmen, excluding the driver. If those six workmen when travelling in the vehicle, are assumed not to have increased risk from the point of view of the Insurance

Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the pose, keeping apart the load it was carrying.

In the present case the driver of the vehicle was not responsible for the accident. Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which by themselves, had gone to contribute to the causing of the accident."

12. Thus, on the basis of the aforesaid discussion, I have no hesitation to conclude that the accident in question took place only on account of the rash and negligent driving of the driver of vehicle No. HP-01M-4006 which was duly insured with the appellant and, therefore, it is liable to indemnify the owner of the liability that would virtually be fastened upon him.

13. As observed earlier, in this batch of appeals, FAO Nos. 1, 2, 3, 4, 5, 6 of 2013 and FAO Nos. 133 and 134 of 2016 are the cases of fatal accident and the claim petitions have been filed by their legal representatives/dependents and some of the passengers in these cases have lost their lives, while some of them have sustained injuries. As regards the passengers, who lost their lives, their dependents/legal representatives would now be required to be compensated in terms of the dictum of the Constitution Bench judgment of the Hon'ble Supreme Court in ***National Insurance Co. Ltd.*** *versus* ***Pranay Sethi and others 2017 ACJ 2700***.

14. Why this case came to be referred to the Constitutional Bench, the answer is not difficult to find and the same is set out in para-1 of the judgment itself which reads thus:

"Perceiving cleavage of opinion between Reshma Kumari v.Madan Mohan, 2013 ACJ 1253 (SC) and Rajesh v. Rajbir Singh 2013 ACJ 1403 (SC), both three-Judge Bench decisions, a two-Judge Bench of this Court in National Insurance Co. Ltd. v. Pushpa, (2015) 9 SCC 166, thought it appropriate to refer the matter to a larger Bench for an authoritative pronouncement, and that is how the matters have been placed before us."

15. The conflict between the judgments as extracted above was resolved by concluding that the decision in ***Rajesh*** *versus* ***Rajbir Singh, 2013 ACJ 1403 (SC)*** was not a binding precedent as it had not taken note of the decision in ***Reshma Kumari*** *versus* ***Madan Mohan, 2013 ACJ 1253(SC)***. The Hon'ble Supreme Court after considering the entire conspectus of law arrived at the following conclusions:-

"*i) The two-Judge Bench in Santosh Devi, 2012 ACJ 1428 (SC), should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, 2009 ACJ 1298 (SC), a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.*

(ii) As Rajesh, 2013 ACJ 1403 (SC) has not taken note of the decision in Reshma Kumari,2013 ACJ 1253 (SC), which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 and 50 years. In case the deceased was between the age of 50 and 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 and 50 years and 10% where the deceased was between the age of 50 and 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 14 and 15 of Sarla Verma 2009 ACJ 1298 (SC), which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma, 2009 ACJ 1298 (SC), read with para 21 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures under conventional heads, namely, loss to estate, loss of consortium and funeral expenses should be Rs.15,000, Rs.40,000 and Rs.15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10 per cent in every three years."

Conclusions (iii) to (viii) are relevant for the adjudication of these cases.

16. It is thus clear from the aforesaid that the compensation henceforth to be awarded in favour of the claimants is essentially to be abide by the aforesaid conclusions, more particularly, conclusions No.(iii) to (viii) which except for conclusions No.(v) and (vi) are self-speaking.

17. Now, as regards conclusions No. (v) and (vi), it would be apposite to extract paragraphs No.14, 15 and 21 along with table as referred to in ***Sarla Verma and others*** *versus* ***Delhi Transport Corporation and another, 2009 ACJ 1298 (SC)*** which read thus:-

"*14. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra's case, 1996 ACJ 831 (SC), the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.*

15. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent/s and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependant on the father. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal

and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

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

Age of the deceased	Multiplier scale as envisaged in Susamma Thomas	Multiplier scale as adopted in Trilok Chandra	Multiplier scale in Trilok Chandra as clarified in Charlie	Multiplier specified in second column in the Table in Second Schedule to MV Act	Multiplier actually used in Second Schedule to MV Act (as seen from the quantum of compensation)
(1)	(2)	(3)	(4)	(5)	(6)
Up to 15 years	-	-	-	15	20
15 to 20 years	16	18	18	16	19
21 to 25 years	15	17	18	17	18
26 to 30 years	14	16	17	18	17
31 to 35 years	13	15	16	17	16
36 to 40 years	12	14	15	16	15
41 to 45 years	11	13	14	15	14
46 to 50 years	10	12	13	13	12
51 to 55 years	9	11	11	11	10
56 to 60 years	8	10	9	8	8
61 to 65 years	6	8	7	5	6
Above to 65 years	5	5	5	5	5

18. It would be noticed that except for one case being FAO No. 1 of 2013 cross-objections have been filed and in other cases, the claimants have not assailed the award by filing cross-objections or by filing separate appeals. But then, the law laid down by the Hon'ble

Supreme Court is binding on this Court as per Article 141 of the Constitution of India and moreover, this Court in exercise of its power under Order 41 Rule 33 can always apply the appropriate multiplier.

19. Order 41 Rule 33 of the Code of Civil Procedure reads as under:-

> ***"33. Power of court of Appeal.-*** *The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised In favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:*
>
> *Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."*

20. It cannot be disputed that the object of the aforesaid rule is to empower the Appellate Court to do complete justice between the parties. This rule gives the Court ample power to make an order appropriate to meet the ends of justice. It enables the Appellate Court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though the appeal is as to part only of the decree; and such party or parties may not have filed an appeal. The necessary condition for exercising the power under the rule is that the parties to the proceedings are before the Court and the question raised properly arises out of the judgments of the lower Court. In that event, the Appellate Court can consider any objection to any part of the order or decree of the Court and set it right. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised and each case therefore must depend upon its own facts. Although, the general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily, the Appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal. But in exceptional cases, the rule enables the Appellate Court to pass such decree or order as sought to have been passed even if such decree or order would be in favour of parties who have not filed any appeal.

21. The scope of the rule has repeatedly came up for consideration before the Hon'ble Supreme Court, but I need only refer to the judgment rendered in ***Pralhad and others vs. State of Maharashtra and another (2010) 10 SCC 458*** wherein it was held:

> *"18. The provision of Order 41 Rule 33 CPC is clearly an enabling provision, whereby the appellate Court is empowered to pass any decree or make any order which ought to have been passed or made, and to pass, or make such further or other decree or order as the case may require. Therefore, the power is very wide and in this enabling provisions, the crucial words are that the appellate court is empowered to pass any order which ought to have been made as the case may require. The expression "order ought to have been made" would obviously mean an order which justice of the case requires to be made. This is made clear from the expression used in the said Rule by saying "the court may pass such further or other order as the case may require". This expression "case" would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.*
>
> *19. In fact, the ambit of this provision has come up for consideration in several decisions of this Court. Commenting on this power, Mulla (Civil Procedure Code, 15th Edn., p. 2647) observed that this Rule is modeled on Order 59 Rule 10 (4) of*

the Supreme Court of Judicature of England, and Mulla further opined that the purpose of this Rule is to do complete justice between the parties.

20. In Banarsi vs. Ram Phal (2003) 9 SCC 606, this Court construing the provisions of Order 41 Rule 33 CPC held that this provision confers powers of the widest amplitude on the appellate Court so as to do complete justice between the parties. This Court further held that such power is unfettered by considerations as to what is the subject matter of the appeal or who has filed the appeal or whether the appeal is being dismissed, allowed or disposed of while modifying the judgments appealed against. The learned Judges held that one of the objects in conferring such power is to avoid inconsistency, inequity and inequality in granting reliefs and the overriding consideration is achieving the ends of justice. The learned Judges also held that the power can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before the Court; secondly, this power cannot be exercised in favour of a claim which has been given up or lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party. (See SCC p. 619, para 15 : AIR para 15 at p. 1997).

It has also been held by this Court in Samundra Devi vs. Narendra Kaur (2008) 9 SCC 100 SCC (para 21), that this power under Order 41 Rule 33 CPC cannot be exercised ignoring a legal interdict.

22. In view of the aforesaid interpretation given to Order 41 Rule 33 CPC by this Court, we are of the opinion that the High Court denied the relief to the appellants to which they are entitled in view of the Constitution Bench decision in K.S. Paripoornan vs. State of Kerala, (1994) 5 SCC 593.by taking a rather restricted and narrow view of the scope of Order 41 Rule 33 CPC and also on a misconstruction of the ratio in Paripoornan."

22. As regards conventional charges, now in terms of the judgment in ***Pranay Sethi's case (supra)***, only reasonable figures under conventional heads, namely, loss to estate, loss of consortium and funeral expenses @ Rs.15,000/- Rs.40,000/- and Rs.15,000/- respectively can be awarded. In such circumstances, the award as passed by the learned Tribunal is required to be modified as under:-

(i) FAO No. 2 of 2013:

Sr.No	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	**Details/Particulars**
(i)	Age of the deceased: 48 years	
(ii)	Assumed salary plus future prospects: Rs.3,500+0=Rs.3,500/-	Modified proved salary plus future prospects: Rs.3,500+25% (3500+ 875) =4,375/- Annual: Rs.4,375x 12= Rs.52,500/-
(iii)	After deduction of 1/3rd of Rs.3,500/- = Rs.2400/-	After deduction of 1/3rd of Rs.52,500 : = Rs.35,000/- per annum.
(iv)	Annual: Rs.2400x12=Rs.28,800/-	
(v)	Multiplier of 13: Rs.28,800x13=Rs.3,74,400/-	Multiplier of 13: Rs.35,000 x13 =Rs.4,55,000/-

(vi)	Loss of contribution towards family =Rs,3,74,400/-	Loss of consortium = Rs.40,000/-
(vii)	Funeral expenses: Rs.5,000/-	Funeral expenses: Rs.15,000/-
(viii)	Loss to estate = Rs.25,000/-	Loss to estate : Rs.15,000/-
(ix)	**Total Award: Rs.4,04,400/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**	**Total Modified Award: Rs.5,25,000/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**

Ordered accordingly.

(ii) FAO No. 1 of 2013 & C.O. No. 4027 of 2013

23. The only claimants Chhama Devi and Meena Devi were held to be the legal representatives of deceased Sh.Chand, whereas the claimants Kaushalya Devi, Monika and Minakshi were not dependent on the income of the deceased as per the decision of the Hon'ble Supreme Court in ***2007 (3) ACC 365*** case titled ***Manjuri Bera vs. Oriental Insurance Company.*** It is held therein that 'legal representative is one who suffers on account of death of a person due to Motor Vehicle Accident' and, therefore, in terms of the aforesaid ratio, the claimants No.3 to 5 were rightly held to be not entitled to the compensation. However, in terms of ***Manjuri Bera's*** case itself, even if the claimants are not proved to be the dependent on the earning of the deceased, liability in terms of Section 140 of the Motor Vehicles Act does not ceases because of absence of dependency and quantum cannot be less than the liability referred under Section 140 of the Motor Vehicles Act. As against the conventional amounts, the claimants now would be entitled to the following amounts:

Sr.No	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	**Details/Particulars**
(i)	Loss of Estate Rs. 50,000/-	Rs. 15,000/-
(ii)	Funeral charges Rs.5,000/-	Rs. 15,000/-
(iii)	Loss of consortium = Nil.	Rs.40,000/-
	Total Award: Rs.55,000/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.	Total modified award Rs.70,000/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.

Ordered accordingly. In view of the above, the appeal filed by the appellant-Insurance Company is dismissed and the cross-objections filed by the claimants are partly allowed.

(iii) FAO No. 3 of 2013:

Sr.No	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	**Details/Particulars**
(i)	Age of the deceased: 46 years	
(ii)	Assumed salary plus future prospects: Rs.3,000+0=Rs.3,000/-	Modified proved salary plus future prospects: Rs.3,000+25% (3000+ 750) =3,750/- Annual: Rs.3,750x 12= Rs.45,000/-

(iii)	After deduction of 1/3rd of Rs.3,000/- = Rs.2000/-	After deduction of 1/3rd of Rs.45,000 : = Rs.30,000/- per annum.
(iv)	Annual: Rs.2000x12=Rs.24,000/-	
(v)	Multiplier of 13: Rs.24,000x13=Rs.3,12,000/-	Multiplier of 13: Rs.30,000 x13 =Rs.3,90,000/-
(vi)	Loss of contribution towards family =Rs,3,12,000/-	Loss of consortium = Rs.40,000/-
(vii)	Funeral expenses: Rs.5,000/-	Funeral expenses: Rs.15,000/-
(viii)	Loss to estate = Rs.25,000/-	Loss to estate : Rs.15,000/-
(ix)	**Total Award: Rs.3,42,000/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**	**Total Modified Award: Rs.4,60,000/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**

Ordered accordingly.

(iv) FAO No. 4 of 2013:

Sr.No	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	**Details/Particulars**
(i)	Age of the deceased: 32 years	
(ii)	Assumed salary plus future prospects: Rs.3,500+0=Rs.3,500/-	Modified proved salary plus future prospects: Rs.3,500+40% (3500+ 1400) =4,900/- Annual: Rs.4,900x 12= Rs.58,800/-
(iii)	After deduction of 1/3rd of Rs.3,500/- = Rs.2400/-	After deduction of 1/4th of Rs.58,800 : = Rs.44,100/-
(iv)	Annual: Rs.2400x12=Rs.28,800/-	
(v)	Multiplier of 16: Rs.28,800x16=Rs.4,60,800/-	Multiplier of 16: Rs.44,100 x 16 =Rs.7,05,600/-
(vi)	Loss of consortium =Rs.25,000/-	Loss of consortium = Rs.40,000/-
(vii)	Funeral expenses: Rs.5,000/-	Funeral expenses: Rs.15,000/-
(viii)	Loss to estate = Rs.25,000/-	Loss to estate : Rs.15,000/-
(ix)	**Total Award: Rs.5,15,800/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**	**Total Modified Award: Rs.7,75,600/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**

Ordered accordingly.

(v) FAO No. 5 of 2013:

Sr.No	Award passed by the Tribunal	Modified Award by this Court
	Details/Particulars	**Details/Particulars**
(i)	Age of the deceased: 23 years	
(ii)	Assumed salary plus future prospects: Rs.3,000+0=Rs.3,000/-	Modified proved salary plus future prospects: Rs.3,000+40% (3000+ 1200) =4,200/- Annual: Rs.4,200x 12= Rs.50,400/-
(iii)	After deduction of 1/3rd of Rs.3,000/- = Rs.2000/-	After deduction of 1/3rd of Rs.50,400 : = Rs.33,600/- per annum.
(iv)	Annual: Rs.2000x12=Rs.24,000/-	
(v)	Multiplier of 18: Rs.24,000x18= Rs.4,32,000/-	Multiplier of 18: Rs.33,600 x 18 =Rs.6,04,800/-
(vi)	Loss of consortium =Rs.25,000/-	Loss of consortium = Rs.40,000/-
(vii)	Funeral expenses: Rs.5,000/-	Funeral expenses: Rs.15,000/-
(viii)	Loss to estate = Rs.25,000/-	Loss to estate : Rs.15,000/-
(ix)	**Total Award: Rs.4,87,000/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**	**Total Modified Award: Rs.6,74,800/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.**

Ordered accordingly.

(vi) FAO No. 6 of 2013.

24. Admittedly in this case the deceased was minor of 17 years of age. In the case of ***Kishan Gopal and another vs. Lala and others (2014) 1 SCC 244***, the Hon'ble Supreme Court had awarded a sum of Rs.4,50,000/- for the death of a minor child aged about 10 years. The accident in that case had taken place on 19.7.1992, whereas the accident in the instant case had taken place on 15.6.2010.

25. Therefore, keeping in view the entirety of the facts and circumstances of the case, more particularly the high cost of living and inflation, I am of the considered view that the ends of justice would be subserved in case the award, as passed by the learned Tribunal, is modified and the petitioners are held entitled to a sum of Rs.6,75,000/- plus interest @ 7.5% per annum from the date of filing of the petition i.e. 27.7.2010.

(vii) FAO No. 133 of 2016

26. Now, adverting to the case where the claimants have sustained injuries, it would first be necessary to advert to the principles with regard to the compensation for injuries. The law in this regard is well settled and reference can conveniently be made to the decision of the Hon'ble Supreme Court in ***Raj Kumar vs. Ajay Kumar and another (2011) 1 SCC 343***, wherein it was held as under:

"19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

27. In assessing the compensation payable the settled principle needs to be borne in mind. A victim who suffers a permanent or temporary disability occasioned by an accident is entitled to the award of compensation. This was so held in a recent decision rendered by three Hon'ble Judge Bench of the Hon'ble Supreme Court in ***Jagdish vs. Mohan and others AIR 2018 SC 1347***, wherein it was observed as under:

"8. In assessing the compensation payable the settled principles need to be borne in mind. A victim who suffers a permanent or temporary disability occasioned by an accident is entitled to the award of compensation. The award of compensation must cover among others, the following aspects:

(i) Pain, suffering and trauma resulting from the accident;

(ii) Loss of income including future income;

(iii) The inability of the victim to lead a normal life together with its amenities;

(iv) Medical expenses including those that the victim may be required to undertake in future; and

(v) Loss of expectation of life.

In Sri Laxman alias Laxman Mourya v Divisional Manager, Oriental Insurance Co. Ltd, 2011 12 Scale 658, this Court held:

"The ratio of the above noted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

In K Suresh v New India Assurance Company Ltd., 2012 12 SCC 274 , this Court adverted to the earlier judgments in Ramesh Chandra v Randhir Singh,
1990 3 SCC 723 and B Kothandapani v Tamil Nadu State Transport Corporation Limited, 2011 6 SCC 420. The Court held that compensation can be granted for disability as well as for loss of future earnings for the first head relates to the impairment of a person's capacity while the other relates

to the sphere of pain and suffering and loss of enjoyment of life by the person himself.

In Govind Yadav v New India Insurance Company Limited, 2011 10 SCC 683 , this Court adverted to the earlier decisions in R D Hattangadi v Pest Control (India) (Pvt) Ltd., 1995 1 SCC 551, Nizam's Institute of Medical Sciences v Prasanth S. Dhananka, 2009 6 SCC 1,Reshma Kumari v Madam Mohan, 2009 13 SCC 422 , Arvind Kumar Mishra v New India Assurance Company Limited, 2010 10 SCC 254 , and Raj Kumar v Ajay Kumar, 2011 1 SCC 343, and held thus:

> "18. In our view, the principles laid down in Arvind Kumar Mishra v. New India Assurance Co. Ltd. and Raj Kumar v. Ajay Kumar must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then 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 his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident." (Id at page 693).

These principles were reiterated in a judgment of this Court in Subulaxmi v MD Tamil Nadu State Transport Corporation, Civil Appeal No. 7750 of 2012, decided on 1 November, 2012 (Reported in 2012 AIR SCW 5945) delivered by one of us, Justice Dipak Misra (as the learned Chief Justice then was)."

28. Similar reiteration of law can be found in another recent judgment delivered by the same Bench on the same date i.e. 6.3.2018 in ***ICICI Lombard General Insurance Company Limited vs. Ajay Kumar Mohanty and another (2018) 3 SCC 686***, wherein it was observed as under:

> *"8. In arriving at the quantification of compensation, we must be guided by the well settled principle that compensation can be granted both on account of permanent disability as well as loss of future earnings, because one head relates to the impairment of the person's capacity and the other to the sphere of pain and suffering on account of loss of enjoyment of life by the person himself.*
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> *9. In Sri Laxman @ Laxman Mourya v Divisional Manager, Oriental Insurance Co. Ltd, (2011)10 SCC 756, this Court held thus: (SCC p.762, para 15)*
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> > "15. "The ratio of the above noted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."
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> 10. In Govind Yadav v New India Insurance Company Limited, 2011 10 SCC 683, this Court after referring to the pronouncements in R.D. Hattangadi v Pest Control (India) (P) Ltd., 1995 1 SCC 551, Nizam's Institute of Medical Sciences v Prasanth S. Dhananka, 2009 6 SCC 1, Reshma Kumari v Madam Mohan, 2009 13 SCC 422, Arvind Kumar Mishra v New India Assurance Co. Ltd., 2010 10 SCC 254, Raj Kumar v Ajay Kumar, 2011 1 SCC 343 held thus: (Govind Yadav Case, SCC p. 693, para 18)

> "18. In our view, the principles laid down in Arvind Kumar Mishra v. New India Assurance Co. Ltd. and Raj Kumar v. Ajay Kumar must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then 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 his inability to lead a normal life and enjoy amenities which he would have enjoyed but for the disability caused due to the accident."
>
> These principles were reiterated in a judgment delivered by one of us (Justice Dipak Misra, as the learned Chief Justice then was) in Subulaxmi v MD Tamil Nadu State Transport Corporation, 2012 10 SCC 177."

29. In the claim petition filed by the petitioner, she has sought compensation to the tune of Rs.15,00,000/- on account of the injuries sustained by her in the accident. The petitioner pleaded that she remained admitted in Zonal Hospital, Mandi w.e.f. 16.6.2010 to 25.6.2010 for the treatment of injuries sustained by her in the accident. She further alleged that on account of the accident, her pregnancy got terminated. The learned Tribunal below awarded following compensation under the non-pecuniary loss:

Sr.No	**1. Non-Pecuniary Loss**	**Amount awarded by the learned Tribunal.**
(i).	Pain and suffering	Rs. 1,00,000/-
(ii)	Loss of enjoyments of life	Rs. 25,000/-
(iii).	Shortened expectation of life.	Rs. Nil.
	2. Pecuniary Damages:	
(i)	Loss of earning and earning capacity	Rs. 25,000/-
(ii)	Medical expenses	Rs. NIL
	3. Misc. Charges	
(i)	Taxi Charges	Nil.
(ii)	Special Diet and attendant charges	Rs. 15,000/-
	Total Compensation:	**Rs.1,65,000/-**

30. It is vehemently contended by Mr. Lalit K. Sharma, learned counsel for the appellant that the compensation awarded by learned Tribunal below in absence of any proof, is very much on the higher side. However, I find myself unable to agree with this submission, more particularly, when the appellant has not questioned the findings of the learned Tribunal below with regard to the termination of the pregnancy of the claimant in the accident in question.

31. Apart from the above, once it was established on record that the petitioner/claimant remained admitted in the hospital w.e.f. 16.6.2010 to 25.6.2010, obviously she would have incurred a considerable amount towards medical expenses and other miscellaneous expenses for which no compensation has been awarded by the learned Tribunal below.

32. Therefore, in the given facts and circumstances, it cannot be said that the compensation of Rs.1,65,000/- as awarded by the learned Tribunal below is on the higher side. This Court cannot be unmindful of the fact that in such like cases it is difficult to assess the

exact amount of compensation for pain and agony suffered by the claimant. No amount of money can restore of physical frame of the claimant i.e. why it has been stated by the 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 "as far as the money can compensate" because it is impossible to equate human sufferings or personal deprivation with money.

33. Even otherwise, in similar facts and circumstances, the Hon'ble Supreme Court in ***National Insurance Company Limited vs. Kusuma and another (2011) 13 SCC 306*** has awarded a consolidated amount of Rs.1,80,000/- towards pain and suffering as also for the loss of unborn child.

(viii) FAO No. 134 of 2016

34. Once, it is not in dispute that the claimant remained admitted in Zonal Hospital, Mandi w.e.f.16.6.2010 to 24.6.2010, then obviously, he would have incurred expenditure towards medication apart from other miscellaneous charges under which head, no amount has been awarded in favour of the claimant.

35. Now, taking into consideration the entire facts and circumstances of the case, an amount of Rs.50,000/- as compensation awarded by the learned Tribunal below on account of the injuries sustained by the claimant, cannot be said to be in any manner excessive.

36. In view of the aforesaid discussion, all the appeals (FAO Nos. 1, 2, 3, 4, 5, 6 of 2013 and FAO Nos. 133 and 134 of 2016 filed by the appellant-Insurance Company and the cross-objection No. 4027 of 2013 are disposed of in the aforesaid terms, leaving the parties to bear their own costs. Registry is directed to place a copy of this judgment on the files of connected matters.

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

Harish Kumar … Petitioner
Versus
State of Himachal Pradesh … Respondent

CrMP(M) No. 604 of 2018
Decided on May 28, 2018

Code of Criminal Procedure, 1973- Section 438- Pre-arrest Bail- Petitioner apprehending his arrest in case FIR registered for offences under Sections 376 and 506 of I.P.C. seeking pre-arrest bail on ground that he has falsely been implicated – On facts, High Court found that (i) petitioner and prosecutrix, aged 32 years, were well known to each other for the last more than five years (ii) during this period, they developed physical relations (iii) Prosecutrix got pregnancy terminated (iv) and even thereafter, she kept on meeting the petitioner – Held, in these circumstances, petitioner entitled for pre-arrest bail subject to conditions of his joining investigation and not making any inducement, threat or promise to any person acquainted with facts of the case etc.

(Paras- 6 to 12)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Jyotirmay Bhatt, Advocate vice Mr. Pratap Singh Goverdhan, Advocate.

For the respondent : Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.
L/ASI Krishna Kumari, IO, Police Station Sadar, Solan, District Solan, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner, namely Harish Kumar, apprehending arrest in FIR No. 132/18 dated 8.5.2018 under Sections 376 and 506 IPC, registered at Police Station Sadar, District Solan, Himachal Pradesh, has approached this Court in the instant proceedings filed under Section 438 CrPC, praying therein for grant of pre-arrest bail.

2. Sequel to order dated 21.5.2018, whereby bail petitioner was ordered to be enlarged on bail, in the event of his arrest, L/ASI Krishna Kumari has come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Close scrutiny of record/status report clearly reveals that the bail petitioner as well as complainant-prosecutrix were known to each other for the last more than five years and during this period, they had developed physical relations. As per complainant-prosecutrix, bail petitioner repeatedly sexually assaulted her under the pretext of marriage and in the month of October, 2016, she had become pregnant, but bail petitioner by administering her medicines, got the pregnancy terminated against her wishes. Allegedly, on 9.4.2017, bail petitioner took complainant-prosecutrix to Kapoor Hospital, Chambaghat but even at that time, no complaint, whatsoever, was lodged by the complainant-prosecutrix against the illegal acts of bail petitioner, rather record suggests that complainant-prosecutrix kept on meeting the bail petitioner thereafter also.

4. Mr. Jyotirmay Bhatt, learned vice counsel representing the bail petitioner, while referring to the status report strenuously argued that no case is made out against the bail petitioner. He further stated that the complainant-prosecutrix is a 32 year old lady and it can not be said that the bail petitioner exploited her taking advantage of her ignorance/innocence. Lastly, Mr. Bhatt, contended that the investigation in the case is complete and nothing is required to be recovered from the bail petitioner and as such, bail petitioner deserves to be enlarged on bail.

5. Mr. Dinesh Thakur, learned Additional Advocate General, on the instructions of the Investigating Officer, who is present in the court, fairly admitted that the bail petitioner has joined investigation in terms of order dated 21.5.2018 and is fully cooperating. Mr. Thakur, while fairly admitting that nothing is required to be recovered from the bail petitioner at this stage, forcefully opposed the prayer having been made on behalf of bail petitioner, for grant of bail and contended that keeping in view the gravity of the offence allegedly committed by the bail petitioner, he does not deserves to be enlarged on bail, rather needs to be dealt with severely. Mr. Thakur further contended that though it appears from the record that complainant-prosecutrix and bail petitioner were known to each other for quite considerable time but that may not be a ground for grant of bail, especially when it has come in the investigation that bail petitioner repeatedly sexually assaulted the complainant-prosecutrix against her wishes.

6. Having heard the learned counsel representing the parties and gone through the record, it is quite apparent that the complainant-prosecutrix and bail petitioner were known to each other for the last more than five years and during this period, they had developed intimate relations with each other. It has specifically come in the investigation that the complainant-prosecutrix had become pregnant in the month of October, 2016, whereafter allegedly, bail petitioner got her pregnancy terminated against her wishes, but there is nothing on record to suggest that during this period, especially immediately after alleged termination of pregnancy,

complaint, if any, was ever lodged by the complainant-prosecutrix against aforesaid illegal act of the bail petitioner. Admittedly, complainant-prosecutrix is a 32 year old lady and it can not be said that she was not aware of consequence of such relationship.

7. Though aforesaid aspects of the matter are to be considered and decided by the court below, on the basis of evidence, if any, led on record by the investigating agency but this court sees no reason to keep the bail petitioner behind the bars for indefinite period, especially when he has joined the investigation and is fully cooperating.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
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> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to

police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

9. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

11. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

12. In view of above, bail petitioner has carved out a case for grant of bail and as such, order dated 21.5.2018 is made absolute subject to petitioner furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with one local surety in the like amount, to the satisfaction of the investigating officer, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by her.

13. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Vinay Sharma ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 476 of 2018
Decided on May 28, 2018

Code of Criminal Procedure, 1973- Section 439- Grant of bail- **Indian Penal Code, 1860-** Sections 217, 218, 468, 420 and 120B - Section 13(i)(d)(ii) of Prevention of Corruption Act- Sections 5 and 7 of Prevention of Specific Corrupt Practices Act- Petitioner seeking regular bail in case FIR registered for aforesaid offences – State though admitting that investigation was complete but opposing bail on the ground of seriousness of offences and possibility of accused tampering with evidence, if enlarged on bail – On finding that investigation was complete and the relevant record had also been taken into possession by investigating agency, High Court ordered release of accused on bail subject to conditions. (Paras- 6 to 9)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Jyotirmay Bhatt, Proxy Counsel.

For the respondent : Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.
Mr. Sandeep Dhawal, SP, CID (Crime) with ASI Anil Kumar, CID/Crime.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant bail petition filed under Section 439 CrPC, prayer has been made for grant of bail in Case No. 09/2016 dated 3.4.2016 under Sections 420, 468, 471, 201, 217, 218, 201 and 120B IPC, Section 13(i)(d)(ii) of Prevention of Corruption Act and Sections 5 and 7 of Prevention of Specific Corrupt Practices Act, registered at CID Police Station, Bharari, District Shimla, Himachal Pradesh.

2. Sequel to order dated 5.5.2018, Mr. Sandeep Dhawal, SP and ASI Anil Kumar, of CID Crime, have come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly admitting the fact that the investigation in the case is almost complete and nothing is required to be recovered from the bail petitioner, contended that keeping in view the gravity of the offence allegedly committed by the bail petitioner, he be not released on bail, because, in the event of his being enlarged on bail, there is every possibility of his tampering with the evidence.

4. Having heard the learned counsel representing the parties and gone through the record, this court finds that investigation in the case is almost complete and nothing is required to be recovered from the bail petitioner at this stage. Record/status report further reveals that investigating agency has already taken into custody relevant record and have also recoded statements of relevant witnesses, as such this court sees no force in the arguments of the learned Additional Advocate General that in the event of petitioner being enlarged on bail at this stage, he may tamper with the evidence and may hamper the investigation. Bail petitioner is behind the bars since 20.3.2018, and he can not be allowed to remain behind the bars for indefinite period, especially when, guilt, if any, of the accused is to be proved in accordance with law. Apprehension expressed by the learned Additional Advocate General can be met by putting bail petitioner to stringent conditions, as has been fairly admitted by the learned counsel representing the bail petitioner.

5. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
>
> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
>
> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

6. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart

from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

7. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

8. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

9. In view of above, bail petitioner has carved out a case for grant of bail and as such, present petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with two local sureties in the like amount, to the satisfaction of the trial court, besides the following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

(e) He shall surrender passport, if any, held by her.

10. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

11. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of. Copy dasti.

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

Ram Saran .....Petitioner
Versus
Rameshwari Devi and others .....Respondents

CMPMO No. 428 of 2017
Reserved on 07.04.2018
Decided on: 24.04.2018

Himachal Pradesh Land Revenue Act, 1954- Sections 17(1) and 126- Revisional jurisdiction of Financial Commissioner – Availability thereof – Petitioner, a purchaser of land from a co-sharer, filed application for his impleadment in partition proceedings pending before A.C. 1st Grade – Application dismissed by A.C. 1st Grade and appeal against that order by Collector – Instead of filing revision, petitioner filing petition under Article 227 of Constitution of India and challenging order of Collector – Held – Act provides remedy of revision against order of Collector before Financial Commissioner – Remedy of filing revision not inefficacious – Petition not maintainable in High Court – Petition disposed of with liberty petitioner to approach Financial Commissioner first within stipulated period and in meanwhile, partition proceedings stayed. (Paras-7 and 8)

For the petitioner: Mr. Naveen Awasthi, Advocate.
For respondent No. 1: Mr. Ramesh Sharma, Advocate.
Respondents No. 2 to 4, *ex parte*.
None for respondents No. 5 to 9.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, is maintained by the petitioner, against the order dated 22.04.2017, passed by learned Assistant Collector 1st Grade, in case No. 21/9 of 2016 and the order dated 09.08.2017, passed by the Collector, Ghumarwin Sub-Division, District Bilaspur, H.P., in case No. 42/2 of 2017.

2. Briefly stating facts giving rise to the present petition are that the petitioner purchased a land, comprised in Khasra No. 66, situated at Village Kalyana, Pargana Tiun, Tehsil Ghumarwin, District Bilaspur, H.P., vide registered sale deed No. 809/2014 and vide order dated 02.12.2014, passed by learned Assistant Collector, 2nd Grade, Ghumarwin, got mutation of the said land attested in his favour, vide mutation No. 30. Subsequently, on 15.12.2014, respondent No. 1 filed an appeal against the said order before the learned Collector, Sub-Division, Ghumarwin. During the pendency of the appeal, the petitioner had also moved an application for impleading him as a party in the partition proceedings, which was rejected by the learned AC 1st Grade, Ghumarwin vide order dated 18.12.2014. On 17.08.2015, the appeal preferred by respondent No. 1 has been allowed and order of mutation No. 30, dated 02.12.2014 was set aside and the case was remanded back to learned AC 2nd Grade, Ghumarwin to decide the same afresh. Feeling aggrieved by the said order, the petitioner maintained an appeal before the learned Divisional Commissioner, Mandi, which was allowed and vide order dated 29.04.2017, mutation No. 30 was confirmed. In the meantime, the petitioner has again moved an application, under Section 126 H.P. Land Revenue Act and Order 1, Rule 10 CPC to implead him as a party in the partition proceedings No. 21/9 of 2016, which was rejected by learned AC 1st Grade, Ghumarwin, vide order dated 22.04.2017. The petitioner challenged the said order before the learned Collector, Sub-Division Ghumarwin, which was also rejected vide order dated 09.08.2017. Hence the present petition.

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

4. Learned counsel for the petitioner has argued that the application under Section 126 of H.P. Land Revenue Act and Order 1, Rule 10 CPC was required to be allowed, however the learned Appellate Authority below has failed to exercise the jurisdiction vested in it and has not impleaded the petitioner as a party to the partition proceedings. He has further argued that though the revision is maintainable, but that is not efficacious remedy, as the partition proceedings are to be finalized after making the petitioner a party to the same.

5. On the other hand, learned counsel for respondent No. 1 has argued that the revision petition is maintainable before the learned Financial Commissioner, not before this Court. Further the petitioner has no right to maintain an application and become a party, as the partition order was to be finalized on the date the application was moved to become party and now the order has attained finality, as the petitioner was satisfied with the order earlier, therefore the present petition may be dismissed, as not maintainable.

6. In rebuttal, learned counsel for the petitioner has argued that to meet the ends of justice, the present petition is required to be allowed, as revision before the learned Financial Commissioner is not an efficacious remedy.

7. At this stage, this Court finds that the petitioner is one of the co-sharer after he purchased the land. The case of the respondent is that he could get the land from the share of the co-sharer from whom he purchased the land after the partition, but he cannot join the partition proceedings, as the same are at the final stage. The only question which is to be determined at this stage is whether the petitioner is one of the co-sharer or he is a purchaser from one of the co-sharer. Admittedly, the petitioner purchased the land and become one of the co-sharer before the partition proceedings are finalized. In these circumstances, this Court finds that had the partition proceedings been finalized and thereafter the petitioner purchased the land, he could not have become one the co-sharer and interested in a partition. However in the instant case, he purchased the land and became one of the co-sharer before the land was actually partitioned. In these circumstances, there is no other conclusion, but that the petitioner is interested as a party in the partition proceedings.

8. Now coming to the arguments advanced by the learned counsel for the respondent that revision petition is maintainable before the learned Financial Commissioner and present petition is not maintainable, this Court finds that the arguments of the learned counsel for the respondent has a force, as the petitioner could have agitated his point before the learned Financial Commissioner, in spite of filing the present petition, but if at this moment, the petitioner is directed to go to the learned Financial Commissioner, it will result into delay in the partition proceedings. However, learned counsel for the respondent has vehemently argued that the revision petition is only alternative remedy, this Court also finds that the revision petition cannot be said to be inefficacious remedy. So, this Court comes to the conclusion that before availing the remedy before this Court, the petitioner should have maintained a revision petition before the learned Financial Commissioner, as provided under the Rules and as argued by the learned counsel for the respondent. Resultantly, the present petition is disposed of by ordering that the petitioner will be at liberty to approach the learned Financial Commissioner and in case, he approaches learned Financial Commissioner against the impugned order within a period of 60 days from today, the partition proceedings will not be finalized within the said period and those will follow the order of learned Financial Commissioner. The time spent before this Court will be deductable as per the law for calculating limitation to maintain revision petition before the learned Financial Commissioner and the learned Financial Commissioner will dispose of the revision petition on merits, if the same is presented before it within 60 days from today.

9. The petition, so also pending miscellaneous application(s), if any, shall stand(s) disposed of accordingly.

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

Lalita Khanna & ors. ...Appellants/Plaintiffs

Versus

Vinod Kumar Malik & ors. ...Respondents/Defendants

R.F.A. No. 231 of 2001.
Reserved on : 24.04.2018
Date of decision: 02.05.018.

Code of Civil Procedure, 1908- Order II Rule 2 and Order IX Rule 9- "Same cause of action" – Test for determination – Held- Proper test is whether cause of action pleaded in two suits in substance, is identical or not? – Form of action is not of much relevance. (Paras- 38 and 40)

Code of Civil Procedure, 1908- Order II Rule 2- Applicability- Held – Subsequent suit on same cause of action is not maintainable unless leave of court qua omitted relief had been obtained in first suit itself – It is not requirement of law that earlier suit should have been disposed of on merits – Mere pendency of earlier suit in Court when subsequent suit was filed, is sufficient to attract bar under Order II Rule 2 – Plaintiffs alleging encroachment of defendants No.1 and 2 (D1 & D2) over their private road and over which D1 and D2 had no right – Plaintiffs claiming possession of that land by removal of encroachment - This suit was filed by plaintiffs on 1.9.1987, when another suit filed by one of them earlier was already pending – Cause of action in both suits was found same – Suit filed earlier however was got dismissed in default on 24.9.1987- Further held – Subsequent suit filed on 1.9.1987 itself was not maintainable under Order II Rule 2 and Order IX Rule 9 – Findings of trial court upheld – Appeal dismissed. (Paras-27, 28, 33 and 39)

Cases referred:

Nirmala vs. Hari Singh AIR 2001 H.P.1

Virgo Industries (Eng.) Private Limited vs. Venturetech Solutions Private Limited (2013) 1 SCC 625

Krishnaji Ramchandra vs. Raghunath Shankar and another AIR, 1954 Bombay 125

Suraj Rattan Thirani and others vs. Azamabad Tea Co. Ltd and others AIR 1965 SCC 295

For the appellants	:	Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate.
For the respondents	:	Mr. Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate, for respondents No. 1 and 2. Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. A.Gs, with Mr. Bhupinder Thakur Dy. A.G., for respondents No. 3 and 4. Mr. Hamender Chandel, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The plaintiffs are appellants, who aggrieved by the judgment and decree passed by the learned trial Court, whereby the suit for grant of declaration and consequential relief for possession, prohibitory injunction, mandatory injunction, recovery of damages/mesne profits etc. has been dismissed, have filed the instant appeal under Section 96 of the Code of Civil Procedure, 1908 read with Section 20 of the Himachal Pradesh Courts Act, 1976.

2. The parties to the lis are hereinafter referred in the same manner, in which they were referred to by the learned Court below.

3. It is not in dispute that the pleadings of the parties have been correctly enumerated in the impugned judgment and are, therefore, reproduced as such.

4. It was averred in the plaint that plaintiffs are co-owners of the property known as Strawberry Hill, which is over the land entered at Khewat No. 13, Khatauni No. 14, Khasra Nos. 112/66/10, measuring 4 bighas 13 biswas, situate at Chotta Shimla, Tehsil and District, Shimla, H.P. (hereinafter referred to as the suit property). The above suit property has been in exclusive use and occupation of the plaintiffs. In fact, plaintiffs previously owned 16 bighas 2 biswas of land, but, lateron sold the remaining area to the various persons including H.P. Housing Board, Shimla. The ancestors of the plaintiffs in order to access to the main house, Strawberry Hill from the main Shimla, Kasumpti Road, had a private approach road and to secure the privacy and avoid unnecessary intrusion, had provided a gate embedded into two cemented pillars within their own property at the bifurcation of the main P.W.D., Chotta Shimla, Kasumpati Road, which is shown by points 'A' and 'B' in the site plan annexed with the plaint. The aforementioned private approach road has been in exclusive use of the plaintiffs and their predecessor-in-interest for the last 70 years, and the main gate has always been kept by the plaintiffs and their predecessor-in-interest under the lock and key and control. The approach road is shown in the site plan as points, C,D,E & F. The predecessor-in-interest of the plaintiffs have also affixed iron mesh railing/fencing on the either side of the road. Since, the plaintiffs were desirous of developing their property by carving out therefrom certain plots of land for which purpose an application was made by the plaintiff No. 1 to H.P. Town & Country Planning Organisation for seeking sub-division of the plots. Lateron the Director Town & Country Planning on 31.07.1982 accorded sanction to the plaintiffs for sub-division of a part of their property. Even the private approach road, as well as main road depicted in the said plan.

5. That out of the plots of the land approved by the Town & Country Planning, Plot No. 2 was sold to Dr. Nath and another plot shown as Plot No. 3 was sold to Ashok Kapoor of Delhi. Both these plots have not yet been built upon or constructed upon by them and there is no access or right of way from the private road of the plaintiffs.

6. Lateron defendant Nos. 1 & 2 approached the plaintiffs for purchase of the plot lying in between the plot No. 1 and 3 and in the revenue record, this plot was shown to be 0-4 biswas being part of Khasra No. 112/66/10/12. This plot was transferred in favour of defendant Nos. 1 & 2 by way of sale deed dated 22.02.1984. This plot in fact is located alongside of Municipal Corporation and P.W.D. road leading from Chhota Shimla to Kasumpti and this plot is about 30 feet below the level of the private approach road of the plaintiffs leading to main house Strawberry Hill. Thus, no right of access was given to defendant Nos. 1 & 2 from the private approach road belonging to the plaintiffs. Lateron plaintiff No. 1 on 20th October, 1984 sent an information to the Executive Engineer, Municipal Corporation, Shimla clarifying that plaintiff No. 1 had not allowed any permission to the defendants to use her private road leading to the main house and defendant No. 1 had only to use the Municipal road passing in front of the plot. A request was also made to the Executive Engineer, M.C. Shimla to ensure that while approving any building plan of defendant No. 1, no access through the private road of the plaintiffs should be shown to the defendant No. 1. The defendant Nos. 1 and 2 continued with their construction till 1984 and defendants used adjacent plot of Dr. Nath for parking their vehicle and used the P.W.D./Municipal Road in front of the plot to approach their house. The construction raised by defendant No. 1 is facing the P.W.D./Municipal Corporation Road and opposite side is towards the approach road leading to the main house of plaintiffs.

7. It was further averred in the plaint that the plaintiffs generally remain out of Shimla and during the winter months and usually come to stay Shimla during summer, and in August, 1986, the plaintiffs found to her dismay and shock that defendant Nos. 1 & 2 had broken the fencing that existed within the boundaries of the land owned and possessed by the plaintiffs and further the defendants had not only encroached upon the property of the plaintiffs and had built a gate, cemented, flower-beds, water tanks, etc. but also made encroachment on the adjacent plot of land. The plaintiff No. 1 informed defendant No. 1 & 2 and called upon them to

restore the fencing to its original condition, but, of no use. The defendant Nos. 1 & 2 for the first time wrongfully asserted and claimed a right regarding the use of their private road. The defendants have also caused damage by caving-in under the approach road during the year 1984, but the defendants made incorrect assertions about its cause and their having repaired and filled up the same at enormous cost.

8. The plaintiffs lateron served the defendants a notice dated 20.10.1986 through their counsel for removal of encroachment and restore fencing which had been provided by the plaintiffs and which had been broken by the said defendants. Copy of the notice was also served upon the defendant Nos. 3, 4 and 5 calling upon them to fulfill their statutory duty and to take appropriate remedial actions. The defendant Nos. 1 & 2 sent the reply to the notice by making wrong and baseless denials. When plaintiff alongwith her husband on 15.11.1986 came to Shimla from Delhi, it was found that the plaintiffs' locks on the main gate at the entrance of the private approach road belonging to plaintiffs of which keys had always remained under the control and possession of the plaintiffs and their predecessor-in-interest for the last more than 40 years had been broken open. The matter was also brought to the notice of the police. The defendant No. 1 at that time gave the assurance to plaintiff No. 2 nothing further would happen. Despite this the defendant Nos. 1 & 2 continued to do illegal acts, the plaintiff No. 2 had no option but to get filed a civil suit in the court of learned Senior Sub Judge, Shimla for grant of a decree for permanent prohibitory injunction restraining defendant No. 1 from breaking open the lock on the gate and keeping the gate open. Lateron, the suit was withdrawn.

9. The plaintiff had sold a plot of land to defendants No. 1 & 2, dimensions of which were mentioned in the plan approved by the State Town Planner of H.P., 6 metres x 13 metres x 9.25 metres x13 metres. But lateron the dimensions were changed and they were shown as 6 karam x 10 karam x 9 karam x 10 karam.

10. Before the sale of the plot to defendant Nos. 1 & 2, the plaintiff No. 1 had intended to club plot Nos. 2 and 3 i.e. the plot of land purchased by defendant Nos. 1 & 2 and the plot of land purchased by Shri Ashok Kapoor and defendant No. 1 were having cordial relations also obtained authority from the plaintiff No. 1, which the defendant No. 1 had lateron mis-used whereby the defendant No. 1 got approved the plots stated above. On the strength of letter of authority, the defendant No. 1 submitted building plan, as mentioned above in the office of Town & Country Planning Department. Although the plaintiff No. 1 has not given any such authority to defendant No. 1 for submission of any plan. Lateron, the office of Town and Country Planning accorded sanction. Thereafter, the defendant No. 1 in connivance with Director of Town & Country Planning Organisation of H.P. manipulated in obtaining a letter dated 19.10.1984, wherein access to the plot of defendant Nos. 1 & 2 is shown through the private approach road of the plaintiffs. Lateron on 20th October, 1984 plaintiff No. 1 addressed a letter to Executive Engineer, Municipal Corporation, Shimla with a copy of said Sh. S.D. Sharma, Chief Executive Officer, Shimla Development Authority/Town & Country Planner about the access to the plot of land purchased by defendant Nos. 1 and 2 through the private approach road of the plaintiffs. Lateron the defendant No. 1 had submitted a revised plan to the Municipal Corporation, Shimla by giving incorrect dimension of the plot, wherein the total built up area as 8.84 metres x 14.02 metres x 12.80 metres. The entry has been wrongly shown through the private road of the plaintiffs.

11. During the process of construction the defendant Nos. 1 & 2 caused damage to the property of the plaintiffs by destroying the restraining wall and have also included within their property 22 ½ sq. yards area, which area has been shown by Khasra No. 120/10/1, measuring 10 biswa in the Aks Tatima Shajra prepared by the Kanoongo In-charge, Shimla on 01.09.1986, which also shows with red within points GHIJ. The defendants have also raised platform for keeping water tank and flower-bed. Two cemented gates have also been erected in this area.

12. Thus, the defendants have committed various acts of encroachment fully mentioned above. The defendant Nos. 3 to 5 were served with notices from time to time and their

attention was drawn to the wrongful and illegal acts and to their statutory obligations to ensure strict adherence to and due compliance of the various provisions of the Act, Rules, regulations and bye-laws. The defendant Nos. 4 and 5 have accorded their sanction to the building plans of defendant Nos. 1 and 2 on 03.03.1984 and 20.05.1985 improperly, irregularly and illegally, contrary and against by-laws. The defendant Nos. 1 and 2 during the winter season of the year 1991-92 took undue advantage of the absence of the plaintiffs from Shimla and have carried out further un-authorised and illegal construction within the set-back area. The defendant Nos. 1 and 2 have created a new opening towards the private approach road of the plaintiffs. The defendant Nos. 1 and 2 have constructed illegally and unauthorisedly the structures to be used as a guard house within the property of the plaintiffs by covering the set-back area by putting a slab. Thus, the defendant Nos. 1 and 2 are liable to restore the property of the plaintiffs in the same condition, as it was before the institution of the suit. The plaintiffs further submitted that they are entitled to claim and recover from the defendants all such losses and damages and mesne profits, on account of encroachment, trespass and illegal acts in the sum of Rs. 10,000/-. The cause of action accrued to the plaintiffs against the defendant Nos. 1 and 2 in the month of January, 1984, thereafter in the month of March, 1984, in the month of September, 1984 and during the months of September to December, 1986 when defendants encroached upon and made criminal trespass upon the property of the plaintiffs.

13. The lis was resisted and contested by the defendants. The defendant Nos. 1 and 2 filed combined written statement and defendant Nos. 3 and 4 also filed a separate written statement. Defendant Nos. 1 and 2 in their written statement took preliminary objections inter alia that the suit is barred by the provisions of order 2 Rule 2 CPC as well as Order 9 Rule 9 CPC. It was averred that previously the civil suit was filed in the Court of Sr. Sub Judge, Shimla, which was dismissed on 24.09.1987, hence the present suit is not maintainable. The defendants also took preliminary objections regarding valuation of the suit, as well as, estoppel, delay and laches, cause of action etc.

14. On merits, it was alleged by defendant Nos. 1 and 2 that in the plan submitted by the plaintiffs to the Town & Country Planning Orgnisation for the purpose of sub division of plots, the approach to the various plots including the plot sold to the defendants have been shown through the disputed path. Even in the site plan, which was sanctioned by the office of Town & Country Planner, as well as, Municipal Corporation, Shimla, the private road is the passage shown to the plot of the defendants. It is totally false that any area of Strawberry Hill Estate had any approach from the PWD/Municipal Road leading from Kasumpti to Chhota Shimla. The land purchased by defendants was described as compound of Kothi in the revenue record. As a matter of fact, the proper plan for the joining of the adjoining plots with the plot in question was submitted by plaintiffs to the Town & Country Planning, Shimla and the front of the plot was clearly shown towards private road in dispute. In August, 1983 an authority letter was given by plaintiff No. 1 to defendant No. 1 authorising him to submit the plans for the house construction etc. Thereafter as per instructions of the plaintiff, a plan was got prepared by defendant No. 1. The said plan was submitted to the office of Town & Country Planning and Municipal Corporation, Shimla and sanction was accorded finally on 03.04.1984. The answering defendants have purchased 180 sq. yards of land from the plaintiffs and they have built their property on the said land which was sold to them by the plaintiffs vide registered sale deed dated 22.02.1984. Thereafter, the demarcation of the land was also got done by the answering defendants.

15. It is also wrong that there was a retaining wall in existence towards the West of the plot of the land purchased by the answering defendants. When the defendants started construction of their house, at that time due to heavy rains the major portion of the private road collapsed and the entire construction work of the defendants was materially hindered. In these circumstances the answering defendants were left with no alternative except to construct a retaining wall towards the private road side by spending more than 40,000/- rupees on the same. The collapsed part of the road was also constructed by the answering defendants. Even the plaintiffs have agreed to share 50% of the cost of the construction of the retaining wall and road,

which they did not pay. The defendants have made no excavation or encroachment over the land of the plaintiffs. The use of the private road is the right of the answering defendants.

16. The plaintiffs have been making false allegations against the answering defendants and the defendants have replied the letter of plaintiff No. 1 dated 09.09.1986. It was not in 1986 that defendants forcibly used the said road. The allegations regarding breaking of the lock etc. is totally false and baseless. The plaintiffs have sent a legal notice dated 20.10.1986 through his counsel and the said notice was duly replied by the defendants. The defendants have purchased a plot of 180 sq. yards of land from the plaintiff and their entire construction is on their own property. The actual measurements of the plot of the defendants are 29' to the North 42' on the South and 47' on the East and 46' on the West. Since, the plans were submitted by the defendants for approval with the consent of plaintiffs, hence, the plaintiffs have no right now to challenge the same. It is totally false that defendant No. 1 practised fraud upon the plaintiffs by mis-using of his authority. The plaintiffs have no right to challenge the orders passed by defendant Nos. 4 and 5 at this stage. The suit is barred by limitation, as the order can be challenged within one year. Hence, the plaintiffs are not entitled to any relief of permanent injunction, mandatory injunction or possession.

17. The defendant Nos. 3 to 5 filed separate written statement. In the written statement defendants alleged that on 22.07.1982 an application was submitted by plaintiffs for sub-division of part of their land and the permission was granted on 31.07.1982 for carving out four plots and there was approach road leading to the main house of Strawberry Hill Estate. All the plot are abutting with each other. The plot sold to Dr. Nath and Mr. Ashok Kapoor were not approved by defendant No.1, which plots were shown to be already sold by the plaintiffs at the time of filing of application for permission for sub division of the plots. The defendants No. 1 and 2 purchased plot bearing Khasra No. 112/66/10/12 from the plaintiff Nos. 1 to 4 as per registered sale deed on 22.02.1984. This plot is between the plot of Ashok Kapoor and Dr. Nath. For the unauthorised construction a notice was served upon the defendant Nos. 1 and 2 by the office of H.P. Town & Country Planning. The site of the plot in dispute works out to be 180 sq. yards with dimensions as per the sub division of land approved on 31.07.1982. It is submitted that plaintiff No. 1 herself had initially applied on 07.10.1983 for grant of planning permission for regularisation of two plots bearing Khasra No. 112/66/10/12 and 112/66/10/5. Simultaneously defendant No. 1 applied on 11.10.1984 for grant of planing permission for construction of house. The construction was carried out by the defendants in 1984. The passage to the plot of defendant Nos. 1 and 2 has been provided through the approach road leading to main house of the Strawberry Hill Estate. The defendants have also granted permission for revised plan on 28.01.1985 in favour of defendant No. 1.

18. Replication to the written statement filed by defendant Nos. 1 and 2 was filed wherein all the allegations mentioned in the plaint were re-affirmed and those of written statement were denied.

19. On 12.12.1990, when the suit was pending adjudication before this Court, the following issues came to be framed:

> *1. Whether the suit is barred by the provisions of Order 2 Rule 2 CPC as alleged?OPD.*
>
> *2. Whether the suit is property valued for purposes of court fee and jurisidction?OPD 1 & 2.*
>
> *3. Whether the suit is not maintainable in view of the provisions of Order 9 Rule 9 CPC or that of the plan sanctioned by the Town and Country Planning authorities, Municipal authorities, as alleged?OPD 1& 2.*
>
> *4. Whether the suit is not maintainable in view of the relinquishment of the remedies available to the plaintiff under the provisions of Himachal Pradesh Municipal corporation Act, 1968 after sanction of the plan by the Town and Country Planning authorities?OPD 1 & 2.*

5. Whether the plaintiffs are estopped from filing the suit as alleged in paras 4 and 5 of the preliminary objections?OPD 1 &2.

6. Whether the relief of prohibitory injunction cannot be granted to plaintiffs as alleged?OPD

7. Whether there is an implied grant of the approach road to the residential building of defendants 1 and 2 as alleged? If so, to what effect?OPD 1&2.

8. In case issue No. 7 is decided in the negative whether defendants No. 1 and 2 are entitled to claim the user of approach road in question as an easement of necessity as alleged?OPD 1& 2.

9. Whether the plaintiffs are the exclusive owners of the property in dispute?OPP.

10. Whether the defendants have encroached any part of the property in dispute or caused any damage to the retaining wall as alleged?OPP.

11. Whether any passage was provided to the plot of the defendant by the Town and Country Planning/Municipal Corporation authorities from the road claimed by the plaintiffs?OPP.

12. Whether the defendants practised any fraud on the plaintiffs as alleged by them?OPP.

13. Whether in view of the sale deed dated 22.02.1984 and the plan which was got sanctioned by the plaintiffs on 06.02.1984 showing the existence of the passage, the plaintiffs are entitled to any relief?OPP.

14. Whether the defendants caused damage to the retaining wall and other properties of the plaintiffs? If so, to what amount of damages/compensation the plaintiffs are entitled?OPP.

15. Relief.

20. On pecuniary jurisdiction having been enhanced, the suit was transferred to the Court of learned District Judge, Shimla, who after recording evidence and evaluating the same, dismissed the same.

21. After recording evidence and evaluating the same, the learned trial Court not only dismissed the suit as being not maintainable while answering Issue Nos. 1 and 3 (supra) but dismissed the same even on merits.

22. Aggrieved by the judgment and decree passed by the learned Court below, the plaintiffs/appellants have filed the instant appeal.

23. Shri Vinay Kuthiala, learned Senior Counsel for the defendants/respondents, duly assisted by Ms. Vandana Kuthiala, Advocate, has raised preliminary objection regarding the very maintainability of the appeal. He would argue that this Court will not un-necessary bother itself and waste its time in adjudicating the appeal as the same is not maintainable in view of the provisions as contained in Order 2 Rule 2 CPC and Order 9 and Rule 9 CPC coupled with the findings recorded by the learned trial Court holding the suit to be barred under the said provisions.

24. Shri Ajay Kumar, learned Senior Counsel for the plaintiffs/appellants duly assisted by Shri Dheeraj Vashisht, Advocate has, in fact, not disputed the legal position that if only the appeal is held legally maintainable, would this Court go into the relative merits of this case. However, he would contend that the provisions of Order 2 Rule 2 would apply only in case the earlier suit has been decided on merits and not otherwise.

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

25. At the outset, it would be relevant to make a note of the background on the basis of which the aforesaid plea is being raised by learned Senior Counsel for the defendants/respondents. Admittedly, one civil suit had earlier been filed by one of the plaintiffs Lalita Khanna against defendant No. 1 V. K. Malik with similar allegations like in the instant case that the defendant had committed illegal acts of trespass and mischief on the suit land belonging to the plaintiff. However, the same came to be dismissed in default on 24.09.1987 and admittedly it was never got restored. Therefore, the present suit on the same cause of action with similar plea was not maintainable.

26. On 05.04.2018, this Court had heard arguments on the maintainability of the appeal as it was conceded by the learned Senior Counsel for the appellants that the merits of the case can be gone into only if this Court comes to the conclusion that the appeal is maintainable and not barred under the provisions of Order 2 Rule 2 and Order 9 Rule 9 CPC. Strong reliance at that time had been placed upon the judgment of learned Single Judge of this Court in ***Smt. Nirmala vs. Hari Singh AIR 2001 H.P.1,*** wherein it was held that in order to attract the applicability of provisions of Order 2 Rule 2, apart from other things, the earlier suit must have been decided on merit.

27. However, while dictating judgment I came across a decision rendered by the Hon'ble Supreme Court in ***Virgo Industries (Eng.) Private Limited vs. Venturetech Solutions Private Limited (2013) 1 SCC 625***, which clearly lays down that in order to make the provisions of Order 2 Rule 2 applicable, it was not necessary that the first suit should have been disposed of at the time when the second suit had been filed. In view of this the case was again fixed for further arguments.

28. At this stage, it would be apposite to refer to the relevant observations made by the learned Single Judge in **Smt. Nirmala's case (supra)**, wherein while construing the provisions of Order 2 Rule 2 CPC learned Single Judge held as under:-

> *"18. The rule, it is apparent, does not preclude second suit based on distinct and separate cause of action. To make this rule applicable, the defendant must satisfy three conditions:-*
>
> *(a) The previous and second suit must arise out of the same cause of action;*
>
> *(b) Both the suits must be between the same parties and*
>
> *(c) The earlier suit must have been decided on merits."*

29. Here, it would be apt to refer to a decision of the Hon'ble Bombay High Court in ***Krishnaji Ramchandra vs. Raghunath Shankar and another AIR, 1954 Bombay 125***, wherein it was held that for the purpose of determining the applicability of Order 2 Rule 2 CPC, the point of time is date of filing of the suit and not any other subsequent date much less the date of passing of decree, if any.

30. I have deliberately made a reference to the decision of the Hon'ble Bombay High Court in ***Krishnaji Ramchandra's case (supra),*** as it was the ratio laid down therein that was approved by the Hon'ble Supreme Court in ***Virgo Industries' case*** (supra) as would be clear from the further discussion.

31. Order 2 Rule 2 CPC, reads thus:

> *"**2. Suit to include the whole claim**.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
>
> *(2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*

(3) Omission to sue for one of several reliefs- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

32. Order 9 Rule 9, reads as under:-

*"9.**Decree against plaintiff by default bars fresh suit** - (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

33. Now, adverting to ***Virgo Industries (supra)***, the Hon'ble Supreme Court while interpreting the provisions of Order 2 Rule 2 CPC, held that the subsequent suit is not permissible when cause of action for later (subsequent) suit is the same as in the first suit, unless leave of court is obtained in first suit as to filing of subsequent suit for omitted relief. It was further held that it was not the requirement of the Order 2 Rule 2 CPC that the first suit should have been disposed of when the subsequent suit is filed and would apply even when subsequent suit is filed during the pendency of the first suit. While affirming the judgment in ***Krishnaji Ramachandra's case (supra)***, it was observed as under:-

"17. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in R. Vimalchand v. Ramalingam (2002) 3 MLJ 177 holding that the provisions of Order 2 Rule 2 CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order 2 Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order 2 Rule 2 CPC as already discussed by us, namely, that Order 2 Rule 2 CPC seeks to avoid multiplicity of litigations on the same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order 2 Rule 2 CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order 2 Rule 2 CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram ILR (1894) 16 All 165 and by the Bombay High Court in Krishnaji Ramchandra v. Ramchandra v. Raghunath Shankar AIR 1954 Bom 125."

34. Bearing in mind the aforesaid exposition of law, it would be noticed that admitted case of the parties is that one of the appellants herein Lalita Khanna had earlier issued legal notice dated 20.10.1986 Ext.PQ wherein the majority of reliefs as claimed in the suit, out of which the instant appeal arises, had been raised. However, thereafter when the suit actually

came to be filed on 29.11.1986 being Civil Suit No. 649/1 of 86 only the relief of injunction was sought therein.

35. The subsequent suit out of which the present appeal arises was filed on 01.09.1987 when the earlier suit was already pending adjudication and came to be dismissed in default only on 24.09.1987.

36. Once this being the admitted position, obviously, the cause of action in both the suits is absolutely same and, in fact, the second suit is based entirely on the legal notice Ex.PQ that was got issued by all the plaintiffs herein. After service whereof, Smt. Lalita Khanna, one of the plaintiffs herein, filed the suit that too only for injunction and the same was otherwise dismissed in default.

37. That the suit is not only barred by the provisions of Order 2 Rule 2 CPC but also barred by the provisions of Order 2 Rule 9 CPC, as these provisions clearly preclude the second suit in respect of the same cause of action, where the first suit is dismissed in default.

38. In this contest, I only refer to the judgment of the Constitutional Bench of Hon'ble Supreme Court in ***Suraj Rattan Thirani and others vs. Azamabad Tea Co. Ltd and others AIR 1965 SCC 295,*** wherein while interpreting the words 'same cause of action' it was held that the terms 'same cause of action' should be construed with reference to the substance rather than the form of action.

39. Even otherwise the provisions of Order 2 Rule 2 is based on the salutary principles that defendant/defendants should not be twice vexed for the same cause by splitting the claim and the reliefs and likewise Order 9 Rule 9 CPC preclude the second suit in respect of the same cause of action where the first suit is dismissed in default for appearance of the plaintiff.

40. In considering whether the cause of action in the subsequent suit is the same or not as the cause of action in the previous suit, the test to be applied is the causes of action in the two suits in substance – not technically identical. Thus, the terms "cause of action" is to be construed with reference to the substance than to the form of action.

41. In the present case, as rightly held by the learned trial Court, a broad analysis of the pleadings of both the cases would show that not only the pleadings are similar but the cause of action in both the suit is practically the same. Plaintiff No. 2, who is also a party in the present suit has specifically averred that the defendant V. K. Malik was trying to interfere over the suit land by trespassing over the same.

42. Likewise, there is specific allegations that the defendants have illegally committed mischief on the suit land and the further allegations regarding the breaking open of the gate as well as of the lock in both the suits. It was averred in the earlier suit that the plaintiff had alternate access to the plot through the government land.

43. In view of the aforesaid discussion, no fault can be found with the reasoning accorded by the learned trial Court whereby holding the suit to be barred under the provisions of both Order 2 Rule 2 and Order 9 Rule 9 CPC and the same is accordingly affirmed. Once the suit as filed by the plaintiffs is itself held to be not maintainable, this Court need not go into relevant merits of the case. Consequently, there is no merit in the appeal and the same is accordingly dismissed.

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

Manjeeta ....Petitioner.
Versus
Harish Kumar ....Respondents.

CMPMO No.: 94 of 2018.
Decided on: 02.05.2018.

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Section 24- Petitioner/wife seeking transfer of divorce petition filed against her from Court of District Judge, Kinnaur at Rampur to court of Additional District Judge, Shimla camp at Rohru as it would be convenient for her to pursue case at Rohru- Held – In matrimonial proceedings normally convenience of wife should be looked into – Petition allowed – Divorce petition ordered to be transferred to court of Additional District Judge, Shimla camp at Rohru for disposal in accordance with law. (Paras- 3 and 4)

Case referred:
Sumita Singh versus Kumar Sanjay and another, (2001) 10 Supreme Court Cases 41

For the petitioner Mr. Nitin Thakur, Advocate.
For the respondent M/s. Sumit Raj Sharma and Ritu Raj Sharma, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India read with Section 24 of the Code of Civil Procedure, the petitioner (wife) has prayed that the proceedings, which stand initiated against her under Section 13 of the Hindu Marriage Act before the Court of learned District Judge, Kinnaur at Rampur Bushahr, be transferred to Court of learned Additional District Judge, Shimla, Camp at Rohru, taking into consideration the fact that petitioner (wife) is presently residing at village Badal, Post Office Dochhi, Tehsil Jubbal, District Shimla and it will be convenient for her to contest said matter at Rohru.

2. Learned Counsel for the respondent has contested the petition on the ground that as the parties were last residing at Nankhari, therefore, proceedings have been rightly initiated at Rampur Bushahr, and present petition has been filed just to harass the respondent (husband).

3. Having heard learned Counsel for the parties and gone through the averments made in the petition, in my considered view, it will be in the interest of justice in case the proceedings, which stands initiated by the respondent herein against the present petitioner i.e. HMA No. 30-R/3 of 2017 under Section 13 (i), (ia) and (ib) of the Hindu Marriage Act, titled Sh. Harish Kumar versus Manjeeta, are ordered to be transferred for the purpose of further adjudication to the Court of learned Additional District Judge, Shimla, camp at Rohru. This I say so as Hon'ble Supreme Court in **Sumita Singh** versus **Kumar Sanjay and another**, (2001) 10 Supreme Court Cases 41 has held that in matrimonial proceedings it is the wife's convenience which must be looked into. Though this Court is not oblivious of the fact that it is not as if under all circumstances such an application has always to be allowed but then taking into consideration the peculiar facts of this case i.e. the difficulty expressed by wife in defending the case at Rampur Bushahr, it will be in the interest of justice in case the proceedings in issue are ordered to be transferred for the purpose of further adjudication to the Court of learned Additional District Judge, Shimla, camp at Rohru. Ordered accordingly.

4. Registry is directed to forthwith ensure that the case file of the petition, i.e. i.e. HMA No. 30-R/3 of 2017, titled Sh. Harish Kumar versus Manjeeta, pending before the Court of learned District Judge, Kinnaur at Rampur Bushahr is transferred to the Court of learned Additional District Judge, Shimla, Camp at Rohru and thereafter, learned Additional District Judge, Shimla, Camp at Rohru, shall issue notice to the parties intimating the date on which the matter shall be listed for further proceedings.

Petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Parkash Chand .....Petitioner
Versus
Avtar Singh .....Respondent

CMPMO No. 510 of 2016
Decided on: 02.05.2018

Code of Civil Procedure, 1908- Order XVII Rules 2 & 3- Closure of evidence – Justification – Counter-claimant did not produce evidence qua his counter claim despite opportunities as such, it was closed by trial Court – Counter-claimant then pleading before trial court that evidence adduced by him in suit be read as evidence qua his counter claim also - Suit however already stood dismissed in default and only counter claim was surviving – Trial court closed evidence of counter-claimant and also declined to consider his evidence recorded in suit (which already stood dismissed in default) – Petition against – Held – Counter-claimant bonafidely did not produce evidence believing that evidence led by him in a suit (which stood dismissed in default) would also be read as evidence qua his counter claim – In the interest of justice, order of trial court closing evidence of counter-claimant, set aside – One opportunity to lead evidence given to counter-claimant – Case remanded. (Paras- 6 and 7)

For the petitioner: Mr. Neel Kamal Sharma, Advocate.
For the respondent: Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral)

The present petition, under Article 227 of the Constitution of India, is maintained by the petitioner, who was the counter claimant before the learned Court below (hereinafter to be called as "counter claimant"), against the order dated 17.12.2016, passed by learned Civil Judge (Jr. Div.), Court No. 2, Ghumarwin, District Bilaspur, H.P., in Civil Suit No. 508-1 of 16/9, whereby learned Court below closed the evidence of the counter claimant and the learned Court below has disallowed the prayer to take into consideration the evidence already led in Civil Suit No. 582/1/11/03 by counter claimant.

2. Briefly stating facts giving rise to the present petition are that the non-counter claimant had filed a suit for grant of permanent prohibitory injunction against the counter claimant, which was dismissed in default for non prosecution on 19.12.2009, however the counter claim was proceeded as per law. Though, the counter claimant prayed before the learned Court below that the evidence, which they have already led in the Civil Suit No. 582/1/11/03, in which the counter claim was filed (however the suit was dismissed, vide order dated 19.12.2009) may be treated as evidence on behalf of the counter claimant, however learned Court below vide

impugned order, declined the submission of the counter claimant and closed his evidence and fixed the case for the evidence of the non-counter claimant. Hence the present petition.

3. I have heard the learned counsel for the parties and have gone through the record available with this Court in detail.

4. Learned counsel for the petitioner/counter claimant has vehemently argued that the learned Court below should have granted one more opportunity to the counter claimant to lead evidence, thus order of the learned Court below, closing the evidence of the counter claimant may be set aside and the counter claimant may be permitted to lead evidence by granting one more opportunity. On the other hand, learned counsel for the respondent/non-counter claimant has argued that the order of the learned Court below is after granting sufficient opportunities to the counter claimant to lead evidence, hence order of the learned Court below needs no interference and the present petition may be dismissed with costs.

5. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail.

6. After hearing the learned counsel for the parties and going through the records, it appears that on the date fixed, the counter claimant could not produce his evidence and remained under the impression that the evidence, which he has led in Civil Suit No. 582/1/11/03 will be read as an evidence in the counter claim too, however learned Court below has declined his request and closed evidence on his behalf. The order of the learned Court below in rejecting the prayer of the counter claimant to take into consideration the evidence led by counter claimant/defendant in counter claim is as per law, as the suit has been dismissed for default and no more survives, however this plea is not pressed by the learned counsel for the petitioner.

7. In the above stated circumstance, this Court finds that to meet the ends of justice, the present petition is required to be allowed and one more opportunity to lead evidence is required to be granted to the counter claimant. Accordingly, the present petition is allowed and order dated 17.12.2016, closing the evidence of the counter claimant is set aside, however subject to the costs of Rs. 1,000/- and the learned Court below is directed to grant one more opportunity to the counter claimant to lead evidence. Parties through their counsel are directed to appear before the learned trial Court on **25th May, 2018**.

8. The petition, so also pending miscellaneous application(s), if any, shall stand(s) disposed of accordingly.

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

Shri Hoshiaru ... Appellant.

Versus

Shri Kishan Chand and others ... Respondents.

RSA No. 422 of 2004.
Reserved on : 25.04.2018
Decided on: 03.05.2018.

Code of Civil Procedure, 1908- Section 100- **Regular Second Appeal -** Order XXIII Rule 3- Compromise of suit- Previous suit instituted on 16.06.1998 by defendant was dismissed as withdrawn on 14.3.2000 on basis of his statement that he had 'compromised' matter – However, no compromise in writing as such was filed on record – Plaintiff who was defendant in earlier suit, then filing suit for declaration and injunction – Plaintiff challenging order dated 14.3.2000 of trial court on ground that it was passed without notice to him – Suit dismissed by trial court and

appeal against that judgment and decree by District Judge – Regular Second Appeal – Held – Since, no compromise deed was filed and made part of record of case and withdrawal of previous suit on 16.06.1998 was not in lieu thereof, it was not obligatory for court to issue notice to plaintiff before allowing withdrawal of suit. (Para-13)

Cases referred:
Gurpreet Singh vs. Chatur Bhuj Goel, AIR 1988 Supreme Court 400
Easwari versus Parvathi and others, (2014) 15 Supreme Court Cases 255
Govinda Iyer v. Kumar and others, AIR 1980 MADRAS 232
Vishwa Nath v. Shakti Ram and others, AIR 1987 Himachal Pradesh 29

For the appellant	:	Mr. Anand Sharma, Advocate.
For the respondents	:	Mr. N.K. Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate, for respondents No. 1,2,4 to 10, 12 and 13. None for respondents No. 3 and 11.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Chamba, in Civil Appeal No. 56 of 2003, dated 09.01.2004, whereby, learned Appellate Court while dismissing the appeal filed by the present appellant, upheld the judgment and decree passed by the Court of learned Sub Judge 1st Class, Chamba, in Civil Suit No. 50 of 2000, dated 20.05.2003, vide which learned trial Court had dismissed the suit so filed by the present appellant.

2. This appeal was admitted on 10.03.2005 on the following substantial question of law:-

"Whether the order dated 14.3.2000 permitting respondent No. 2 to withdraw the suit for partition without notice to the plaintiff-appellant, is legally sustainable in view of provisions of Order 23 Rule 2-A of the Code of Civil Procedure?"

3. Brief facts necessary for adjudication of this appeal are as under:-

Appellant/plaintiff (hereinafter referred to as 'plaintiff') had filed a suit for declaration and permanent prohibitory injunction against the defendants pleading therein that order dated 14.03.2000, passed in Civil Suit No. 160/1998, on an application filed by plaintiff therein, namely, Kishan Chand, in which suit, present plaintiff was impleaded as defendant No. 4, vide which, learned Court in Civil Suit No. 160/1998, dismissed the suit as withdrawn, was illegal qua his rights and the same be declared as null and void and consequential relief by way of decree of permanent prohibitory injunction be granted in his favour, restraining the defendants from alienating the suit property allotted to them by way of illegal partition proceedings by Assistant Collector 1st Grade.

4. The suit was resisted by the defendants, who contested the very maintainability of the suit and on merits stated that the partition between the parties had been carried out in accordance with law and the same also stood effected and that parties were in cultivating possession of their respective shares as the separate possession of the same stood delivered to the parties by the revenue agencies. According to the defendants, plaintiff was estopped by his own act and conduct from filing the suit and further he has no cause of action to file the suit.

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

"1. Whether the order dated 14.3.2000 passed by the ld. Senior Sub Judge, Chama in absence of the plaintiff is illegal qua his right and same is null and void as alleged? OPP

2. If Issue No. 1 is decided in affirmative, whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP.

3. Whether the suit of the plaintiff is not maintainable in the present form? OPD.

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

5. Whether the plaintiff has got no cause of action to file the present suit? OPD.

6. Whether the suit of the plaintiff is hopelessly time barred? OPD.

7. Whether the suit of the plaintiff is bad for non joinder and mis joinder of necessary parties? OPD

8. Whether the suit of the plaintiff is not properly valued? OPD

9. Whether the defendant is entitled for special costs amounting to Rs. 3000/- as alleged? OPD.

10. Relief."

6. On the basis of evidence led by the parties, both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court in the following manner:-

"Issue No.1	*: No.*
Issue No. 2	*: No.*
Issue No. 3	*: No.*
Issue No.4	*: Yes.*
Issue No. 5	*: No.*
Issue No. 6	*: No.*
Issue No. 7	*:No.*
Issue No. 8	*:No.*
Issue No. 9	*:Yes.*
Relief	*: The suit of the plaintiff is dismissed as per the operative part of the judgment."*

7. Learned trial Court dismissed the suit by holding that plaintiff had failed to establish that order dated 14.03.2000, passed by the Court of learned Senior Sub Judge, Chamba, on an application filed by Kishan Chand (plaintiff in Civil Suit No. 160 of 1998), was bad in the eyes of law. Learned trial Court held that the previous suit was filed against partition proceedings i.e. an order passed by Assistant Collector 1st Grade and said order of partition was passed by Assistant Collector 1st Grade was not objected to by the present plaintiff as he had not assailed it before any competent authority/Court of law. Learned trial Court also took note of the fact that the plaintiff while appearing in the witness box had admitted that he was party in the partition proceedings and that his statement was recorded at the time of partition qua possession and that he had also admitted that suit land stood partitioned in the year 1996 and possession stood delivered in the year 1998. Learned trial Court also held that plaintiff as PW1 had also admitted that he had deposed before the Tehsildar that he had no objection qua partition. Learned trial Court also held that plaintiff was not entitled for decree of permanent prohibitory injunction as he had failed to establish that the order passed by learned Assistant Collector 1st Grade in the partition proceedings dated 19.7.1997 was illegal or null and void order.

8. The judgment and decree so passed by the learned trial Court was challenged by the plaintiff by way of an appeal. Learned Appellate Court while dismissing the appeal on

09.01.2004, upheld the judgment passed by the learned trial Court. Learned Appellate Court held that suit filed by Kishan Chand was dismissed as withdrawn as plaintiff Kishan Chand had stated in the Court that he had compromised the case with the defendant. Learned Appellate Court also held that though it had come in the statement of Kishan Chand that he was withdrawing the suit as he had compromised the matter with the defendant therein, but as there was no compromise on record, therefore, the effect was that Kishan Chand had got his suit dismissed as withdrawn. Learned Appellate Court also reiterated that as plaintiff has failed to prove that order of partition passed by learned Assistant Collector 1st Grade suffered from any infirmity, especially when plaintiff was duly associated with the partition proceedings, there was no infirmity with the judgment passed by th learned trial Court. On these bases, learned Appellate Court dismissed the appeal.

9. Feeling aggrieved, plaintiff/appellant has filed the present appeal.

10. Mr. Anand Sharma, learned Counsel for the appellant has strenuously argued that the judgment and decree passed by the learned trial Court as well as learned Appellate Court are not sustainable in the eyes of law as both the learned Courts below erred in not appreciating that withdrawal of the previous suit by the respondents without any notice to the present appellant was not permissible in law as the withdrawal of the suit in view of compromise had adversely affected him. He further argued that learned trial Court in the said suit erred in not appreciating that even if it intended to allow the plaintiff therein to withdraw the suit, then it should have had transposed the present appellant in the said suit. In support of his arguments, learned Counsel for the appellant has relied upon the following judgments:-

1) Gurpreet Singh vs. Chatur Bhuj Goel, AIR 1988 Supreme Court 400;

2) Easwari versus Parvathi and others, (2014) 15 Supreme Court Cases 255;

3) Pemmada Prabhakar and Others versus Youngmen's VYSYA Association and Others;

4) Govinda Iyer v. Kumar and others, AIR 1980 MADRAS 232;

5) Vishwa Nath v. Shakti Ram and others, AIR 1987 Himachal Pradesh 29;

11. On the other hand, Mr. N.K. Thakur, learned Senior Counsel appearing for the respondents has argued that there is no merit in the contentions of the learned Counsel for the appellant because previous suit was simply withdrawn by the plaintiffs therein by informing the Court that they intended to withdraw the suit in lieu of compromise entered into and it is not as if the suit was withdrawn on the basis of compromise, of which Court had taken cognizance legally.

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

13. A perusal of the records demonstrates that Civil Suit No. 160 of 1998, which was filed by Kishan Chand (present respondent) was withdrawn on 14.03.2000 by the plaintiff therein by making a statement before the learned trial Court that in view of a compromise having been entered into between him, plaintiff intended to withdraw the suit. In view of statement so made by the plaintiff, the suit was permitted to be withdrawn. Here, it is not a case that plaintiff had produced some compromise before the Court and suit was permitted to be withdrawn in lieu of that particular compromise or some compromise was taken on record making it part of the record and then the suit was permitted to be withdrawn. In these peculiar circumstances, in my considered view, it was not incumbent upon the learned trial Court to have had issued notice to the present appellant who were also one of the defendants therein, before permitting the plaintiff therein to withdraw the suit. It is a matter of record that the plaintiff in the said suit was aggrieved by partition proceedings and had assailed the same by filing said civil suit. Incidentally, present appellant did not assail the partition proceedings independently but was supporting the plaintiffs cause therein. Simply because he was supporting the plaintiff cause therein, did not confer upon them any right that they ought to have had issued the notice and heard before permitting the plaintiff to withdraw the suit. The contention of the learned Counsel for the

appellant that it was incumbent upon the learned trial Court to have had transposed the present appellants as plaintiffs in the said suit, in view of stand so taken by them in their written statement is also without merit. During the period when the suit was so pending before the learned trial Court, no such application was filed by the present appellant before the learned trial Court. In this view of the matter it was not the duty of the learned trial Court to have had transposed present appellant as plaintiffs as learned Counsel for the appellant wants this Court to believe. Further as I have already discussed above, this is a simple case where the suit filed by the plaintiff therein was withdrawn. The factum of it being recorded in a statement that he was withdrawing the suit in lieu of compromise having been entered into was of no consequence. The argument of the learned Counsel for the appellant that there was no compromise on record does not help him at all because it strengthens the reasoning of this Court that it was a simplicitor withdrawal of the suit by the plaintiff by making a innocuous statement in the Court because he was doing so as the matter stood compromised. What adverse effect the same has had on the appellant could not be satisfactorily explained by him. Undoubtedly, present appellant had a right in law to assail the partition proceedings independently which he failed to do so. Now simply because the said partition proceedings were assailed by some other party, which subsequently withdrew the suit so filed unconditionally by informing the Court that it was doing so on account of compromise having been entered into cannot be said to have caused any prejudice to the present appellant who was also a defendant therein. Therefore, in view of above discussion, I do not find any merit in the arguments so advanced by learned Counsel for the appellant.

14. This Court is not dwelling or dealing in detail with the judgments relied upon by learned Counsel for the appellant because none of these judgments lays down the law that a simple prayer for withdrawal of suit by the plaintiff cannot be permitted by the competent Court without notice to the defendants.

In view of above discussion, as there is no merit in the present appeal, the same is accordingly dismissed. Consequently, judgments and decrees passed by the learned Courts below are upheld. Pending miscellaneous application(s), if any, also stand disposed of.

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

Sanjeev Kumar ...Petitioner.

Versus

Union of India & Others .....Respondents.

CWP No. 628 of 2016.
Decided on: 8th May, 2018.

Constitution of India, 1950- Articles 14 & 226- **Shashastra Seema Bal (SSB) Rules, 2009**- Rule 26- Termination of services of petitioner – Validity – Petitioner joined SSB as CT/GD in 1999 – Taking into consideration his previous misconduct which included consumption of liquor during office hours and misbehavior with senior officers, competent authority deciding to terminate his services and issued show cause notice to him – In reply to show cause notice, petitioner specifically admitting his previous misconduct – Competent authority terminating his services – Challenge thereto – In alternative, petitioner also pleading that penalty is not commensurate with misconduct – On facts, petitioner was found to have absconded from duty twice even after submitting his reply to show cause notice despite giving under taking not to repeat such acts in future – He absented from duty without leave on dozen of occasions – Order of competent authority terminating of his services valid - Petition dismissed. (Paras-8 to 12)

For the petitioner : Mr. Rajiv Rai, Advocate.

For the Respondents : Mr. Lokinder Pal Thakur, Senior Panel Counsel.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Heard. Order Annexure P-1, whereby the third respondent has discharged the petitioner from service, is under challenge in this writ petition. The petitioner was enrolled in Shashastra Seema Bal, a para military force against the post of CT/GD in the year 1999.

2. The allegations against the petitioner as disclosed from the perusal of show cause notice Annexure P-4 read as follows:-

1. **U/s 24(e) Neglects to obey any general, local other order**:- In that, during Sainik Sammelan & in roll call, it is clearly ordered that no personnel of this unit will consume liquor/intoxicated substances during duty time. But on dated 27/08/2014, being a CHM of 'B' Coy and as well QRT commander for same day you had consumed liquor during Roll Call parade.

2. **U/s 29 (2) Intoxication**:-In that on 27/08/2014, being CHM of 'B' Coy and as well as QRT Commander for that day, you had consumed intoxicated material during roll call parade and also behaved in a disorderly manner with Coy Commander Sh. Prateek Gupta, AC.

3. **U/S 22(c) Use Insubordination language to such officer-** In that on 27/08/2014 at about 2100 hrs, when Coy Commander Sh. Prateek Gupta went to your barrack and found you influenced with alcohol and when he had asked you the reason of consuming liquor during roll call, in reply, you had used insubordinate language and abuse the Coy Commander.

4. **21(f) When in camp or elsewhere, if found beyond any limits fixed or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer**- In that on 28/08/2014, you had tried to abscond from the campus of your Coy and had caught by the Coy personnel nearby BOP, Kawabari at No Man's land.

Whereas you had pleaded guilty before the commandant, 59th Bn. SSB, Nanpara for the sections framed against you. On which Commandant, 59th Bn SSB has detailed a Board of Members to examine/scrutinize your previous service record.

Whereas, Board of Members have examined/scrutinize your previous service record and while checking your past record, it is found that you were enrolled in SSC on 22/09/1999 to the post of CT/GD in GC SSB, Dharampur. During your entire service of 15 years (approx) the following adverse entries were found in your service book.

1) While undergoing JCC w.e.f. 20/12/2006 to 22/02/2007 at Coy Hqr, Kamlapuri, you were given permission to avail 01 day station leave dated 11.02/2007, but you failed to report back at Coy Hqr, on due date to undergo JCC. You remained absent/missing w.e.f. 12/02/2007 to 16/02/2007 till 2130 hrs and returned back to your quarter at Palia on 16/02/2007 about 2130 hrs.

Punishment awarded- On cancellation of station leave, OSL period regularized by granting 06 days EOL, 07 days quarter Guard w.e.f. 14/03/2007 to 20/03/2007 with forfeiture of pay and allowances.

2) While undergoing JCC at SSB 'F' Coy Kamlapuri Hqr, you had absconded on 28/05/2007 at about 0545 hrs without any information/permission from the competent authority and was found in near village-Govind Nagar on 29/05/2007 at about 1330 hrs.

Punishment awarded – Awarded Censure

3) While posted at 'E' Coy, 4th Bn SSB, Palia Kalan, you had absconded from unit Campus without permission of the competent authority on 05/06/2007.

Punishment awarded- 318 days OSL period regularized by granting of 155 days EL w.e.f. 25/09/2007 to 06/02/2008 and 163 days EOL (without MC) w.e.f. 07/02/2008 to 19/07/2008 and 28 days extra guard duty.

4) You were detailed with 'D' Coy, 13th Batch BRTC for instructional duty but you had absconded from SSB campus Gorakhpur on 06/03/2013 without permission or intimation to competent authority on 06/03/2013 at 1435 hrs.

Punishment awarded – 08 days confinement to the line.

5) You were detailed to perform Guard Commander at RP Gate (Recruits Line) but you had absconded from RTC SSB, Gorakhpur campus on 06/07/2013 without permission or information to the competent authority on the same day at about 0600 hrs You had reported willingly at RTC SSB, Gkp on 10/07/2013 at about 1000 hrs after absenting yourself by 04 days.

Punishment Awarded- Severe reprimand and absence period regularized by granting 04 days EOL (NQS)

6) You had absconded from RTC, SSB Gorakhpur on 04/10/2013 at 1530 hrs without intimation/prior permission and willingly reported at RTC Gorakhpur on 11/10/2013 at 1800 hrs after absenting yourself by 07 days.

Punishment Awarded- Absconded period regularized by granting him 07 days EOL (NQS)

7) You had been dealt with under section 21 (f) of SSB Act' 2007 (Absent without leave). In that while you were performing the duty as mess commander of SO's mess at Bn hqr and had absconded from campus area w.e.f. 24/10/2013 (FN) at about 0600 hrs without intimation or permission of the competent authority and you were found at railway station Gorakhpur on 30/10/2013 (AN) at about 0830 hrs by the searching party after 07 days. You had pleaded guilty of the charge framed against you.

Punishment Awarded- Awarded reprimand and absconded period regularized by granting 07 days EOL.

8) While performing the guard duty as HC/GD at Unit MI Room, you had left the campus area on 06/12/2013 at about 1730 hrs without prior intimation/permission of the competent authority and willingly reported back to Bn Hqr on 10/12/13 at about 0600 hrs after absenting yourself by 03 days.

Punishment Awarded- Awarded 14 days pay fine and 03 days absconded period regularized by granting 03 days EOL without MC.

9) On dated 16/09/2014, you had absconded from the campus of Bn Hqr and after absenting yourself by 71 days, you had willingly reported at 59th Bn. Hqr on 26/11/2014.

Punishment Awarded- Awarded "Severe Reprimand" and absent period of 71 days regularized by granting 71 days EOL (NQS)."

3. It is in this background the competent authority i.e. third respondent had formed an opinion that he is habitual to abscond from duty and despite repeated warnings and imposing punishments, no improvement in his conduct and behaviour could be noticed. The third respondent further formed an opinion that he is not suitable for further retention in service, therefore, vide show cause notice Annexure P-4, the penalty for termination of his service under Rule 26 of SSB Rule 2009 was proposed to be imposed upon him, however, before that he was called upon to submit his explanation by 30th June, 2015.

4. The reply Annexure P-5 to the writ petition amply demonstrates that the petitioner has admitted all allegations of misconduct and misbehaviour attributed to him in the show cause notice, however, requested the third respondent not to terminate his services keeping in view the adverse family circumstances comprising his wife, children and old father and thereby to give one opportunity to improve his behaviour.

5. The third respondent, on consideration of the allegations against the petitioner and reply to the show cause notice as submitted and affording him opportunity of being heard, has ordered to discharge (remove) him from service with effect from the date of impugned order Annexure P-1 i.e. 21.3.2015. He was directed to submit the documents perhaps required in the matter of sanction of service benefits.

6. Mr. Rajiv Rai, Advocate learned counsel representing the petitioner though has fairly conceded the past conduct of the petitioner as is apparent from the record, however, in the matter of the penalty imposed upon him, he has strenuously contended that the same does not commensurate viz-a-viz the so called misconduct attributed to the petitioner. According to Mr. Rai, in view of the reply to the show cause notice submitted by the petitioner, lenient view should have been taken in the matter and instead of discharging him straightway from service, he should have been given an opportunity to mend his behaviour and become a law abiding public servant. In the alternative he should have been dealt with in accordance with the provisions contained under Section 21(f) and 24(e) of 'The Sashastra Seema Bal Act, 2007', hereinafter referred to as the Act.

7. On the other hand, learned Senior Panel Counsel while drawing our attention to the record and also the provisions contained under Rule 26 of the Rules framed under the Act has strenuously contended that the competent authority when arrived at a conclusion that it is not in the interest of the 'Bal', the impugned order Annexure P-1 has rightly been passed.

8. We have carefully analyzed the entire record and also the rival submissions made on behalf of the parties on both sides. Besides, the allegations against him taken note of in para supra, the petitioner even after submitting the reply Annexure P-5 to the show cause notice, also absconded on 14.3.2015, at such a stage when the matter was under active consideration of the third respondent. He absconded from duty after undertaking not to repeat any mistake in future. After submission of the reply Annexure P-5, he firstly absconded on 12.3.2015, when proceeded to Nepal side at 08.00 hours from Border Pillar No.61 under 59 Battalion, Nanpara and was found in the state of intoxication at about 13.30 hours. Not only this, but again he has absconded on 14.3.2015 and remained absent from duty upto 20.3.2015, for six days. When he was available on 21.3.2015, the opportunity of being heard was given to him and the impugned order came to be passed on that day.

9. The record of this case amply demonstrates that the petitioner is habitual of absenting from duties. He absented from duties without leave and reasonable cause on dozen of occasions. He failed to improve his conduct and behaviour despite imposition of penalty and reprimanded on several occasions. True it is that such absence from duty is an offence within the meaning of Sections 21(f) and 24(e) and also Section 29(1) of the Act and he could have been tried for the commission of such offence by own Court of the force and sentenced including to undergo imprisonment, however, at the same time Rule 26 empowers the competent authority, the Commanding Officer of the Battalion, where the delinquent official was serving at the relevant time, to have retired him compulsorily from service, of course, after obtaining option from the delinquent official either to seek retirement or tender his resignation.

10. In view of the overall acts, conduct and behaviour of the petitioner, the course i.e. his discharge from service has rightly been chosen by the competent authority i.e. The Commandant 59th Battalion, SSB Nanpara. The petitioner, in our considered opinion, is not a fit person to be retained in service, however, as required under Rule 26(2), before resorting to discharge of the petitioner from service, option from him, either to seek retirement or tender resignation should have been given. The impugned order reveals that no such option has been

given to him. Therefore, the impugned order though is upheld; however, the same is modified to the extent that the competent authority i.e. third respondent shall seek option from the petitioner, which he has either to send in writing within a month from today or by appearing in person on or before 31st July, 2018 along with certified copy of this judgment. In the event of the option in the manner as aforesaid is exercised, the third respondent shall modify the impugned order accordingly. In case no option is exercised well within the time granted, the impugned order shall remain inforce for all intents and purposes.

11. With the above observations, the writ petition is disposed of, so also the pending application(s), if any.

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

Cr. Appeal No. 24 of 2006 a/w
Cr. Appeal No. 527 of 2005.
Decided on : 09.05.2018.

Cr. Appeal No. 24 of 2006.

State of Himachal Pradesh ....Appellant
Versus
Gurmail Singh & others ....Respondents

Cr. Appeal No. 527 of 2005.

State of Himachal Pradesh .....Appellant
Versus
Gurmail Singh & another .....Respondents

Indian Penal Code, 1860- Sections 420 and 480- Accused 'G', 'P' and 'H' were tried by trial court on allegations of illicit transport of country liquor in a truck of 'H' without permit after tampering its chassis and engine numbers - Trial Court acquitting accused of cheating and using false property marks as genuine – Appeal against – Held – On facts, it is not proved by prosecution that chassis and engine numbers of truck impounded by police were different from the chassis and engine number of vehicle as recorded in record of Motor Registering and Licencing Authority- Acquittal upheld. (Paras- 9 and 10)

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- Constructive possession- Held - Person not having control or supervision over driver of vehicle cannot be said to be in the constructive possession of vehicle – Accused 'H', owner of truck was found to be in jail at Chandigarh when his vehicle was intercepted by police carrying country liquor without permit – He had no control or supervision over person plying vehicle at the relevant time – He cannot be held to be in constructive possession of liquor in question – Acquittal upheld. (Para-11)

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- **Code of Criminal Procedure, 1973-** Section 377- Appeal by State against inadequacy of sentence– Accused 'G' and 'P' were sentenced for offence under Section 61(1)(a) of Excise Act by trial court to period already gone by them in custody (three days) - State seeking enhancement of sentence – Further held – (i) only three out of 4420 pouches of liquor were sent for chemical examination and no findings can be given that other pouches contained country liquor, (ii) offence was committed in year 2001 and there is no plausible reason to enhance sentence after 17 years – Appeal of State dismissed. (Para-17)

Cases referred:

Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shimla Law Cases, 208
State of H.P versus Ramesh Chand, Latest HLJ, 2007, (HP) 1017

Joginder Singh versus State of Himachal Pradesh, Latest HLJ 2017 (HP) 118)

For the Appellant(s) :	Mr. Shiv Pal Manhans, Additional Advocate General with Mr. Raju Ram Rahi and Mr. Amit Kumar Dhumal, Deputy Advocate Generals.
For the Respondent(s):	Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 & 2 in Cr. Appeal No. 24 of 2006 and for both the respondents in Cr. Appeal No. 527 of 2005. M/s Anand Sharma and Karan Sharma, Advocates, for respondent No. 3 in Cr. Appeal No. 24 of 2006.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge *(oral)*

State has preferred **Cr. Appeal No. 527 of 2005,** against respondents Gurmail Singh and Paal Singh, against the judgment dated 26.09.2005, passed by learned Chief Judicial Magistrate, Sirmaur, Distt. at Nahan (HP), in Criminal Case No. 79/01 of 2002 (hereinafter referred to as 'the impugned judgment), for enhancement of the sentence imposed upon them under Section 61(1)(a) of the Punjab Excise Act, as applicable to the State of Himachal Pradesh (for short 'the Excise Act'), in case FIR No. 39/2001, dated 02.03.2011, registered in Police Station Sadar, Nahan, District Sirmaur, under Section 61(i)(a) of the Excise Act read with Sections 420 & 482 of the Indian Penal Code.

2. **Criminal Appeal No. 24 of 2006** has also been preferred by the State arising out of the same judgment, against which Criminal Appeal No. 527 of 2005 has been preferred by the State. This appeal has been preferred against all the respondents, i.e. Gurmail Singh, Paal Singh and Harvinder Pal, for setting aside their acquittal vide impugned judgment under Sections 420 & 482 of Indian Penal Code (hereinafter referred to as 'IPC)

3. Both these appeals are based upon the one and the same evidence on record of one case and the common question of law and fact is involved in these appeals, therefore, they are taken up for hearing together and are being decided accordingly.

4. On the basis of challan presented by the prosecution in the Court, respondents were charge-sheeted under Section 61(1)(a) of the Excise Act, for transporting 4420 pouches (each pouch containing 70 ml) of 'Sirmour No. 1", in Truck No. HR-37-A-0305, on 02.03.2001, at around 9.30 p.m., without any legal and valid permit to transport the same and for commission of an offence under Section 420 of IPC, by dishonestly inducing and cheating the State of Himachal Pradesh, after changing the chassis and engine numbers of the aforesaid truck and also for commission of an offence under Section 482 IPC by using false property marks instead of original chassis and engine numbers of the said truck, with intent to defraud the State of Himachal Pradesh.

5. Prosecution has examined 15 witnesses in support of its case. After recording statements of the respondents-accused under Section 313 of the Code of Criminal Procedure, they have not chosen to lead any evidence in their defence.

6. On conclusion of trial, respondents Gurmail Singh and Paal Singh were convicted by learned Trial Court under Section 61(1)(a) of the Excise Act and were sentenced to undergo the simple imprisonment already undergone by them during the trial w.e.f. 02.03.2001 to 05.03.2001 and also to pay fine of Rs. 1,000/- each and they were acquitted under Sections 420 and 480 of IPC. Respondent-Harvinder Pal was acquitted for all the offences, for which he was charged.

7. Respondents Gurmail Singh and Paal Singh have not assailed their conviction and sentence imposed upon them. It is only the State, which has challenged the impugned judgment, as stated, *supra.*

8. As far as commission of offences under Sections 420 & 482 IPC is concerned, the only evidence on record is the statement of PW-8 Sanjeev Kumar, copy of release application (Ext. PW-13/A) filed by Harvinder Pal for staying the auction of truck No. HR-37-A-0305, photocopy of registration certificate of the said truck (Ext. PW-13/B) and power of attorney signed by Harvinder Pal (Ext. PW-13/C), filed on his behalf at the time of preferring the release application (Ext.PW-13/A).

9. PW-8 Sanjeev Kumar in his deposition has stated that as per record of office of the Registering and Licencing Authority, Ambala, truck No. HR-37-A-0305 bearing chassis No. 344052198983 and engine No. 692022206658, has been registered in the name of respondent Harvinder Pal. There is nothing on record to establish that the truck impounded by the police being used for transporting the liquor has having different chassis and engine numbers from that proved by PW-8 in the Court, rather, from the copy of registration certificate (Ext. PW-13/B) proved by PW-13 Amit Kumar, Criminal Ahlmed of the office of the Chief Judicial Magistrate, Nahan, it is evident that registration certificate placed on record by respondent-Harvinder Pal alongwith his release application (Ext. PW-13/A) and registration certificate (Ext. PW-13/B) bears the same chassis and engine numbers, as proved by PW-8 Sanjeev Kumar on the basis of record of Registering and Licencing Authority.

10. From the available evidence on record, it can safely be said that there is not even an iota of evidence led by the prosecution to establish the charge under Sections 420 & 482 IPC against the respondents.

11. Respondent-Harvinder Pal has also been acquitted under Section 61(1)(a) of the Excise . Though, in his statement under Section 313 Cr.P.C, he has denied the ownership and possession of truck No. HR-37-A-0305, but at the same time, there is unrebutted evidence of documents, i.e. release application (Ext. PW-13/A), registration certificate (Ext. PW-13/B) and power of attorney (Ext. PW-13/C), which establishes that Harvinder Pal had filed an application in the court claiming the ownership and possession of the truck in question. Further PW-8 has also established that the said Harvinder Pal was the owner of the truck. There is no cross-examination of the said witness in this regard despite having opportunity to do so. Therefore, ownership of truck No. HR-37-A-0305 is undoubtedly stands proved to be of Harvinder Pal. But the ownership of the vehicle is not sufficient to prove involvement of Harvinder Pal in the commission of offence, i.e. transportation of illicit liquor. It is again a case of no evidence on this count.

12. Though, owner is to be supposed in constructive possession of the vehicle and he cannot get rid of the acts committed by his servants, particularly, when the ownership is claimed and auction of the vehicle involved in the offence is opposed, but in peculiar circumstances of the present case, Harvinder Pal Singh cannot be said to be having even constructive control over the vehicle so as to direct or permit his driver or conductor for using the truck for illegal transportation of liquor unless proved by leading cogent and reliable evidence as he, at the relevant point of time, was in custody in jail at Chandigarh in another case, which fact has been proved by PW-11 Head Constable Ashok Tuli. There is possibility that he might not having the control over the person plying the vehicle at relevant point of time.

13. There is nothing on record to establish that Harvinder Pal had ever allowed respondents Gurmail Singh and Paal Singh to transport the said liquor. On this issue for want of convincing evidence, he is entitled for benefit of doubt. Therefore, on this issue also, learned trial court has not committed any mistake. Conviction and sentence imposed upon Gurmail Singh and Paal Singh have not been assailed by the said respondents.

14. It is further contended on behalf of the State that for the commission of offence under Section 61(1)(a), minimum sentence of six months imprisonment has been prescribed alongwith fine and thus, it is canvassed that sentence imposed by the learned trial court is inadequate and lesser than minimum punishment prescribed under the Excise Act.

15. Learned Counsel for respondents has referred provisions of Section 61 of the Act, applicable in present case, prevailing at relevant point of time, which is not disputed by the State. The same reads as under:-

*"**61(1) Penalty for unlawful import, export, transport, manufacture, possession, etc.**- whoever, in contravention of any section of this Act or of any rule, notification issued or given thereunder or order made, or of any license, permit or pass granted under this Act,-*

(a) imports, exports, transports, manufactures, connects or possess any intoxicants; or

(b) constructs or works any distillery or brewery; or

(c) uses, keeps or has in his possession any materials, still, utensils, implement or apparatus whatsoever, for the purpose of manufacturing any intoxicant other than tari;

Shall be punishable for every such offence with imprisonment for a term which may extend to three years and with fine which may extend to two lakh of rupees;

Provided that in the case of an offence relating to the possession of-

(i) a working still for the manufacture of any intoxicant, such imprisonment shall not be less than three years and such fine shall not be less than one lakh rupees;

(ii) lahan such imprisonment shall not be less than one year and such fine shall not be less than fifty thousand rupees;

(iii) Country liquor manufactured otherwise than in a licensed distillery in Himachal Pradesh, in a quantity not exceeding ten bottles, each bottle containing 750 milliliters, such imprisonment shall not be less than six months and such fine shall not be less than five thousand rupees; and in a quantity exceeding ten bottles of the aforesaid capacity such imprisonment shall not be less than one year and such fine shall not be less than ten thousand rupees.

(iv) Foreign liquor other than—

(a) manufactured in a licensed distillery/ brewery in India; or

(b) imported into India on which custom duty is leviable under the Customs Tariff Act, 1975, or the Custom Act, 1962.

such imprisonment shall not be less than one year and such fine shall not be less than twenty thousand rupees.

(2) Penalty for unlawful import, export, transport, manufacture, possession, sale etc. –*Whosoever in contravention of any section other than sections 29 and 30 of this Act or of any rule, notification issued or given thereunder or order made, or of any license, permit or pass granted under this Act-*

(a) sells any intoxicant; or

(b) cultivates the hemp plant; or

(c) removes any intoxicant from any distillery, brewery or warehouse established or licensed under this Act; or

(b) bottles any liquor for the purposes of sale; or

(e) taps or draws tari from any tari-producing tree;

Shall be punishable-

(i) Where such contravention relates to an offence specified in clauses (a), (c), (d) and (e), with imprisonment for a term which shall not be less than six months but which may extend to two years and shall not be liable to fine which shall also be less than fifty thousand rupees but which may extend to two lakh rupees; and

(ii) Where such contravention relates to an offence specified in clause (b), with imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees.

(3) *Notwithstanding anything contained in sub-section (1), where any contravention relates to intoxicating drugs, such contravention shall be punishable under section 20 or section 27 of the Narcotics Drugs & Psychotropic Substances Act, 1985, as the case may be. "*

16. It is evident from the provisions of Section 61 of the Excise Act that transportation of any intoxicant shall be punishable with imprisonment for a term, which may extend to three years and with fine upto Rs. 2,00,000/-. The minimum sentence from six months' to three years' imprisonment alongwith fine has been prescribed for offences mentioned in clauses (i) to (iv) in proviso to Section 61(1) of the Excise Act.

17. In present case, respondents Gurmail Singh and Paal Singh have been charge-sheeted for transporting liquor without permit, but not for offences mentioned in proviso to Section 61(1) of the Excise Act. No doubt, for the offence committed by respondents Gurmail and Paal Singh, imprisonment may extend to three years and for transporting a huge quantity of 4420 pouches of country liquor without permit, prayer of State may be justifiable to enhance the sentence, but for the reason that only three pouches were sent for chemical examination and there is nothing on record to establish that rest of the pouches were also containing country liquor and for settled position of law in this regard (*see judgments rendered in cases titled as* ***Dharam Pal and another versus State of Himachal Pradesh****, reported in* ***2009 (2) Shimla Law Cases, 208****;* ***State of H.P versus Ramesh Chand****, reported in* ***Latest HLJ, 2007, (HP) 1017*** and ***Joginder Singh versus State of Himachal Pradesh, reported in Latest HLJ 2017 (HP) 118****)* and also for the fact that the offence was committed in the year 2001, I do not find any plausible reason for enhancement of the sentence after 17 years.

18. No other point raised or urged. For the aforesaid discussion, it cannot be said that learned Trial Magistrate has not appreciated the evidence completely and correctly or the impugned judgment has caused miscarriage of justice or resulted into travesty of justice. Therefore, no ground for interference is made out. Hence, both the appeals are dismissed. Bail bonds furnished by and on behalf of the respondents are discharged.

19. Pending application(s), if any, stands disposed of. Record be sent back.

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

Balbir Singh ....Petitioner

Versus

State of H.P & others ....Respondents

CWP No. 2928 of 2015
Decided on : 10.05.2018.

Grant-in-Aid (PTA) Rules, 2006- Release of grant- Petitioner was engaged as teacher by PTA and he served as such in a school since 22.3.2007 against sanctioned post - He was not paid anything by respondent State- Pursuant to directions of High Court issued in earlier writ petition of petitioner, Director Elementary Education considered petitioner's case but rejected his claim on ground that petitioner was engaged on basis of resolution of PTA Committee – Moreover, petitioner was not eligible as per GIA Rules to be appointed as a language teacher – Petition against – Respondent State challenging petitioner's engagement on ground that procedure stipulated in office instructions dated 13.7.2007, requiring issuance of advertisement, holding of interview and of candidate must be having requisite qualification, was not followed in petitioner's case – On facts, it was found that petitioner was engaged on 22.3.2007 before issuance of instructions dated 13.7.2007 by State, therefore, procedure stipulated therein could not have been followed in his case- Petitioner otherwise found eligible for post of language teacher- Respondents were further found to have released grant in aid in favour of many other persons similarly situated vis-à-vis petitioner after issuance of instructions dated 13.7.2007 – Held – In such circumstances, State cannot discriminate against petitioner- Petition allowed- Respondents directed to release grant in aid from date of his engagement as a language teacher.

(Paras-5 to 8 and 19)

For the petitioner : Mr. Shyam Singh Chauhan, Advocate.

For the Respondents: Mr. Shiv Pal Manhans, Additional Advocate General with Mr. Raju Ram Rahi and Mr. Amit Kumar Dhumal, Deputy Advocate Generals

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge *(oral)*

Present petition has been filed against rejection of claim of petitioner for grant-in-aid by Director vide his order dated 05.01.2015 (Annexure P-6). Petitioner was engaged as a PTA teacher on 22.03.2007 against the sanctioned post of Language Teacher in pursuant to the resolution of the PTA Committee of the concerned school. But grant-in-aid to Parent-Teachers Association, as provided under Grant-in-Aid Rules, 2006 (in short 'GIA Rules') was not released by respondents in his favour.

2. Aggrieved by non release of grant-in-aid, petitioner had approached this High Court by filing CWP No. 10246/2011, titled as Balbir Singh versus State of Himachal Pradesh & others, seeking direction to respondents to release up to date grant-in-aid to him w.e.f 22.03.2007, alongwith interest thereupon. At that time, proposal sent by Principal for releasing grant-in-aid, in favour of the petitioner, was pending consideration with the respondent authority and therefore, the said petition was disposed of on 22.12.2011, with a direction to respondent authority to take final decision in the matter within a period of two months from the date of production of a copy of judgment before the Deputy Director of Elementary Education, Kullu.

3. In compliance to the aforesaid direction passed in CWP No. 10246 of 2011, Director Elementary Education, has passed the impugned order rejecting the claim of the petitioner on the ground that at the time of appointment of the petitioner, as per the Recruitment and Promotion Rules in vogue, he was not eligible to be appointed as a Language Teacher and he was engaged by the PTA Pradhan on the basis of resolution of PTA committee of the concerned school without adopting the proper procedure provided in GIA Rules.

4. GIA Rules were notified vide notification No. EDN-A(Kha)7-3/2006, dated 29-06-2006. Thereafter, the State has circulated clarification/administrative instructions on "Grant-in-Aid" to PTA Rules, 2006, vide communication dated 2nd August, 2006/19th August, 2006, wherein Principal was advised to distance himself from the selection of a candidate by the PTA and was directed to advise the PTA to constitute a selection committee comprising of President PTA,

Secretary PTA and Subject Specialist/Expert., as provided in the said notification. There is no other communication brought in notice in this regard, except instructions dated 13.07.2007, prescribing any definite procedure for appointment of PTA teachers, as pre-condition for entitling them for grant-in-aid under the GIA Rules.

5. In the instructions dated 13.07.2007, procedure to be followed by the PTAs for appointment of PTA teachers was circulated for the first time, providing issuance of advertisement, giving 15 days' time to the desirous candidates, conducting interview on 5th or 20th of a month, duly notified in advance to the desirous candidates and appointing those candidates only, who fulfill the educational and professional qualification, as per Recruitment and Promotion Rules, for the concerned post. It was further directed that the selection should be made strictly on the basis of merit by adopting objective competitive criteria.

6. Admittedly, the petitioner was appointed as PTA teacher on 22nd March, 2007. At that time, instructions dated 13.07.2007 were not in existence. Undisputedly, the petitioner was appointed after issuance of GIA Rules, but prior to issuance of procedure and criteria for making appointment for PTA teachers by passing a resolution by the Parents Teachers Resolution on the basis of practice prevailing at the time of appointment of the petitioner. Therefore, objections of the respondents with regard to non-adoption of procedure prescribed for appointment of PTA teachers vide Instructions dated 13.07.2007, is not sustainable. Denial of grant-in-aid for non-compliance of procedure, which was not in existence at the time of appointment of the petitioner, is not justifiable, rather irrational, unreasonable and arbitrary.

7. So far as the academic and professional qualification for the post in question is concerned, it is also undisputed that as on date, as per existing Recruitment and Promotion Rules, the prescribed qualification is 'B.A with Hindi' as an elective subject from a recognized university, with 50% marks in Hindi or its equivalent or 'M.A. in Hindi'. Besides that, for appointment as a teacher, one has also to qualify Teacher Eligibility Test (TET). The petitioner has placed on record his testimonials, wherefrom it is evident that he has passed B.A. with Hindi as an elective subject, with 50% marks in Hindi, in the year 1999 and has completed his M.A. (Hindi), securing more than 50% marks in the year 2004 and has also qualified the TET for Language Teacher in the year 2013.

8. The petitioner has also placed on record information received under RTI from the Deputy Director, Elementary Education, Sirmour, (Annexure P-9) indicating therein that similarly situated persons appointed before and after issuance of GIA Rules, having qualification of B.A. and M.A. only, which was not prescribed academic qualification for Language Teacher at that time, are being paid grant-in-aid by the respondents. In the said information, candidate at Sr. No. 4, having qualification of M.A. was appointed on 1st June, 2006, candidate at Sr. No. 8, having qualification of B.A, M.A. (Hindi) and TET, was appointed on 01.09.2006 and candidate at Sr. No. 13 having qualification of M.A. only, was appointed on 10.10.2007, i.e. even after appointment of the petitioner and also circulation of instructions dated 13.07.2007. State is not supposed to discriminate the similarly situated persons, particularly, when the same duty is being performed by such employees.

9. The issue in present petition is not between the petitioner and PTA, but between the petitioner and the respondents-State, as though petitioner was appointed by PTA, but it is the State which has permitted him to continue teaching the classes for about 11 years and that too, without paying a single penny in grant-in-aid or otherwise. Schools have been opened by the respondents-State, but without teachers, existence of schools is meaningless. Therefore, after opening the schools, to provide teachers in those schools is the primary function of the State. Though, it is also a serious issue that the State cannot shirk from its duty to provide well qualified regular teachers to the students by permitting PTA to appoint teachers in schools and allowing them to continue for such a long period under the garb of stop gap arrangements. But, despite the fact that it is depreciable arrangement, such arrangement does not absolve the State

from paying admissible remuneration to petitioner appointed by PTA in the Government School against vacant post, which has not been filled up by appointing a regular teacher by respondents-State. Undoubtedly, no one can be permitted to teach the students in Government Schools without express or implied consent of the State and the omissions and commissions on the part of State established consent for appointment and continuation of the petitioner as PTA teacher.

10. An objection of non-joinder of necessary party has also been taken by stating that concerned PTA, which has appointed petitioner, has not been made party in the present petition. Concerned PTA is not necessary party as appointment of petitioner by the said PTA has not been disputed by respondents, rather admitted and for the reasons that for release of grant-in-aid, there is no role of PTA and grant-in-aid is to be released by respondents only on the recommendation of principal concerned. Concerned PTA, at the most, may be proper party, whose non-joinder is not fatal.

11. Learned Counsel for the petitioner submits that similarly situated persons, even appointed after appointment of petitioner, have also been extended benefits of grant-in-aid either on their demand by the Department or its own or in compliance of various orders passed by this Court.

12. Learned Counsel for the petitioner has also relied upon the judgments passed by a Division Bench of this High Court in CWP No. 2549 of 2015 titled as Hem Raj Sharma versus State of H.P. and others, decided on 07.08.2015 and judgments of Co-ordinate Benches of this Court in CWP No. 2638 of 2015 titled as Devi Saran versus State of H.P. and others, decided on 16.09.2016 and CWP No. 358 of 2015 titled as Chander Parkash Sharma versus State of H.P. and others, decided on 01.07.2016, wherein the persons appointed even after issuance of instructions dated 03.01.2008 directing to stop the selection/appointment by Parent Teachers Associations and not to accept joining of such appointees, have also been held entitled for grant-in-aid and the said judgments stand implemented by respondents. Further, it is also pointed out that in ***Hem Raj's*** case *supra*, it has been recorded that three teachers, namely, Indira Devi, Kauran Devi and Mukand Lal, who were appointed on PTA basis after 03.01.2008 were also being paid grant-in-aid and the said fact has not been denied by respondents-Department in the said writ petition.

13. Reliance has also been put by learned Counsel for the petitioner on pronouncement of Division Bench of this High Court passed in CWP No. 929 of 2017 titled as Sonika Chaudhary versus State of H.P. & another, decided on 03.04.2018 and judgment passed by a Co-ordinate Bench of this Court in CWP No. 226 of 2010 titled as Promila Devi versus State of H.P. & others, decided on 02.04.2015, with plea that in compliance of decisions therein, respondents have released grant-in-aid.

14. Plea of payment of grant-in-aid in above referred cases remained unrebutted. Respondents are availing services of the petitioner till date, but are not willing to release grant-in-aid to him, despite the fact that he is performing the same duty, as being performed by other PTA teachers to whom grant-in-aid is being released.

15. It is strange behaviour on the part of the State that for teaching the students, petitioner is eligible, but for making payment of grant-in-aid, he is being considered ineligible for want of certain formalities to be performed by PTA on behalf of respondents-State. In case his appointment was defective or illegal, he should not have permitted to continue for 11 years. In any case, there was no impediment to the State to make arrangement of a teacher having requisite qualification for the post, during the last eleven years. Therefore, this plea, at this stage, is not sustainable for denying grant-in-aid.

16. Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. In India, since ancient era, State is always for welfare of citizens being guardian and protector of their rights. Primary duty of State is welfare of people and exploitive actions of rulers have always

been deprecated and history speaks that such rulers were always reprimanded and punished. 'Rule of Law' was and is Fundamental Principle of 'Raj Dharma'. Dream of our forefathers, to establish 'Rule of Law' after independence, has emerged in our Constitution. Exploitation by State has never been expected on the part of State as the same can never be termed as 'Rule of Law', but the same is arbitrariness, which is antithesis of 'Rule of Law'. To make law, to ameliorate exploitation, is duty of State and in fact State has also framed laws to prevent exploitation. But, in present case, State is an instrumental in exploitation, which is contrary to essence of the Constitution.

17. In an identical matter, Co-ordinate Bench of this Court in a judgment dated 10.4.2015, passed in CWP No. 8692 of 2012 titled as Lata Kumari vs. State of H.P. & Ors., directing the State to release grant-in-aid to the person appointed prior to issuance of notifying GIA Rules, has observed as under:-

> *"9. The matter can be looked from a different angle. Indisputably the petitioner had been appointed and assigned the duties to teach the students and such duties have been continuously performed by her. Then can the respondents, who are model employers, be permitted to act with total lack of sensitivity and indulge in "Begar", which is specifically prohibited under Article 23 of the Constitution of India.*
>
> *10. The State government is expected to 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. A model employer should not exploit its employee and take advantage of their helplessness and misery. In the present case the conduct of the respondents falls short of expectation of a model employer.*
>
> *11. It is not the case of the respondents that petitioner has not been discharging her duties diligently, honestly and faithfully. Therefore, in such circumstances while demanding her legitimate due by way of grant in aid under the Rules, the petitioner has not asked for the moon.*
>
> *12. In view of the aforesaid discussion, there is merit in the petition and the same is allowed and the respondents are directed to release the grant-in-aid to the petitioner as per the 'Grant-in-Aid to Parent Teacher Association Rules, 2006' from the date of promulgation of the Rules. No costs."*

18. Aforesaid observations are fully applicable in present case also.

19. In view of above discussion and pronouncements of this Court referred herein-above, petition is allowed and the respondents are directed to release the grant-in-aid to the petitioner from the date of his appointment on or before 31.07.2007, after adjusting amount as per Rules, if any, paid to him. Petitioner shall also be entitled for all other consequential benefits, which have been extended by the respondents-State to other similarly situated persons. Respondent No.2 shall file compliance affidavit within two weeks after 31.07.2018.

20. Petition is disposed of in aforesaid terms, so also the pending applications, if any.

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

Madan Lal .....Petitioner
Versus
Alam Singh .....Respondent

CMPMO No. 27 of 2018
Reserved on 01.05.2018
Decided on: 11.05.2018

Code of Civil Procedure, 1908- Order XXVI Rule 9- Appointment of Local Commissioner- Object of local investigation is not to collect evidence which can be taken in Court - Purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot – Further such evidence must be necessary for elucidating any point left doubtful on evidence produced before Court- Plaintiff claiming right of passage to his house and cow-shed through adjoining land of defendant- Defendant pleading in written statement that plaintiff had recently constructed cow-shed over his land and wanted to create passage through his (defendants') land – Held – Dispute is regarding existence of path leading to cow-shed of plaintiff – It can be easily determined by local investigation by Commissioner – Order of trial court set aside – Matter remanded with direction to appoint a Commissioner for local investigation. (Para-13)

Cases referred:
Bali Ram vs. Mela Ram, AIR 2003 (HP) 87
Moti Ram vs. Tikam Ram's case, latest HLJ 2010 (HP) 711
Pawan Kumar vs. Pradeep Kumar's case, Latest HLJ 2015 (HP) 998.

For the petitioner: Ms. Komal Chaudhary, Advocate.
For the respondent: Mr. Vinod Chauhan, Advocate, vice counsel.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition, under Article 227 of the Constitution of India, has been maintained by the petitioner/plaintiff (hereinafter to be called as "the plaintiff"), against the order dated 21.12.2017, passed by learned Civil Judge (Jr. Div.), Jogindernagar, District Mandi, H.P., whereby an application under Order 26, Rule 9 CPC, filed by the plaintiff for appointment of the Local Commissioner has been dismissed.

2. Briefly stating facts giving rise to the present petition are that the plaintiff filed a Suit for permanent prohibitory injunction and for mandatory injunction, under Section 38 & 39 of the Specific Relief Act against the defendant, wherein he alleged that the suit land, i.e. Khasra No. 1623, situated in Mohal Ropari/79, Tehsil Jogindernagar is joint land and the house of the plaintiff is situated in adjoining Khasra No. 1624 of the same Mohal. It has been further averred that through the suit land there exist a path to the house and cow shed of the plaintiff, where the defendant has constructed a septic tank and now he is creating hindrance in order to ingress and outgress the plaintiff and other co-sharers from the path, therefore appointment of the Local Commissioner is necessary to elucidate the matter in dispute.

3. In reply to the application, the defendant has taken preliminary objection qua maintainability. On merits, it has been averred by the defendants that the application has been moved just to create evidence, as the plaintiff has miserably failed to establish the factum of existence of path, hence the application may be dismissed.

4. Learned Court below vide order dated 21.12.2017, dismissed the application, so filed by the plaintiff, hence the present petition.

5. Ms. Komal Chaudhary, learned counsel for the petitioner has argued that the order of the learned Court below is without appreciating the facts and law to the effect that Local Commissioner was required to be appointed, as present is a boundary dispute. In support of her contentions, learned counsel for the petitioner placed reliance upon the judgments of this Hon'ble High Court, rendered in ***Bali Ram*** *vs.* ***Mela Ram,*** AIR 2003 (HP) 87 and ***Moti Ram*** *vs.* ***Tikam Ram's case,*** latest HLJ 2010 (HP) 711. On the other hand, Mr. Vinod Chauhan, learned vice counsel appearing on behalf of the respondent has argued that present is not a boundary dispute and the plaintiff, after availing three opportunities for addressing arguments, after the completion of the evidence has moved the application, which is nothing, but creation of evidence and the Court is not required to create evidence for the party, so the learned Court below has rightly dismissed the application of the plaintiff for appointment of a Local Commissioner. Learned vice counsel appearing on behalf of the respondent, in support of his contentions, placed reliance upon the judgment of a Coordinate Bench of this Hon'ble High Court, rendered in ***Pawan Kumar*** vs. ***Pradeep Kumar's case***, Latest HLJ 2015 (HP) 998.

6. The case of the plaintiff is that his residential house is situated in the adjoining Khasra number 1624 of the suit land, which is situated towards the upper side to his house and his cowshed is situated towards the upper and back side to the house of the defendant. As per the plaintiff, there existed a path over the suit land, which goes to his cowshed and the inhabitants of the village also use this path to approach the road. However, in 2011, the defendant with some malafide intention, started digging the said path in order to construct a septic tank. Though, the plaintiff has objected at the time of digging and constructing of the septic tank, however the defendant assured him that the tank would be under ground and it will not block the path in any manner, as the plaintiff, as well as other inhabitants of the village are using the said path to approach the road. Thereafter, the defendant also raised danga/wall upto the height of 2-3 feet over the path and again the plaintiff objected for the same, but the defendant ensured the plaintiff that he will construct and make the path to approach his cowshed, as well as for the other inhabitants of the village. However, after completing the construction, the defendant blocked the path by putting some hurdle, so that the plaintiff and inhabitants of the village cannot go easily from that path. Thus, the plaintiff reported the matter to the Gram Panchayat Ropari, but nothing needful could be done.

7. In the month of November, 2013, the plaintiff once again compelled to bring the matter before Gram Panchayat Ropari and on the application of the plaintiff, the President Gram Panchayat Ropari visited the spot on 08.01.2014, but he shown his inability to do anything. As per the plaintiff, the house of the defendant is situated in upper side, thus the defendant with malafide intention diverted the water channel towards the house of the plaintiff, which may cause landslide and would be endanger to human life. Though, on 15.04.2014, the plaintiff requested the defendant to mend the path and divert the water channel, but the defendant straightaway refused the request, so made by the plaintiff and further threatened the plaintiff that he will permanently block the path. In these circumstance, the application for appointment of a Local Commissioner is required to be considered.

8. On the other hand, the defendant in his written statement submitted that the plaintiff has recently constructed the cowshed over the Government land and against him, encroachment proceedings are pending before the learned Assistant Commissioner, Jogindernagar. It has been further submitted in the written statement that the plaintiff is trying to trespass the part of the suit land, which is exclusive possession of the defendant just to make path to the cowshed and the plaintiff has filed this false and frivolous case, in order to compel the defendant to allow him to enter in his land.

9. From this, it appears that there is dispute with respect to the fact that whether path was there or not and whether cowshed is there or not. As per the defendant, the plaintiff has constructed cowshed on the Government land and he want to use the land of the defendant for

going to the cowshed. Meaning thereby, that there is some dispute with respect to the path, leading to the cowshed. Now whether the path is there or not, is a matter of fact, which can be easily determined, if a Local Commissioner is appointed, as he/she is the best person, who after visiting the spot, can give its report, with regard to the existence of the path.

10. A co-ordinate Bench of this Hon'ble High Court in ***Bali Ram vs. Mela Ram***, 2003 (HP) 87, has held as under:

> ***"13. Rule 9 of Order 26 of the Code of Civil Procedure (hereinafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if in the facts and circumstance of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case."***

11. A co-ordinate Bench of this Hon'ble High Court in ***Moti Ram vs. Tikam Ram***, Latest HLJ 2010 (HP) 711, has held as under:

> ***"3 The other question of law which according to the plaintiff is a substantial question of law is relating to interpretation of the provisions of Order 26, Rule 9 of the Code of Civil Procedure, 1908 (the Code). Admittedly, the prayer for appointment of Local Commissioner was made even before settlement of issues. It has been disposed of by the learned trial Court by a well reasoned order dated 6.11.2007. The purpose of commissions to make local investigations stipulated under Order 26, Rule 9 of the Code is for the purpose of elucidating any matter in dispute etc. etc. However, in the present case, the parties were yet to enter into evidence and the dispute till that stage was only by way of the pleadings set up on their behalf. Had they led any evidence and had there been any ambiguity therein, the same could very well be elucidated with the help of a Local Commissioner. In such situation, the evidence already on record could be appreciated properly by the Court with the help of the report of the Local Commissioner, but in the present case, there was no such evidence at the time when the application for appointment of Local Commissioner was moved on 7.11.2007.***
>
> ***4. For the foregoing reasons, the second question of law can also not be said to be a substantial question of law in the peculiar facts and circumstances of the present case"***

Meaning thereby, that the Local Commissioner is required to be appointed after the evidence has been led. In the present case also the evidence has already been led, so this judgment is in favour of the plaintiff.

12. As far as the judgment (supra) cited by the learned counsel for the respondent is concerned, the same is not applicable to the facts of the present case, as in the present case the

plaintiff has already led evidence and has shown *prima facie* to the Court that there is some dispute with respect to the path and the Local Commissioner is required to inspect the same.

13. From the above, it is clear that there is some dispute with respect to the factum of the existence of the path. The case of the defendant, as already discussed hereinabove, is that the path is being created by the plaintiff to go to the cowshed, which he has constructed on the Government land. All these aspects can only be determined by the Local Commissioner after visiting the spot, which will also help the Court to adjudicate the lis *inter se* the parties.

14. Therefore, the present petition is allowed and impugned order is set aside and the learned Court below is directed to appoint a Local Commissioner, who after visiting the spot shall submits its report qua the existence of the path on the suit land. Parties through their counsel are directed to appear before the learned Court below on **30th May, 2018**.

15. In view of the aforesaid terms, the petition, so also pending application(s), if any, shall stand(s) disposed of. However, in peculiar facts and circumstances of the case, the parties are left to bear their own costs.

****

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

State of Himachal Pradesh .....Appellant
Versus
Madan Singh .....Respondent

Cr. Appeal No. 427 of 2005
Reserved on: 02.05.2018
Decided on: 11.05.2018

Indian Penal Code, 1860- Sections 279 and 338- Negligent driving – Proof of – Allegations against accused driver of bus being that he all of sudden started moving bus ahead without waiting for whistle of conductor, when injured was still alighting from it - As a result victim fell down and received crush injuries on foot – Accused acquitted by trial court - Appeal against on ground of mis-appreciation of evidence by trial court – On facts, it was doubtful whether or not conductor had actually whistled/signalled accused to move ahead – Conductor also did not support prosecution case- Other passengers were not associated in investigation – Acquittal upheld – Appeal dismissed. (Paras- 9 to 11 and 16)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant : Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals.
For the respondent : Mr. R.P. Singh, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal, under Section 378 of the Code of Criminal Procedure, has been maintained by the appellant-State of Himachal Pradesh, assailing the judgment of acquittal, dated 29.06.2005, passed by the learned Judicial Magistrate 1st Class, Nahan, District Sirmaur, H.P, in criminal case No. 36/2 of 2004, under Sections 279 and 338 of the Indian Penal Code.

2. Briefly the facts giving rise to the present appeal as per the prosecution story are that on 04.12.2003 Smt. Rita Devi alongwith her son Rahul, had come to buy household articles at Nahan Bazar and after purchasing the articles, they boarded Bus No. HP-18-3601, in order to reach their home at Vikram Castle. Around 6.00 p.m., the bus reached at Vikram Castle and the driver/accused (hereinafter to be called as "the accused") stopped the bus to drop the passengers there, though Smt. Rita Devi alighted the bus safely, however when her son Rahul alighting the bus, the accused without waiting for the whistle of the conductor, started the bus, as a result of which, he fell down and received injury on his right foot under the rear tyre of the bus. Naresh Kumar/complainant (hereinafter to be called as "the complainant") and his brother Sanjeev Kumar were also occupying the aforesaid bus, who took the injured to the Zonal Hospital, Nahan for treatment and telephonically informed the Police about the said accident. The Police recorded the statement of the complainant, on the basis of which, FIR No. 243/03 was registered against the accused at Police Station, Nahan. The Investigating Officer visited the spot and prepared site plan as per the position of the spot. The bus was taken into possession alongwith its documents and memo in this regard was prepared. The photographs of the place including the offending bus were obtained and vehicle was mechanically examined, which was found without any mechanical defect. After completing the investigation, *challan* was presented in the Court.

3. Prosecution, in order to prove its case, examined as many as eleven witnesses. Statement of the accused was recorded under Section 313 Cr. P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 29.06.2005, acquitted the accused for the commission of offences, punishable under Sections 279 & 338 of IPC, hence the present appeal.

4. Learned Additional Advocate General, has argued that the judgment of acquittal, passed by the learned trial Court is without appreciating the evidence to its true perspective and after re-appreciating the evidence correctly, the accused be convicted, as the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. On the other hand, learned counsel appearing on behalf of the accused/respondent has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and, therefore, the well reasoned judgment of acquittal, passed by the learned trial Court needs no interference.

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

6. PW-1, HC Choli Ram, has taken the photographs Exts. P-1 to P-5 of the place of occurrence including the offending bus and the negatives thereof are Exts. P-6 to P-10. PW-5, Jamil Ahmad, a driver in HRTC depot, Nahan is a witness to memo, Ext. PW-5/A, whereby the offending bus alongwith its documents was taken in possession. PW-9, Laiq Ram has produced extract of logbook and duty register, which are Exts. PW-9/A and PW-9/B. PW-8, HC Saran Singh has carried out mechanical examination of HRTC Bus No. HP-18-3601 and submitted his report, Ext. PW-8/A. In his cross-examination, he could not tell the time, when he carried out the mechanical examination of the offending bus.

7. Complainant, Naresh Kumar appeared in the witness box as PW-2 and stated that on 04.12.2003, at about 5.30 p.m., he boarded Bus No. HP-18-3601 from the bus stand, Nahan and the bus reached at Vikram Castle, at about 6.00 p.m., where PW-4, Rita Devi safely alighted the bus, however when PW-3, Rahul was alighting the bus, the accused suddenly started the bus, due to which, Rahul fell down and his right foot came under the rear tyre of the bus. Thereafter, he alongwith PW-4, Rita Devi and his brother Sanjeev Kumar took the injured to the Zonal Hospital, Nahan for treatment. In his cross-examination, he has stated that there were many passengers in the bus, when it reached at Vikram Castle. He has further stated that PW-3 and PW-4 are known to him, as he used to work with them. He has deposed that PW-3, Rahul was sitting with him, whereas his mother PW-4 was sitting on the seat in front of them. He admitted that he boarded this bus many times before and usually it was being driven by the accused, who used to drive the same with due care and caution. He has deposed that when PW-3

and PW-4 alighted the bus, there was nothing in their hands. Self stated that PW-4 was having bag with her. He denied the defence suggestion that when bus started, PW-3 Rahul came running to take the articles back and had a fall, due to which his foot came under the trye of the bus.

8. It is not in dispute that PW-3 Rahul and PW-4 Rita Devi have tried to support the prosecution case in their examination-in-chief, however in their cross-examination, they could not validate the allegations of negligence on the part of the accused satisfactorily. They stated that on the evening of 04.12.2003, they boarded bus No. HP-18-3601 at 5.30 p.m. and around 6.00 p.m., the bus reached at Vikram Castle and when PW-3 was alighting the bus, the accused suddenly started the bus, due to which, PW-3 fell down and sustained injury on his right foot. As per PW-3, the accident has occurred, as the accused suddenly started the bus. However, he has not stated anything whether the conductor of the bus has given whistle to start the bus or not. On the other hand, as per PW-4, the accused was responsible for causing the accident, as he started the bus without waiting for the whistle of the conductor. Both these witnesses in their cross-examination have corroborated themselves with respect to the detail of the articles, which they had been carrying at the time of the accident. PW-3 in his evidence, admitted that they were carrying one bag of vegetable and one briefcase, which they kept on the road after alighting themselves from the bus, however PW-4, denied the factum of having one briefcase with them at the time of said accident.

9. PW-11, Mam Raj, conductor of the offending bus has not supported the case of the prosecution and he was declared hostile. In his cross-examination, he deposed that on 04.01.2003, at about 6.00 p.m., PW-3 and PW-4 had safely alighted the bus and thereafter at the instance of the passengers sitting in the bus, the accused started the bus and when the bus started PW-3 came running to take the articles back and had a fall, due to which, his right foot came under the rear tyre of the bus. He further deposed that on hearing the cries, he gave whistle and the accused stopped the bus. He denied that the accident has occurred due to negligence of the accused.

10. PW-7, Dr. S.C. Goel, has medically examined PW-3, Rahul and issued MLC, Ext. PW-7/A and opined the injury to be grievous in nature. PW-6, Dr. D.V. Kulkarni, Radiologist, Zonal Hospital, Nahan, performed the x-rays of the injured and gave his opinion, which is Ext. PW-6/C.

11. After analyzing the evidence which have come on record, it is clear that PW-11, conductor of the bus, has not supported the case of the prosecution. Though it has come on record that there were many passengers in the bus, but the Investigation Officer has not associated any of them as an independent witness. The mere statement of PW-2 is not sufficient to hold the accused guilty, as he is an interested witness and has admitted in his cross-examination that PW-3 & PW-4 are known to him, as he used to work with them.

12. Admittedly, the boy has received grievous injury on his right foot, but whether it has occurred by a fall or due to rashness of the driver/accused is suspicious. So, in these circumstance, after taking into consideration the evidence, which has come on record and testimonies of the witnesses, even after re-appreciating the evidence, this Court finds that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and the well reasoned judgment of acquittal, passed by the learned trial Court, needs no interference.

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

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

15. In **Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal :

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***(2) The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
>
> ***(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
>
> ***(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.***
>
> ***(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."***

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

****

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

Asho Ram. ...Petitioner

Versus

State of H.P. & others. ...Respondent.

CWP No. 10545 of 2012
Date of Decision: 16.5.2018

Industrial Disputes Act, 1947- Sections 12(5) and 25H- Refusal on part of Government to refer dispute to Labour Court on ground of its fading away - Validity thereof – Services of petitioner initially discontinued by the department In 1998 - However, pursuant to order of Administrative Tribunal, he was re-engaged in September, 2001 but with periodical breaks – After Dec. 2002, he was never engaged – Petitioner sending demand notice in April, 2008 to department and pleading

that preference ought to have been given to him being a retrenched daily wager before engaging another person for said job - Petitioner seeking reference of dispute to Labour Court – However, Labour Commissioner declined reference on ground of unexplained delay in raising dispute – Petition against - Held – Reference for Labour Court generally cannot be questioned on ground of delay alone – Even in case where there is some delay, Labour Court can always mould relief by declining back wages to workman till the date he raised demand - At any rate, delay and laches, if any, is to be considered from date of knowledge of engagement of another person in place of retrenched workman – Further, cause of petitioner was continuing one and cannot be said to have faded away with passage of time – Petition allowed – Labour Commissioner directed to refer dispute to Labour Court. (Para- 16, 17 and 19)

Cases referred:

Central Bank of India versus S. Satyam and Others, (1996) 5 Supreme Court Cases 419

Sapan Kumar Pandit versus U.P. State Electricity Board and others, (2001) 6 Supreme Court Cases 222

S.M. Nilajkar and others versus Telecom District Manager, Karnataka (2003) 4 Supreme Court Cases 27

Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301

Jasmer Singh versus State of Haryana and another (2015) 4 Supreme Court Cases 458

For the Petitioner:	Mr.Avinash Jaryal, Advocate.
For the Respondents:	Mr.Shiv Pal Manhans, Additional Advocate General with Mr.Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

Present petition has been filed assailing communication dated 23.2.2012 (Annexure P-1), whereby Labour Commissioner Himachal Pradesh has conveyed refusal on behalf of appropriate Government to refer the dispute to Labour Court under the provisions of Industrial Disputes Act, 1947 (herein after referred to as the Act), stating therein that dispute had faded away with the passage of time and was no more in existence and there was no justification for making reference to the Labour Court in view of judgments of this High Court passed in CWP No. 398 of 2001, titled M.C. Paonta Sahib Vs. State of H.P. & others, CWP No. 1486 of 2007, titled Laiq Ram Vs. State of H.P.

2. Petitioner was engaged by respondent No. 3 as daily waged baildar/Mate in December, 1997 as evident from mandays chart placed on record along with affidavit of Superintending Engineer of 7th Circle HPPWD, Dalhousi. However, he was disengaged in the year 1998, whereafter he had preferred an Original Application bearing No. OA (D) No. 388 of 2001 before the H.P. Administrative Tribunal, Dharamshala, which was directed to be treated as representation with direction to the Department to dispose of the same after hearing petitioner within six weeks from the date of passing of order i.e. 21.8.2001. In case of adverse order, the petitioner was granted liberty to assail the said order before appropriate form.

3. It is undisputed that after disposal of O.A. No. 388 of 2001, petitioner was re-engaged by respondent No. 3 in September, 2001, but thereafter also, frictional breaks were given to his engagement and finally he was never engaged after December, 2002.

4. In April, 2008, petitioner had submitted demand notice to respondent No. 3 vide application dated 8.4.2008, stating therein that the Department was violating the provisions of Sections 25-G, 25-H as well as Section 25-T read with Schedule V of the Act. It was specifically

stated in the said demand notice that in case of retrenchment of daily rated/casual workers, preference has to be given to such retrenched workers on an offer for engaging the workman on dates subsequent to their retrenchment, but the Department was not following the said principle. An example of a person who was junior to the petitioner was also cited in the demand notice, who was allowed to work in the same division and to complete 180 days without offering reappointment to the petitioner, who was senior to him, but was retrenched by respondent No. 3.

5. The only defence of the respondent is that the dispute was raised vide demand notice dated 8.4.2008 after lapse of 5 years without giving any reason for delay and there was nothing on record to suggest that dispute had been kept alive by the petitioner over a long period of time, therefore, declining the reference of the petitioner/workman as per provisions of Section 12(5) of the Act vide impugned communication, has been justified by giving reference of judgments of this Court in CWP No. 398 of 2091, titled as M.C. Paonta Sahib Vs. State of H.P. and others, CWP No. 1486 of 2007, titled as Laiq Ram Vs. State of H.P. and CWP No. 1619 of 2007, titled Kamlesh Vs. State of H.P.

6. Section 25-F of the Act, deals with condition precedent to retrenchment of workmen. Section 25-G deals with procedure for retrenchment. Section 25-H contains provision for Re-employment of retrenched workmen. As per Section 25 a workman, having continuous service for not less than one year under the employer, shall not be retrenched unless one month notice as prescribed in Section 25-F is given, workman has been paid and notice is served to the appropriate government or such authority as prescribed in the Section 25-F. Admittedly, petitioner had not served for one year and had also not completed 240 days in a calendar year.

7. Section 25-G provides that employer shall ordinarily retrench the workman who was the last person employed in that category. Section 25-H provides that after retrenchment of workman if employer proposes to engage any persons later on then employer shall give opportunity to the retrenched workman for re-employment in preference to other persons. So far as provisions of Section 25-G and Section 25-H are concerned there is no condition precedent of continuous service of one year under an employer.

8. The Apex Court in case titled as ***Central Bank of India versus S. Satyam and Others, (1996) 5 Supreme Court Cases 419*** has held as under:-

> *"9. The plain language of Section 25- H speaks only of re-employment of retrenched workmen". The ordinary meaning of the expression "retrenched workmen" must relate to the wide meaning of 'retrenchment' given in Section 2 (oo). Section 25-F also uses the word 'retrenchment' but qualifies it by use of the further words "workman…who has been in continuous service for not less than one year". Thus, Section 25-F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of the further words "workman.. who has been in continuous service for not less than one year". It is clear that Section 25-F applies to the retrenchment of a workman who has been in continuous service for not less than one year and not to any workman who has been in continuous service for less than one year; and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less than one year. Chapter V-A deals with all retrenchments while Section 25-F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25-G prescribes the principle for retrenchment and applies ordinarily the principle of "last come first go" which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25-F".*
>
> *10. The next provision is Section 25-H which is couched in wide language and is capable of application to all retrenched workmen, not merely those covered by*

Section 25-F. It does not require curtailment of the ordinarily meaning of the word 'retrenchment' used therein. The provision for reemployment of retrenched workmen merely gives preference to a retrenched workman in the matter of re-employment over other persons. It is enacted for the benefit of the retrenched workmen and there is no reason to restrict its ordinary meaning which promotes the object of the enactment without causing any prejudice to a better placed retrenched workman.

11. Chapter V-A providing for retrenchment is not enacted only for the benefit of the workmen to whom Section 25-F applies but for all cases of retrenchment and, therefore, there is no reason to restrict application of Section 25-H therein only to one category of retrenched workmen. We are, therefore, unable to accept the contention of Shri Pai that a restricted meaning should be given to the word retrenchment' in Section 25-H. This contention is, therefore, rejected".

9. In present case, in demand notice Annexure P-3, petitioner has specifically referred violation of provisions of Sections 25-F, 25-H and 25-T of the Act by giving reference of a junior person engaged by respondents and allowing such person to complete 180 days by ignoring the right of petitioner for reemployment under Section 25-H of the Act. The said issue has not been dealt with either by the Labour Commissioner at the time of refusing to make reference of demand notice of the petitioner or in the reply filed by the respondents to the present petition. Petitioner being retrenched employee has a preferential right to be considered for re-employment in comparison to others, who were engaged in subsequent years after his retrenchment. Therefore, there is violation of Section 25-H of the Act in the present case.

10. Respondents have taken plea of delay in raising demand notice with regard to dispute and have justified the refusal to make the reference to the Labour Court.

11. The Apex Court in case titled as ***Sapan Kumar Pandit versus U.P. State Electricity Board and others, (2001) 6 Supreme Court Cases 222***, has held as under:-

"10 In considering the factual position whether the dispute did exist on the date of reference the Government could take into account factors, inter alia, such as the subsistence of conciliation proceedings. It is of no consequence that conciliation proceedings were commenced after a long period. But such conciliation proceedings are evidence of the existence of the industrial dispute".

……..

"15. There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons it does not cause the dispute to wane into total eclipse".

12. The Apex Court in case titled as ***S.M. Nilajkar and others versus Telecom District Manager, Karnataka (2003) 4 Supreme Court Cases 27***, has held as under:-

"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in Shalimar works Ltd. v. Workmen that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute it does not mean that the dispute can be raised at any time without regard to the delay and reasons therefore. There is no limitation prescribed for reference of disputes to an industrial tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising

the dispute after even re-employment of the most of the old workmen was held to be fatal in Shalimar Works Ltd. v. Workmen. In Nedungadi Bank Ltd. v. K.P. Madhavankutty a delay of 7 years was held to be fatal and disentitled the workmen to any relief. In Ratan Chandra Sammanta v. Union of India it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in Daily Rated Casual Employees Under P & T Department v. Union of India the department was formulating a scheme to accommodate casual labourers and the appellants were justified din awaiting the outcome thereof. On 16.1.1990 they were refused to be accommodated in the scheme. On 28.12.1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay".

13. The Apex Court in case titled as ***Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301*** has held as under:-

"15. In the case on hand, no doubt there is a delay in raising the dispute by the appellant; the Labour Court nevertheless has the power to mould the relief accordingly. At the time of adjudication, if the dispute referred to the Labour Court is not adjudicated by it, it does not mean that the dispute ceases to exist. The appropriate government in exercise of its statutory power under Section 10(1)(c) of the Act can refer the industrial dispute, between the parties, at any time, to either the jurisdictional Labour Court/Industrial Tribunal as interpreted by this Court in the ***Avon Services*** *case referred to supra. Therefore, the State Government has rightly exercised its power under Section 10(1)(c) of the Act and referred the points of dispute to the Labour Court as the same are in accordance with the law laid down by this Court in* ***Avon Services & Sapan Kumar Pandit*** *cases referred to supra.*

16. Further, the workman cannot be denied to seek relief only on the ground of delay in raising the dispute as held in the case of ***S.M. Nilajkar & Ors. v. Telecom District Manager****, it was held by this Court as follows- (SCC pp. 39-40, para-17).*

> *"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree.....* ***In Ratan Chandra Sammanta and Ors. v. Union of India and Ors.(supra)[JT 1993(3) SC 418], it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief....."****(Emphasis laid by the Court).*

17. In view of the legal principles laid down by this Court in the above judgment, the reference of the industrial dispute made in the case on hand by the State Government to the Labour Court to adjudicate the existing industrial dispute between the parties was made within a reasonable time, considering the circumstances in which the workman was placed, firstly, as there was a criminal case pending against him and secondly, the respondent had assured the workman that he would be reinstated after his acquittal from the criminal case. Moreover, it is reasonable to adjudicate the industrial dispute in spite of the delay in raising and referring the matter, since there is no mention of any loss or unavailability of material evidence due to the delay. Thus, we do not consider the delay in raising the industrial dispute and referring the same to the Labour Court for adjudication as gravely erroneous and it does not debar the workman from claiming rightful relief from his employer.

.....

45. It is an undisputed fact that the dispute was raised by the workman after he was acquitted in the criminal case which was initiated at the instance of the respondent. Raising the industrial dispute belatedly and getting the same referred from the State Government to the Labour Court is for justifiable reason and the same is supported by law laid down by this Court in ***Calcutta Dock Labour Board****(supra). Even assuming for the sake of the argument that there was a certain delay and latches on the part of the workman in raising the industrial dispute and getting the same referenced for adjudication, the Labour Court is statutorily duty bound to answer the points of dispute referred to it by adjudicating the same on merits of the case and it ought to have moulded the relief appropriately in favour of the workman. That has not been done at all by the Labour Court. Both the learned single Judge as well as the Division Bench of the High Court in its Civil Writ Petition and the Letters Patent Appeal have failed to consider this important aspect of the matter. Therefore, we are of the view that the order of termination passed by the respondent, the award passed by the Labour Court and the judgment & order of the High Court are liable to be set aside. When we arrive at the aforesaid conclusion, the next aspect is whether the workman is entitled for reinstatement, back wages and consequential benefits. We are of the view that the workman must be reinstated. However, due to delay in raising the industrial dispute, and getting it referred to the Labour Court from the State Government, the workman will be entitled in law for back wages and other consequential benefits from the date of raising the industrial dispute i.e. from 02.03.2005 till reinstatement with all consequential benefits."*

14. Dealing with the limitation period to the proceedings in the Industrial Disputes Act, 1947, the Apex Court in case titled as ***Jasmer Singh versus State of Haryana and another (2015) 4 Supreme Court Cases 458***, has held as under:-

"14. On issue No. 3, after adverting to the case of State of Punjab v. Kali Dass. wherein the High Court has observed that the workman cannot be allowed to approach the Labour Court after 3 years of termination of his services, upon which reliance placed by the respondent-employer with reference to the said plea the Labour Court has rightly placed reliance upon the judgment of this Court in Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd. in which it is observed by this Court that there is no period of limitation to the proceedings in the Act.

15. Accordingly, Issue No. 3 is answered against the respondent-management. The relevant paragraph from Ajaib Singh's case is extracted herein below: (SCC p.90 para 10)

> *"10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay in shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/ termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages."*

15. On the same issue in similar cases, Division Benches of this Court in CWP No. 6687 of 2014 decided on 24.09.2014, CWP No. 9467 of 2014 decided on 30.12.2014 and LPA No. 152 of 2015 decided on 28.09.2015 have relied upon ratio laid down by Hon'ble Supreme Court, in case titled as **Raghubir Singh versus General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301**, and allowing the petition, have directed Labour Commissioner to make reference to the Labour Court.

16. In the instant case the respondent No. 3 had engaged workman after disengagement of petitioner without giving opportunity to the petitioner by offering re-engagement to him. Employment and continuation of juniors in employment without offering re-employment is also cause of action to petitioner to raise Industrial Dispute under the Act. Therefore, time for determining delay and laches is to be considered from date of knowledge of appointment/continuation of junior.

17. The petitioner was firstly disengaged in the year 1998 and re-engaged only after direction of the H.P. State Administrative Tribunal passed in Original Application No. 388 of 2001, but again he was retrenched in December, 2002 and thereafter he was never offered re-engagement. It is not the case of the respondents that there was no work available with them or no other person junior to petitioner was engaged/re-engaged after disengaging the petitioner. The only ground taken is that respondents had failed to raise the dispute by demand notice for 5 years. Petitioner is resident of remote village of District Chamba and also for the fact that engagement and continuation of person junior to him without offering him re-appointment under Section 25-F of the Act was giving continuous cause to him to raise the dispute. It cannot be said that at the time of issuance of demand notice the dispute had faded away by the passage of time, rather it was alive on account of acts, conduct and deeds of respondents Department.

18. Therefore, in the given circumstances of the case, it cannot be considered that there was a delay in referring the industrial dispute on the part of petitioner. Besides, as held by Apex Court, Labour Court can always mould the relief according to the facts and circumstances of each case. Therefore, it was not justifiable for the concerned authority to refuse to refer the dispute to the Labour Court.

19. In view of the facts and circumstances of the case and ratio of law laid down by the Apex Court, present petition is allowed and impugned refusal to refer the matter to Labour Court conveyed vide communication dated 23.2.2012 (Annexure P-1) is quashed and Labour Commissioner is directed to make reference to the Industrial Disputes-cum-Labour Court on or before 31st July, 2018. Pending application(s), if any stands disposed of. No order as cost.

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

Sh. Satish Malhotra ....Petitioner.
Versus
Sh. Mool Raj Raizada and another ...Respondents.

CMPMO No.: 199 of 2017.
Decided on: 17.05.2018.

Code of Civil Procedure, 1908- Order VI Rule 17- Amendment of pleadings- Plaintiffs filing suit for possession and recovery of rent by alleging that defendant was inducted as tenant and tenancy stood terminated with lapse of time in 1999 – Defendant admitted ownership of plaintiffs but asserting that tenancy is to lapse in 2030 – Suit at final stage of arguments – Plaintiffs moving application for amendment of relief clause of plaint wherein, vacant possession of 'half share only' was claimed – Application for amendment for rectifying this mistake and incorporating claim of possession of 'entire land', was allowed by trial court - Petition against – Held – Plaintiffs in their plaint have clearly mentioned about their ownership over 'entire suit land' – Their ownership was not denied by defendant – Mistake of mentioning half share in relief clause of plaint was bona fide inasmuch as two notices one each from two plaintiffs, each having half share in suit land were issued to defendant and mistake of mentioning half share in relief clause thus crept in for this reason – Defendant not prejudiced in his defence by amendment – Order of trial court upheld – Petition dismissed. (Paras-10 and 11)

Case referred:
Abdul Rehman and another versus Mohd. Ruldu and others, (2012) 11 Supreme Court Cases 341

For the petitioner Mr. Tara Singh Chauhan, Advocate.
For the respondents Mr. N.K. Thakur, Sr. Advocate with Mr. Nitish Negi, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order dated 06.04.2017, passed by the Court of learned Senior Civil Judge, Una, District Una, in CMA No. 361-VI-15 filed in Civil Suit No. 781 of 2013, vide which an application filed under Order 6, Rule 17 of the Code of Civil Procedure (hereinafter referred to as 'CPC' for short) by the plaintiffs for amendment of the plaint stood allowed by the learned Court below subject to payment of cost of Rs.5,00/-.

2. Brief facts necessary for adjudication of the present petition are that respondents/plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for possession of land measuring 0-16-86 Hectares, comprised in Khewat No. 202 min, Khatauni No. 347 min, Khasra No. 2109, situated in Up-Mohal Behdala, Tehsil and District Una, HP (hereinafter referred to as 'suit land') as per jamabandi for the year 2003-04 and also for recovery of Rs.36,000/- as recovery of arrears of rent alongwith interest and mesne profit. Averments made in paras 1 to 4 of the original plaint are reproduced herein below:-

> *"1. That the plaintiffs are owner of the land measuring 0-16-86 Hectare bearing Khewat No. 202 min, Khatouni No. 347 min, Khasra No. 2109 as per the Jamabandi for the year 2003-04 situated in Up-Mohal Behdala Tehsil and Distt. Una.*
>
> *2. That the defendant had taken the said land on lease which expired in the year 1999 but have not vacated the said land even after the expiry of the lease period.*
>
> *3. That the defendant has also not paid the lease amount which was fixed as Rs. 12,000/- per year. The plaintiff No. 1 got issued legal notice dated 14.2.2002 to the*

defendant to vacate the said land and to pay the outstanding lease amount but the defendant failed to vacate the said land and requested for some more time as the brick kiln is installed on the suit land. The defendant was requested again and again to vacate the land but the defendant took one or the other excuse and till date has not vacated the said land.

4. That the lease granted in favour of the defendant stand already terminated and the defendant is in unauthorized possession of the land w.e.f. 1.4.2002."

3. The relief sought in the original plaint is reproduced herein below:-

"It is, therefore, prayed that a decree for vacant possession of land measuring 0-08-43 Hectare being ½ share out of 0-16-86 Hectare bearing Khewat No. 202 min, Khatouni No. 347 min, Khasra No. 2109 as per the Jamabandi for the year 2003-04 situated in Up-Mohal Behdala Tehsil and Distt. Una and for recovery of Rs. 36,000/- as arrear of rent with interest @ 9 % per annum, may kindly be passed in favour of the plaintiff and against the defendant. The decree for the recovery of mesne profit and for the use and occupation of the premises w.e.f. the date of institution of the suit till the vacation of the premises @ Rs. 1000/- per month may also be passed. The court may grant any other relief also which may be found proper in the circumstances of the case and in the interest of justice."

4. In the written statement so filed to the suit, the stand of the defendant was that the suit land was on lease with the defendants which they had so taken from the plaintiffs for a period which subsisted till the year 2030. On these bases, the averments as pleaded in the plaint, were denied and it was also mentioned in the written statement that there was no question of vacation of the suit land and suit was thus, premature.

5. During the pendency of the civil suit, plaintiffs filed an application under Order 6, Rule 17 of the CPC praying for amendment of the suit. The amendment sought in the suit was that during the course of arguments, plaintiffs realized that by mistake, in the relief clause, decree was sought for vacant possession of half share of the suit land whereas plaintiffs were entitled for decree of possession of the entire suit land. According to the plaintiffs, there was no discrepancy in the description of the suit land in the plaint and it was clearly mentioned in the plaint that plaintiffs were owners of the entire suit land and thus the discrepancy in the relief clause was a mistake which was purely a clerical error. Thus, by way of all the proposed amendments, the plaintiffs prayed for decree for vacant possession of the entire suit land alongwith other reliefs already earlier prayed.

6. The application was resisted by the defendants on the ground that the amendment, if allowed, would change the entire nature of the case and the proposed amendment was not within the ambit of provisions of Order 6, Rule 17 of the CPC.

7. Learned trial Court while allowing the application so filed by the plaintiffs for amendment of the plaint held that though amendment was being sought at a belated stage, but as the same was necessary for effective adjudication of the case as in the head note of the plaint, the suit land has been described properly but it was only in the prayer clause that the same was incorrectly mentioned on account of a clerical mistake, therefore, application deserved to be allowed as no prejudice shall be caused to the defendant by making correction of a clerical mistake. Learned trial Court also held that question of termination of tenancy can otherwise be seen at the time of final arguments. Accordingly, it allowed the application in issue, subject to payment of cost of Rs.500/-.

8. Feeling aggrieved, the petitioner/defendant has filed the present petition.

9. I have heard learned Counsel for the parties and gone through the impugned order as also the records of the case.

10. It is not in dispute that in the plaint so filed by the plaintiffs, they had claimed to be owners of the entire suit land. According to the plaintiffs, the lease of rent in favour of

defendant had expired in the year 1989 and despite this, defendant had not vacated the suit land and was in unauthorized possession of the same. Now in the written statement so filed to the original plaint, the factum of the plaintiffs being owners of the suit land was not disputed by the defendant. The stand of the defendant was that the lease was continuing and was to expire in the year 2030, and therefore, the suit was premature.

11. When one peruses the application filed under Order 6, Rule 17 of the CPC filed for amendment of the plaint, it is apparent that the amendment sought for was a bonafide amendment as in fact a typographical error had crept in the prayer clause of the plaint wherein erroneously possession of only half of the suit property stood claimed by the plaintiffs. The reason as to why this typographical error crept in, is not too far to be searched for. The records demonstrate that two notices i.e. one each on behalf of each of the plaintiffs was issued by learned Counsel to the defendants, in which each of the plaintiffs had claimed half of the suit property. Obviously, this was done because there were two owners and both of them were entitled to half share of the suit land. As has been explained by learned Senior Counsel appearing for the respondents/plaintiffs, inadvertently, due to a typographical error, in the prayer clause, rather than claiming the vacant possession of the entire suit land on behalf of both the plaintiffs, only vacant possession qua half of the suit land was prayed which apparently was a typographical error, as while drafting the plaint, prayer clause was got typed in a mechanical manner, taking into consideration the averments made in the notice so issued by the land owners/plaintiffs to the defendants.

12. In these circumstances, in my considered view, there is no perversity in the order passed by the learned trial Court whereby it allowed the plaintiffs to carry out the necessary amendment in the prayer clause of the plaint. Incidentally, taking into consideration the fact that the defendant has not denied the ownership of the plaintiffs over the entire suit land, the amendment which has been allowed by the learned trial Court does not prejudices the case of the defendant at all, because according to the defendants, though the land is on lease with them but the said lease is continuing till the year 2030 and this is a point for determination before the learned trial Court. Therefore also there is no infirmity in the order so passed by the learned trial Court.

13. Hon'ble Supreme Court in case titled as **Abdul Rehman and another versus Mohd. Ruldu and others**, (2012) 11 Supreme Court Cases 341, has reiterated that all amendments which are necessary for the purpose of determining the real question in controversy between the parties, should be allowed if it does not change the basic nature of the suit and a change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

14. In view of above discussion, as also the law laid down by Hon'ble Supreme Court in case referred to supra, as there is no merit in the present petition, the same is accordingly dismissed.

15. At this stage, learned Counsel for the petitioner prays that the cost imposed by the learned trial Court while allowing the amendment is on the lower side. This Court concurs with the prayer so made by learned Counsel for the petitioner and orders that the amendment in the plaint shall be subject to further payment of cost of Rs.3,000/- by the plaintiffs to the defendant, which shall be in addition to the cost already imposed by the learned trial Court. Parties through their learned Counsel are directed to appear before the learned trial Court on 28.05.2018. Registry is directed to forthwith send the records of the case to the learned trial Court so that the same may reach to the learned trial Court well in time.

Petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

****

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

Bhag Singh & other ....Appellants

Versus

Collector Land Acquisition HPPWD Mandi ....Respondents

Regular First Appeal No. 5 of 2012
Date of Decision 18th May, 2018

Land Acquisition Act, 1894 (Act)- Section 53 – vis-à-vis **Code of Civil Procedure, 1908** - Order XXII- Applicability of – Held – Relevant provisions of Code which are not inconsistent with Act can be made applicable to land reference cases - Therefore, legal representatives of deceased/claimant can be brought on record to continue proceedings. (Para-9)

Land Acquisition Act, 1894 (Act)- Section 53 – vis-à-vis **Code of Civil Procedure, 1908** - Order XXII- **Limitation Act, 1963**– Held – No period of limitation is prescribed for moving application for bringing legal representatives of a deceased claimant on record – However, application has to be filed within reasonable time – There can be no abatement of reference proceedings inasmuch as Reference Court is bound to answer reference in one way or other- Land owners including 'C' had filed an application before LAC for sending reference to District Judge - During pendency of this application 'C' died – Collector sent reference to District Judge after 5-6 years without verifying status of parties – As a result name of 'C' was also figuring in the reference of collector – On receipt, District Judge issuing notices to claimants including 'C' – Then, LRs of 'C' filing an application under Order XXII Rule 3 of Code for their substitution – However, their application was dismissed by District Judge on ground that 'C' was already dead before commencement of reference proceedings before him – Petition against – Since, 'C' had died before commencement of proceedings before reference Court, High Court treated the application of legal representatives to be one under Order 1 Rule 10 CPC and ordered them to be substituted in place of 'C'- Petition allowed. (Paras-9 and 15 and 27)

Cases referred:

Shrimati Dhani Devi and others vs. Collector, Land Acquisition, Talwara and another, AIR 1982 HP 42

Bachhittar Singh and others vs. The Collector Land Acquisition Talwara Township in 1982 Sim.L.C. 90

Khazan Singh (dead) through LRs. Vs. Union of India (2002)2 SCC 242,

Thakur Dass vs. Land Acquisition Collector and others Latest HLJ 2003(HP) 12

Collector Land Acquisition NHPC vs. Khewa Ram and others Latest HLJ 2007 HP 270

Sardar Amarjit Singh Kalra (dead) by L.Rs and others vs. Pramod Gupta (Smt.)(dead) by L.Rs and others (2003)3 SCC 272

Joseph vs. The Special Tahsildar (L.A.) and another, AIR 2008 Kerala 175

Abdul Karim vs. State of Madhya Pradesh AIR 1964 Madhya Pradesh 171

Alihusain Abbasbhai and others vs. Collector, Pancha Mahals AIR 1967 Gujarat 118

State of W.B. vs. Dwijendra Chandra Sen AIR 1979 Calcutta 182

Chander and others vs. Mauji and others AIR 1989 Delhi 97

Khazan Singh (dead) by L.Rs. vs. Union of India (2002)2 SCC 242

Sardar Amarjit Singh Kalra (Dead) by L.Rs. v. Pramod Gupta (Smt.)(dead) by LRs and others (2003)3 SCC 272

Collector Land Acquisition NHPC vs. Khewa Ram reported in Latest HLJ 2007(HP) 270

For the Appellants: Ms. Leena Advocate vice Mr.G.R.Palsara, Advocate.

For the Respondents: Mr. Shiv Pal Manhans, Ms. Rameeta Kumari, Addl.Advocate General with Mr.R.R.Rahi Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

This appeal has been preferred against the impugned order passed on 28.3.2011 by learned Additional District Judge, Mandi, whereby name of Chamaru Ram, predecessor-in-interest of appellants, has been ordered to be deleted on the ground that said Chamaru Ram had expired on 01.06.1999 prior to receipt of the reference petition in Court on 19.2.2003.

2. Relevant facts for adjudication of present appeal are that the respondent/State had acquired land in village Piyun, Sub Tehsil Aut, District Mandi for construction of Aut-Takoli-Parashar road by completing the process under Land Acquisition Act, 1894 (hereinafter to be referred to as 'the Act') after issuance of notification under Section 4 of the Act published in Rajpatra on 2.3.1991. Land Acquisition Collector had passed award under Section 11 of the Act determining the compensation payable to the land owners/claimants.

3. Being aggrieved by inadequacy of compensation awarded, land owners including deceased Chamaru Ram alongwith co-sharers had preferred applications to the Land Acquisition Collector to make reference under Section 18 of the Act for enhancement of compensation. The said applications were preferred on 8.7.1997. In one of the applications, Chamaru Ram was also one of ten co-sharer land owners, who alongwith other co-sharers had preferred joint applications for land reference. Land Acquisition Collector had referred these applications including the one preferred by deceased Chamaru Ram and his co-owners to District Court on 19.2.2003. But prior to that, Chamaru Ram had expired on 1.6.1999.

4. On noticing about death of deceased Chamaru Ram, learned counsel representing the co-sharer land owners in reference petition(s) before learned Additional District Judge, had preferred an application under Order 22 Rule 3 of the Code of Civil Procedure (for short 'CPC') through legal representatives of deceased Chamaru for their substitution in place of Chamaru Ram. The said application was taken for consideration by learned Additional District Judge on 28.3.2011.

5. After knowing that deceased Chamaru Ram had expired on 1.6.1999, prior to receiving the reference petition by the Court from Land Acquisition Collector, his name was ordered to be deleted with finding that dead person was not competent to approach the Court.

6. Feeling aggrieved by said order, the legal representatives of deceased Chamaru Ram have filed present appeal. During interregnum, land references preferred by other co-owners, amongst whom Chamaru Ram was also one of claimant, were decided by learned Additional District Judge on 28.9.2011.

7. Proceedings of the land reference petition under Land Acquisition Act are unique in nature where referring authority i.e. Land Acquisition Collector is also respondent who is represented in the Court through Government Advocate even prior to issuance of notice to the claimants, who is under obligation to give the necessary information, including names of persons whom he has reason to think interested in such land as provided under Section 19 of the Act, to the Court at the time of making reference.Notices to applicant/claimant and others are issued only after registration of reference by Court and the proceedings start only when the Court takes cognizance of the reference by registering it.

8. Scheme of the Act provides that land owner/claimant cannot approach the Court directly under Section 18 of the Act for making land reference to the District Judge. On dissatisfying and being aggrieved by award of the Land Acquisition Collector, the land owner/claimant has a right to submit an application to the Land Acquisition Collector with its

grounds for making reference to the District Judge within the time prescribed under Section 18 of the Land Acquisition Act and on the basis of such application, as provided under the Act, Land Acquisition Collector has to make references, whereupon the District Judge shall make an award as provided under the Act.

9. With regard to applicability of Order 22 CPC and Limitation Act, a Division Bench of the Madhya Pradesh High Court in a judgment in case titled as ***Abdul Karim versus State of Madhya Pradesh***, reported in ***AIR 1964 MP 171,*** has held that once a reference under Section 18 of the Act is made, the Court has to make an award irrespective of appearance or absence of the person at whose instance the reference was made and there cannot be any dismissal or abatement as reference proceedings under the Act and proceedings of suit under CPC were altogether different and cannot be deemed proceedings before the Court under the Act for very nature and scope of proceedings under Section 18 of the Act. After considering various pronouncement of different High Courts including the judgment rendered by the Madhya Pradesh High Court in ***Abdul Karim's case, (supra)*** and also pronouncements of the Apex Court, a Division Bench of this Court in ***Shrimati Dhani Devi and others vs. Collector, Land Acquisition, Talwara and another,*** reported in ***AIR 1982 HP 42 (also reported as Bachhittar Singh and others vs. The Collector Land Acquisition Talwara Township in 1982 Sim.L.C. 90)*** has held that relevant provisions of CPC, which are not inconsistent with the Act, can be made applicable in land acquisition reference cases because of Section 53 of the Act and there is nothing in the Act which militates against the legal representation of the deceased claimant being required to be brought on record so as to continue proceedings with further observation that though provisions of Order 22 CPC are applicable in the reference cases under Land Acquisition Act, but the provisions of Limitation Act, for dealing with such application under Order 22 CPC, are not applicable. However, such application has to be preferred within reasonable time.

10. The Division Bench in Dhani Devi's (Bachhittar Singh's) case, has also observed that in case the applicant disappears from the scene, the Court cannot justify the amount awarded by the Collector on the ground that applicant is no more interested in supporting the objections raised by him as under Section 26 of the Act and the Court while making its award is required amongst others, to give the grounds of awarding each amount and such award is not possible in absence of claimant and thus reference Court is not bound to make award in absence of claimant. But, in view of subsequent pronouncement of the Apex Court in ***Khazan Singh (dead) through LRs. Vs. Union of India*** reported in ***(2002)2 SCC 242,***this part of judgment of the Division Bench has lost force as the Apex Court has held as under:-

> ***"7. The provisions above subsumed would thus make it clear that the civil court has to pass an award in answer to the reference made by the Collector under Section 18 of the Act. If any party to whom notice has been served by the civil court did not participate in the inquiry it would only be at his risk because an award would be passed perhaps to the detriment of the party concerned. But non-participation of any party would not confer jurisdiction on the civil court to dismiss the reference for default."***

11. Based upon the ratio laid down by the Apex Court in Khazan Singh's case, a Single Judge of this High Court in ***Thakur Dass vs. Land Acquisition Collector and others Latest HLJ 2003(HP) 12*** has held that the District Judge ought not to have dismissed the reference application in default and he was under legal obligation to decide the reference application on merits in absence of either party.

12 Another Single Judge of this Court again in ***Collector Land Acquisition NHPC vs. Khewa Ram and others*** reported in ***Latest HLJ 2007 HP 270,*** after relying upon pronouncement of the Apex Court in ***Khazan Singh's case*** and also in case of ***Sardar Amarjit Singh Kalra (dead) by L.Rs and others vs. Pramod Gupta (Smt.)(dead) by L.Rs and others*** reported in ***(2003)3 SCC 272*** considering their conjunctive inference has concluded that it is

apparent that the Apex Court has impliedly held that provisions of Order 22 CPC are applicable to the land acquisition matters also but absence of claimant or his legal representatives after his death will not result into dismissal or abatement as reference Court under the provisions of the Act is bound to decide the reference petition even in absence of claimant. Legal position in this regard as concluded by learned Single Judge is as under:- (para 12)

> ***"1. That a duty is cast upon the reference court to decide a reference petition even if the claimant does not appear.***
>
> ***2. If the claimant does not appear despite notice, he does so at his own risk and the court can answer the reference in the absence of the evidence led by the claimant.***
>
> ***3.A situation may arise where the claimant absents himself after leading evidence. In such a situation, the court is bound to decide the reference petition on the basis of the evidence led before it."***

13 It emerges from aforesaid discussion that view of the Division Bench of this Court in ***Dhani Devi's (Bachhitar Singh's) case,*** so far as it pronounces that provision of Order 22 CPC would be applicable in land reference case, stands reiterated but with rider that rigours of abatement shall not follow in these cases. Learned Single Judge in ***Khewa Ram's case*** supra, in a situation, where claimant has died during proceedings of land reference,has elaborated the procedure to be followed for dealing with such situation in some circumstances as follows:-(para 13)

> ***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 a 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."***

14. A learned Single Judge of Kerala High Court, in case ***Joseph vs. The Special Tahsildar (L.A.) and another,*** reported in ***AIR 2008 Kerala 175,*** after considering the views expressed by High Courts of *Madhya Pradesh,* Gujarat, Calcutta and Delhi ***Abdul Karim vs. State of Madhya Pradesh AIR 1964 Madhya Pradesh 171, Alihusain Abbasbhai and others vs. Collector, Pancha Mahals AIR 1967 Gujarat 118, State of W.B. vs. Dwijendra Chandra Sen AIR 1979 Calcutta 182 and Chander and others vs. Mauji and others reported in AIR 1989 Delhi 97,*** but without noticing the Apex Court in ***Khazan Singh (dead) by L.Rs. vs. Union of India*** reported in ***(2002)2 SCC 242 and Sardar Amarjit Singh Kalra (Dead) by L.Rs. v. Pramod Gupta (Smt.)(dead) by LRs and others*** reported in ***(2003)3 SCC 272,*** and also this Court in ***Collector Land Acquisition NHPC vs. Khewa Ram*** reported in ***Latest HLJ 2007(HP) 270,*** has agreed with view taken by the Madhya Pradesh High Court in ***Abdul Karim's case*** that their could be no dismissal of the reference case on the ground of abatement and has culled out certain principles, for more suitability and lesser inconvenience to the parties, to deal with situations arising out on account of death of land owner/claimant.

15. In present case the legal representatives had approached the Court by filing the application under Order 22 Rule 3 CPC for their substitution against deceased land owner who had expired prior to receipt of reference by the Court.

16**.** There may be another issue with regard to maintainability of application under Order 22 Rule 3 CPC, for the reasons that such application would have been maintainable in case the land owner had expired during pendency of petition. In present case, the land owner had already expired prior to the receipt of land reference in Court. But, in any case, legal heirs have right to become party in the land reference petitions and thus, the court should have addressed the Land Acquisition Collector to supply the detail of legal heirs of deceased land owners being interested person in acquired land and should have exercised its power under Order 1 Rule 10 CPC for adding them in place of deceased being a necessary party for proper, complete and final decision of the case.

17. Dealing with the situation where the respondent had expired after passing of award, but before filing of appeal by State, the Hon'ble Apex Court in ***State of Kerala vs. Sridevi and others*** reported in ***(2000) 9 SCC 168*** has held that in such a situation where Order 22 CPC shall not be applicable but provision under Order 1 Rule 10 CPC has to be invoked and there is no specified period of limitation for making an application in the aforesaid Rule and if at all any application is necessary, the same could be filed within three years under Article 137 of the Limitation Act, and three years begin to run from the date when right to apply accrues.

18. In case in hand, the deceased land owner had made an application for reference within prescribed time which was to be further transmitted by the Land Acquisition Collector to the District Judge as land reference.

19. Pending consideration application with Land Acquisition Collector, one of the land owners Chamaru Ram had expired. The application was referred by Land Acquisition Collector after about 5-6 years without verifying the status of parties. In making reference to Court, after submitting application to Land Acquisition Collector, the land owner has no role. Therefore, it was incumbent upon the Land Acquisition Collector before making the reference after lapse of 5/6 years to ascertain the current status of interested parties and in case of death of any party, he must have ascertained the details of legal representatives of such claimant and should have made the reference alongwith report of death of applicant Chamaru Ram with detail of legal heirs of deceased claimant/land owners. But he had failed to perform his duty.

20. At the second stage of case when notices were issued to land owners by learned Additional District Judge after receiving the land references from Land Acquisition Collector and it was noticed that one of the land owners had expired, it was duty of the Land Acquisition Collector to inform the Court about the legal representatives of deceased land owner and also inform the legal representatives about reference made by him on the basis of application of their

predecessor-in-interest and thereafter legal heirs of such deceased land owner would have liberty either to approach the Court or not pursue the matter before the Land Acquisition Collector.

21. In the present case, right had definitely accrued after knowledge to legal representatives with regard to transmission of reference petition by the Land Acquisition Collector to the Court, whereafter they had preferred the application under Order 22 Rule 3 CPC. As land owner/claimant had expired prior to reference petition coming into existence and death had not taken place during pendency of reference petition, provisions of Order 22 CPC were not attracted.

22. Land Acquisition Act is beneficiary Act and it is also settled that wrong mention of provisions in application should not be made basis to deny justice or adjudicate the matter, if otherwise, such application or petition is maintainable under another provisions of law. In present case, legal representatives had come to know about reference petitions, made on behalf of deceased Chamaru Ram, only after registration of reference petition by Reference Court and application for their substitution was filed during pendency of the said reference petition. There is no delay on the part of legal representatives in approaching the Court, much less the inordinate delay. Therefore, in my opinion, learned Additional District Judge must have considered the said application under Order 1 Rule 10 CPC and keeping in view the scheme of Land Acquisition Act, as discussed above, he should have allowed the legal representatives of deceased Chamaru Ram to be substituted in his place in land reference petition.

23. Finding of learned Additional District Judge is that dead person is not competent to approach the Court. Undoubtedly, a dead person cannot approach the Court, but in case, in hand, it was not a deceased land owner, who had approached the Court, but reference petition was transmitted to the Court by Land Acquisition Collector by performing his duty under the Act. Therefore, it was not a case where dead person had approached the Court.

24. In almost similar facts and circumstances, this Court in ***RFA No. 549 of 2011, titled Jyoti Prakash and others vs. Collector, Land Acquisition, HPPWD and another*** decided on 1.9.2017 has permitted the legal representatives of deceased land owner/claimant to make an application to come on record of land reference petition after substituting the deceased land owner and to revive the reference petition dismissed by the Reference Court.

25. In fact, the Land Acquisition Collector was under obligation to supply the details of legal representatives of land owner/claimant to the Court at the time of referring the application. Therefore, when it came in notice of Court that land owner/claimant had expired after submitting the application to Land Acquisition Collector, but prior to the transmission of reference petitions to Court, learned Additional District Judge should have addressed the Land Acquisition Collector for furnishing details of legal representatives of deceased land owner/claimant.

26. Conjunctive consideration of relevant provisions and binding pronouncements of the Apex Court, following principles would be appropriate to deal with various situations arising on account of death of land owner/claimant:-

1. In case, claimant/land owners expires during pendency of land reference made under Section 18 of the Act, provisions of Order 22 CPC for bringing his legal representatives on record in such proceeding may be invoked and Court should follow procedure to deal with situation as provided in ***Khewa Ram's case Latest HLJ 2007 HP 270*** referred supra. Further, in case no one comes forward for substitution of deceased claimant through his legal representatives, the reference petition is to be decided finally on the basis of material placed before the Court by party(ies).
2. Despite applicability of Order 22 CPC, rigours of abatement shall not be applicable in land reference cases.
3. Though, no provisions of the Limitation Act, 1963 is applicable to such application, however, the application has to be made within reasonable period

depending upon the facts and circumstances of each case to be considered and determined by the Court.

4. In case of death of claimant before registration of reference petition in the Court, but noticed after registration of reference petition, provisions of Order 22 CPC will not be applicable, but provisions of Order 1 Rule 10 CPC will be attracted.

5. If claimant expires after submitting application by land owner/claimant to Land Acquisition Collector for making land reference, but before making the reference, then it is duty of the Land Acquisition Collector to make reference indicating therein the legal representatives of deceased claimant as interested parties on behalf of deceased.

   In case, he fails to do so, and the fact of death of claimant comes to notice of Court during pendency of reference, the Land Acquisition Collector should be asked by the Court to furnish the details of legal representatives of deceased claimant and Court should issue notice to them and add them as claimants in place of deceased claimant after deleting the name of deceased claimant by exercising the power under Order 1 Rule 10 (2) CPC.

   Legal representatives, after having knowledge of land reference made to the Court by Land Acquisition Collector, may also approach the Court themselves by invoking the provisions of Order 1 Rule 10 CPC as Order 22 CPC will not be applicable in such a situation for the reason that claimant has not expired during pendency of land reference petition.

6. In case claimant expires after dispatch of reference to the Court, but before registration of the same in the Court, in such eventuality also, Land Acquisition Collector is under obligation to substitute the deceased claimant by his legal representatives. However, after having the knowledge of pendency of reference petition, legal representatives, on their own, may also approach the Court under Order 1 Rule 10 CPC and the Court either on application of legal representatives or its own, after having details of legal representatives of deceased claimant from Land Acquisition Collector, and after issuing notice to them, can add such legal representatives as party to the reference petition invoking Order 1 Rule 10(2) CPC.

7. In case the claimant expires after registration of reference petition, but before service of notice, then also firstly it is duty of the Land Acquisition Collector to furnish the details of legal representatives of deceased claimant and the Court can address him to do so, whereupon the Land Acquisition Collector has to furnish detail of legal representatives of deceased claimant, whereupon the Court shall issue notice to such legal representatives of deceased claimant. After having presence of such legal representatives, the Court can add them after deleting the deceased claimant, by exercising power under Order 1 Rule 10 (2) CPC or they can be added as claimants on filing an application by them by invoking provisions of Order 1 Rule 10 CPC after receiving the notice from Land Acquisition Collector or otherwise having the knowledge of pendency of land reference petition as the death of claimant takes place after making of reference, but before service of notice and at that time neither deceased nor his legal representatives are having the knowledge of making of reference to Court. At this stage, Order 22 CPC can also be invoked in such a situation, as claimant expires after registration of reference petition in the Court i.e. during pendency of reference petition.

8. In case the claimant expires after receiving the notice in reference petition from the Court, then certainly it is duty of the legal representatives of deceased claimant to come on record within reasonable period to continue the proceedings

of reference petition and in such a situation, provisions of Order 22 CPC shall be applicable.

Legal representatives of deceased claimant can themselves approach the Court under relevant provisions of law applicable for their impleadment in proceeding at any stage without waiting either for furnishing of detail by Land Acquisition Collector or for issuance of notice by the Court. The Court after considering objection of respondent, if any, shall pass appropriate order, in accordance with law.

27. In view of above discussion, particularly principles enumerated hereinabove, impugned order is set aside and present appellants, who are legal representatives of deceased Chamaru Ram, are permitted to be taken on record of land reference petition. As noticed above, Land Reference Petition No. 44 of 2003, titled as Jawahar Lal & others vs. Collector Land Acquisition, wherein deceased Chamaru was one of claimants, stands finally decided by learned Additional District Judge, enhancing the amount of compensation to the land owners. Therefore, the present appellants, i.e. legal representatives of deceased Chamaru Ram, are also held to be entitled for the same amount of compensation as has been awarded to other co-owners in the said Land Reference Petition No. 44 of 2003, along with consequential benefits including interest, subject to modification thereof, if any, in any other judgment passed by the competent Court in appeal or any other proceedings arising out of the award passed in said Land Reference Petition.

28. Appeal is allowed in aforesaid terms. Respondents are directed to calculate the amount of compensation payable to the appellants/legal representatives of deceased Chamaru Ram within two months from today and ensure the payment of the same along with upto date interest and all statutory benefits applicable and admissible to the persons entitled, within eight weeks thereafter.

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

State of Himachal Pradesh ...Appellant.

Versus

Pritam Chand. ...Respondent.

Cr. Appeal No. 142 of 2009
Date of Decision: 18.5.2018

Code of Criminal Procedure, 1973- Section 378- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Accused was tried and acquitted by trial court for said offences - Appeal against – State submitting before High Court that accident was result of rash driving of accused – However, plea of accused being that accident was on account of sudden breakage of suspension of vehicle – On facts, High Court observed that auto mechanic found main suspension of offending bus broken at time of its examination – Mechanic also admitting in cross-examination that breakage of main suspension can lead to occurrence of accident – Eye-witnesses/occupants of bus also stating of eruption of loud sound from lower part of bus before accident – Held - Plea of accused that accident was because of sudden developing of mechanical defect thus is probablized – Allegations of rashness/negligence while driving a motor vehicle on public highway, not proved - Acquittal of accused upheld – Appeal dismissed. (Paras-7 to 10)

For the Appellant: Mr.Shiv Pal Manhans & Ms.Rameeta Kumari, Additional Advocate Generals with Mr.Raju Ram Rahi, Deputy Advocate General.

For the Respondent: Mr.Kishore Pundeer, Advocate, vice Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

Present appeal has been preferred by the State of Himachal Pradesh against acquittal of respondent vide judgment dated 21.10.2008 passed in Police Challan No. 52-1-2005, in case FIR No. 144 of 2005, registered in Police Station Hamirpur under Sections 279, 337 and 338 of IPC.

2. Brief facts of the case are that bus being driven by respondent carrying passengers of a wedding party had met with an accident on 2.5.2005 at about 12:30 P.M. near Ukhali, causing injuries to its occupants, leading into registration of FIR against respondent under Sections 279, 337 and 338 IPC. On completion of investigation, finding prima facie complicity of accused/respondent, challan was presented against him in the court. On conclusion of trial, respondent stands acquitted.

3. I have heard learned Deputy Advocate General for the appellant as well as learned counsel for the respondent and also gone through the records of the case.

4. Occurrence of the accident is not disputed. Respondent was driving the bus involved in the accident, is also not disputed, as there is no cross-examination of PW-11 Raj Kumar, owner of the bus, establishing on record that on the date of accident, respondent was the driver of the bus and he was driving the bus at relevant point of time. From the trend of cross-examination, it is also apparent that the accident causing injuries to its occupants has also not been disputed.

5. It is the case of prosecution that the cause of accident was rash and negligent driving of respondent, whereas the defence taken by respondent is that the accident had occurred on account of breakage of suspension (Patta).

6. Prosecution has examined PW-1 Hari Singh, PW-2 Banarsi Dass, PW-3 Kirlu Ram, PW-4 Prem Chand, PW-5 Narinder Singh, PW-6 Mast Ram and PW-8 Amrik Singh as spot/injured witnesses, who were traveling in the bus. Before discussing other evidence on record, scrutiny of their evidence is undertaken first.

7. PW-8 Amrik Singh has not leant support to the prosecution case and was declared hostile. In his cross-examination by learned Public Prosecutor, nothing material against the respondent could be extracted, whereas in cross-examination by defence counsel, he had admitted that the accident had taken place on account of breakage of suspension (Patta). So far as evidence of rashness and negligence on the part of respondent in the statements of other spot witnesses is concerned, that can also not be considered as cogent and reliable evidence so as to construe that the respondent was driving the bus in rash and negligent manner, much less with gross negligence, as required to be established so as to fasten criminal liability upon him.

8. PW-1 Hari Singh, PW-2 Banarsi Dass, PW-4 Prem Chand and PW-6 Mast Ram in their examination-in-chief though have stated that respondent was driving the bus in high speed, but they have not uttered even a single word with regard to driving of bus in rash and negligent manner. Speed is also relevant factor for determining rash and negligent driving. Undisputedly, the bus was being plied on National Highway No. 88. There is nothing in their statements so as to establish the driving of the bus with gross negligence. Though PW-5 Narinder Singh in his examination-in-chief at one place, has stated that the bus was being driven with speed, but in the same breath in the next line he stated that the speed was not so high. Therefore, unless the speed of the bus is proved to be so high that no prudent man was expected to drive the vehicle with such speed on a National High Way, high speed cannot be treated as rash and negligent driving. It is only PW-3 Kirlu Ram, who in his examination-in-chief has stated that the bus was being driven negligently in high speed. But in his cross-examination he has stated that the accident had taken place at a curve and he did not know that on the curve speed of bus was low.

He has also stated that he could not say that accident had taken place on account of breakage of suspension (patta).

9. PW-1 Hari Singh, in his cross-examination, has admitted that before accident, there was a sound under the bus, but he did not know that there was breakage of suspension. All other spot witnesses have also admitted that prior to accident, there was a sound from lower part of the bus and thereafter bus had tilted.

10. PW-10 Ramesh Chand is Police Mechanic who had examined the bus mechanically after the accident. In his mechanical report he had reported that off side front rod spring centre bold (main suspension) was found to be broken at the time of mechanical examination and rod spring mounting bracket was also found to be loose. In his cross-examination he has admitted that at the time of mechanical examination, central bolt of main suspension was found broken with further admission that in case of breakage of bolt of main suspension, the bus can met with accident. No other evidence with regard to cause of accident is on record.

11. As referred herein above, injuries caused to the passengers and bus being driven by respondent, is not disputed, but that is not sufficient to fasten criminal liability upon the respondent. For convicting the respondent, cogent, reliable and convincing evidence must be on record to prove the gross negligence and rashness on the part of respondent beyond reasonable doubt, which is lacking in the present case. Rather from the evidence of prosecution, the defence of accused is probablized. It is settled law that respondent/accused is not required to prove his case beyond reasonable doubt, but to satisfy the preponderance of probability only. As discussed above, from the statements of spot witnesses as well as PW-10 Ramesh Chand who is a Police Mechanic, possibility of accident on account of breakage of central bolt of main suspension, cannot be ruled out.

12. It is settled law that when two views are possible, the view favourable to the accused is to be preferred. Moreover, respondent has advantage of being acquitted by the trial Court. From the deposition of spot witnesses and other evidence on record, as discussed above, rash and negligent driving of the respondent is not established. As no case is made out on the basis of spot/injured witnesses, there is no need to discuss the statements of other witnesses, who were associated during the investigation only for completion of trial.

13. From the scrutiny of evidence on record, it cannot be said that the trial Court has not appreciated the evidence completely or properly or the acquittal of respondent has caused miscarriage of justice or resulted into travesty of justice. I find no material on record, so as to interfere in the judgment of acquittal passed by learned trial Court. Accordingly, the present appeal being devoid of any merits is dismissed. Bail bonds, if any, furnished by or on behalf of respondents are discharged. Records of the Court below be immediately sent back.

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

Hem Chand .....Petitioner
Versus
State of H.P. and another .....Respondents

Cr. MMO No. 200 of 2017
Reserved on: 16.05.2018
Decided on: 21.05.2018

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 379 and 447- Quashing of FIR –Accused seeking quashing of FIR registered against him on allegations that he removed logs of wood cut and stacked by complainant on his land – Accused relying on

fact that cancellation report was filed by police on ground that land from which trees were cut by complainant belonged to accused's brother – High Court found that complainant was in legal possession of land from where trees were cut by him – Held – Theft is constituted when goods are taken away from legal possession of complainant – Legal possession of logs was with complainant – Prima facie case for offences in question against petitioner/accused is made out- Petition dismissed. (Paras-7 and 8)

For the petitioner : Mr. Ajay Sharma, Advocate.
For the respondents : Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals, for respondent No. 1.
Mr. Peeyush Verma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure, has been maintained by the petitioner, for quashing and setting aside the proceedings pending before the learned Judicial Magistrate 1st Class, Barsar, District Hamirpur, H.P., in complaint No. 7-1-17, whereby the petitioner has been summoned, under Sections 379 and 447 of the Indian Penal Code.

2. The facts necessary for adjudication of the present petition are that respondent No. 2/complainant (hereinafter to be called as "the complainant") filed a complaint before Police Station, Barsar, wherein it has been alleged that about 1-½ year(s) ago he has cut two eucalyptus trees from his land, comprised in Khata No. 418, Khasra No. 782 and its logs were kept over in the said land. On 05.02.2011, the complainant received a telephone from his brother, who told him that the petitioner with the help of a labourer has taken away the logs of the complainant. On the basis of which, F.I.R. No. 32/11, dated 27.02.2011, under Sections 379 and 447 IPC was registered against the petitioner. The learned trial Court vide order dated 06.05.2017, hold that the *prima facie* case is against the petitioner and issue summons to him under Sections 379 and 447 of the IPC. Hence the present petition for quashing and setting the order dated 06.05.2017.

3. Learned counsel for the petitioner has argued that the land from which the eucalyptus trees were cut, belongs to the brother of the petitioner and by lifting the logs from his brother's land, the petitioner has not committed any crime and no case is made out against him, so the present petition may be allowed and summoning order passed by the learned trial Court may be quashed, alongwith all pending proceedings.

4. On the other hand, learned counsel for respondent No. 2 has argued that the petitioner trespassed the land, which is in possession of the complainant and removed the logs from the land without the permission of the complainant, so there is prima facie case against him and order of learned trial Court, summoning the petitioner, needs no interference.

5. Learned Additional Advocate General has argued that the Police after completing investigation has concluded that no case is made out against the petitioner and thereafter filed cancellation report before the learned trial Court.

6. To appreciate the arguments of learned counsel for the parties, this Court has gone through the records in detail.

7. From the records it is clear that though the Police has filed cancellation report on the ground that eucalyptus trees were cut by the complainant from the land of his brother, however by leading cogent evidence before the learned trial Court, the complainant has brought sufficient material before the Court that there was dispute with respect to the land and the logs were in the possession of the complainant. Even it is presumed that logs were cut from the land

of the petitioner's brother, then also they were in legal possession of the complainant and *prima facie* there is material to proceed against the petitioner, when from the legal possession of the complainant the goods were taken away.

8. Accordingly, this Court after going through the records, finds that there was *prima facie* case against the petitioner and learned trial Court has rightly issued summons against the petitioner. Further the petitioner has a right to even argue on the charge after appearing before the Court. In these circumstance, the order of the learned trial Court issuing summons, needs no interference.

9. The net result of the above discussion is that present petition sans merit, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of. Parties through their counsel are directed to appear before the learned trial Court on **31st May, 2018.**

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

Jeet Ram .....Appellant

Versus

Pritam Singh and another .....Respondents

RSA No. 264 of 2005
Reserved on: 14.05.2018
Decided on: 21.05.2018

Code of Civil Procedure, 1908- Order XLI Rule 22- Cross-objections – Necessity of filing – Held – A party in whose favour decree stands in entirety can challenge any finding recorded against him in a judgment without filing cross-objections – However, if no cross-objections are filed against a finding, same will not survive, if appeal is dismissed in default or same is withdrawn. (Para- 6)

Code of Civil Procedure, 1908- Order XLI Rule 22- Cross-objections – Filing of - Plaintiff sought decree of declaration and injunctions on allegations that he was co-owner in possession of suit land and defendants were threatening to interfere in it – However, defendants claiming their own possession over suit land and raising plea of adverse possession – Trial court dismissing suit of plaintiff and simultaneously also deciding issue of adverse possession against defendants- Appeal by plaintiff before District Judge – No cross objections filed by defendants against finding of trial court qua issue of adverse possession – In appeal, District Judge set aside finding of trial Court on issue of adverse possession and held that defendants had become owners of suit land by adverse possession – RSA – Plaintiff contending before High Court that District Judge was not competent to reverse findings of adverse possession in absence of cross-objections - Held- Defendants could have assailed findings of trial court on issue of adverse possession without filing cross-objections – Finding of District Judge on issue of adverse possession upheld – RSA dismissed. (Paras- 16 and 17)

Cases referred:

Ram Rakhi vs Attri and another, AIR 1993 HP 137

Banarsi and Others vs. Ram Phal, (2003) 9 SCC 606

For the appellant Mr. Karan Singh Kanwar, Advocate.

For the respondents Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Charu Bhatnagar, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present regular second appeal is maintained by the appellant, who was the plaintiff before the learned trial Court (hereinafter to be called as "the plaintiff"), laying challenge to the judgment and decree, dated 31.03.2005, passed by learned District Judge, Sirmaur District at Nahan, H.P., in Civil Appeal No. 30-CA/13 of 2003, whereby the judgment and decree, dated 24.03.2003, passed by learned Sub Judge, Court No. 1, Paonta Sahib, District Sirmaur, H.P, in Civil Suit No. 131/1 of 2001, was affirmed, wherein suit of the plaintiff was dismissed.

2. Briefly, the facts, which are necessary for determination and adjudication of the present appeal, are that the plaintiff claimed himself to be co-owner in possession of the land, comprised in Khata/Khatauni No. 580/983, Khasra No. 109, measuring 12 Biswas, situated in Mauza Khagani, Tehsil Paonta Sahib, District Sirmaur (hereinafter to be called as the "suit land"). As per the plaintiff, the respondents/defendants (hereinafter to be called as "the defendants") have no right, title or interest in the suit land. Further the defendants are trying to raise forcible construction by digging the foundation in the suit land, which leads the plaintiff to file a suit for permanent injunction, by restraining the defendants from raising forcible construction on the suit land.

3. The suit of the plaintiff was contested by the defendants by filling written statement, wherein it has been averred that neither the plaintiff, nor his predecessors-in-interest were ever remained in possession of the suit land as tenant. The suit land is a *Gair Mumkin Abadi* and since 35 years, there have been residential houses of the defendants and they have become owners by way of adverse possession. Lastly, they averred that proprietary rights upon the plaintiff and others, under the H.P. Tenancy and Land Reforms Act, are illegal, collusive and fraudulent and prayed for dismissal of the suit.

4. By filing replication, the contents of the plaint were reiterated. The learned trial Court on 16.04.2002 framed the following issues for determination and adjudication:

"1.Whether the plaintiff is entitled for injunction as prayed? OPP

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

3. Whether the defendants have become the owners by way of adverse possession as alleged? OPD

4. Whether the revenue entries in favour of plaintiff is collusive and fraudulent, null and void and not binding on the rights of defendants as alleged? OPD

5. Whether the plaintiff has no cause of action as alleged? OPD

6. Relief."

5. After deciding issues No. 1, 3 and 4 in negative and issues No. 2 and 5 in affirmative, the suit of the plaintiff was dismissed. Subsequently, the plaintiff maintained an appeal before the learned first Appellate Court, which was also dismissed and the findings recorded by the learned trial Court were upheld. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

"1. Whether the learned first Appellate Court erred in reversing the findings of the learned trial Court in respect of the adverse possession without there being any cross-objection by the defendants against the decision of the learned trial Court?

2. Whether the learned first Appellate Court misconstrued, misinterpreted the material evidence placed on record and ignored the admissible evidence in accepting the plea of adverse possession of the defendants?"

6. Leaned counsel for the appellant has argued that both the learned Courts below have not considered the evidence led by the plaintiff and so the appeal is required to be allowed. He has further argued that the learned first Appellate Court, without there being any appeal on

behalf of the defendants regarding the findings against them, had set aside the findings, which has attained finality qua adverse possession. On the other hand, learned Senior Counsel appearing on behalf of the respondents has argued that after the amendment in Code of Civil Procedure, the findings which are against the party in whose favour the decree is, the party even without filing the cross-objection argue on the findings against him/her and so the cross-objections were not required to be filed and there is nothing wrong in the findings of the learned Court below. In rebuttal, learned counsel for the appellant has argued that the learned Court below has committed an error and the question of law, as framed, is required to be answered holding that the findings qua adverse possession cannot be set aside by the learned first Appellate Court.

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

8. The plaintiff appeared in the witness box as PW-1 and his statement reveals that the disputed land is 12 Biswas and the defendants trying to raise the plinth over the same. On 14.12.2001, the defendants started digging the suit land forcibly, whereafter the Panchayat members were called and work was stopped. In his cross-examination he denied that in the year 1950, the defendant's predecessor-in-interest, taken the possession of the suit land and they have raised their construction and their possession is open as owner. He further denied that about 35 years back, predecessor-in-interest of the defendant has constructed the houses and they have not raised any objections, however he has voluntarily submitted that their houses are at their own land.

9. PW-2 Kishan Chand, has deposed that he knows the parties and the disputed land is 12 Biswas, belongs to Rulda, Sukar and Bishna and now their heirs are in possession of the same. In his cross-examination, he admitted that neither the children of Sukar are residing in the disputed land, nor the sons of Ami Chand. He has further admitted that the house of the defendants consisting of three rooms and one varanda. He denied that the house is 35 years old, but stated that it is about 5-6 years old. He further denied that adjacent to that house, there is another house, which is of four room. He has admitted that in the four rooms' house, Rattan Pal is residing and that house is 20 years old. He further admitted that father of the defendants is residing on the suit land since 1950, but stated that the disputed land is another one. He has stated that the disputed land is 4 Biswas, which the defendants are trying to dig.

10. The defendant Pritam Singh appeared in the witness box as DW-1 and stated that their predecessors are residing in the suit land from 35-36 years and the plaintiff neither came there nor residing there. He further stated that the plaintiff is residing in different places and mutation has wrongly been attested in his favour and he never cultivated the disputed land. In his cross-examination, he denied that they were aware about the entries in favour of the plaintiff. He admitted that the inheritance of Sukar was attested in favour of the plaintiffs, but voluntarily submitted that their houses are there.

11. DW-2, Jashmer Singh, has deposed that neither the plaintiff nor his father residing in the disputed land. In his cross-examination, he admitted that mutation of Sukar was attested in favour of his heirs in his presence. He further admitted that the disputed land is 12 Biswas and the same is not in possession of the plaintiff.

12. DW-3, Dyal Singh, has deposed that the disputed land is 12 Biswas, which belongs to the defendants and they are residing there. In his cross-examination, he denied that on 12.12.2001 and 14.12.2001, the defendants tried to dig the foundations and the land does not belong to them.

13. From the evidence, it is clear that the land was not under cultivation and there were houses. Though the defendants have not preferred any cross-objections against the findings with regard to adverse possession against them, however the law to this aspect is very clear.

14. The Hon'ble High Court of Himachal Pradesh in ***Ram Rakhi*** vs ***Attri and another***, AIR 1993 HP 137, has held as under:-

> *"6. About second point Mr. Barowalia, learned counsel for the respondents/plaintiffs has raised preliminary objection that it cannot be considered by this Court in the present appeal as the appellant/defendant had not filed cross-objections challenging the findings of the trial Court, which have now become final between the parties. The District Judge had also not considered this point for this reason. For making his submission Mr. Barowalia has relied upon Krishan Dev vs. Smt. Ram Piari, AIR 1964 Him Pra 34. But in view of the amended provisions of Order 41, Rule 22, read with Rule 33, C.P.C. this preliminary objection is without any force."*

15. The Division Bench of Hon'ble Supreme Court in ***Banarsi*** and ***Others vs. Ram Phal***, (2003) 9 SCC 606, have held as under:-

> *"10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we well shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:*
>
> *(I) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.*
>
> *(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.*
>
> *(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.*
>
> *11. In the type of case (I) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amendment CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."*

16. From the above it is clear that even without there being cross-objections, the party against whom the findings are, can assail the findings against him/her after the amendment in the Code of Civil Procedure, but the only difference is that while maintaining cross-objections, even if the other party withdraws the appeal, cross-objections are required to be disposed of on merits, but In the case no cross-objections were filed, so the findings against the party, who has neither filed the appeal nor cross-objections when the other party withdraws the appeal, cannot be gone into. In the present case, the appeal was not withdrawn, so substantial question of law No. 1 is answered holding that the learned first Appellate Court has not erred in reversing the findings of the adverse possession, without there being any cross-objections on behalf of the defendants.

17. The testimonies of defendant's witnesses shows that the defendants are in continues possession of the suit land, upon which their predecessors-in-interest have raised their *pucca* house, consisting of three rooms and a verandah. All these witnesses denied in their cross-examination that the defendants tried to dig the foundations in the suit land. The fact that the defendants are in adverse possession of the suit land is quite obvious on the plaintiff's own showing, as he has himself admitted that he has been residing in Amargarh, which is at a distance of 25 Kms from the suit land. PW-2, Kishan Chand in his cross-examination has also admitted that children of Sukar, including the plaintiff are not residing in the suit land and he only saw the defendant's house on the suit land. Though, this witness has denied that the said house is constructed 35 years back, but stated that it is 5-6 years old and admitted that he had also seen the house of defendant Rattan Pal, which consists of 3-4 room and the same is existed there for the last 20 years. From this admission, coupled with the evidence of the defendants, it is clear that the defendants have been living on the suit land since 1950 and they have raised *pucca* houses on the same, which have been constructed beyond 12 years, before the filing of the suit, as such they have already acquired title by way of adverse possession by the time suit was filed. Therefore, the findings recorded by the learned Court below are as per law and the substantial question of law No. 2 is answered holding that the learned first Appellate Court has not misconstrued, misinterpreted and misapplied the material on record and ignored admissible evidence in accepting the plea of adverse possession of the defendants and refusing alternative relief of possession to the plaintiff on title.

18. The net result of the above discussion is that the present appeal, sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stand(s) disposed of. However in the peculiar facts and circumstances of the case, parties are left to bear their own costs.

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

Kavita Bhaskar .....Petitioner

Versus

M/s H.P. General Industries Corporation Ltd. .....Respondent

Arb. Case No. 89 of 2017
Reserved on: 07.05.2018
Decided on: 21.05.2018

Arbitration and Conciliation Act, 1996- Section 11(6)- Appointment of arbitrator – Held- Though contract between parties regarding appointment of arbitrator must be adhered to but in exceptional circumstances, deviations therefrom are permissible – Once aggrieved party files an application under Section 11 (6) of the Act in High Court, opposite party would lose its right of appointment of arbitrator(s) as per terms of contract – Contract interse petitioner and respondent provided that in event of dispute, same was to be resolved by an arbitrator to be appointed by

respondent – Respondent never appointed arbitrator even as per directions of High Court passed earlier – Petitioner approaching High Court under Section 11(6) of the Act for appointment of Arbitrator – Respondent taking plea that it had already appointed arbitrator pursuant to earlier order of the High Court – However, respondent was found to have not strictly complied earlier order of High Court within time- Held – Respondent had lost its right to appoint arbitrator as per terms of contract – Fresh arbitrator appointed by High Court of its own. (Paras- 3, 5 and 8)

Cases referred:

North Eastern Railway and others vs. Tripple Engineering work, (2014) 9 SCC 288
Indian Oil Corporation Limited vs. Raja Transport Limited, (2009) 8 SCC 520

For the petitioner: Ms. Vandana Misra, Advocate.
For the respondent: Ms. Sunita Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 11 (6) of Arbitration and Conciliation Act, 1996, has been maintained by the petitioner, for appointment of arbitrator. As per the petitioner, in the year 2012, she filed a suit for recovery of an amount of Rs. 21,318/- alongwith interest, against the respondent, before the learned trial Court. However, the respondent in its written statement had specifically averred that as there exist an arbitration agreement, therefore the suit is not maintainable. Consequently, the petitioner sought permission to withdraw the said suit with liberty to approach the learned Arbitrator, under Order 23, Rule 3 of CPC, but the same was rejected by the learned trial Court. Against the said order of rejection, the petitioner filed CMPMO No. 405 of 2014 before this Court, which was allowed, vide order dated 01.01.2015. Thereafter, the respondent filed a review petition against the order dated 01.01.2015, being review petition No. 11 of 2016, which was dismissed, vide order dated 15.07.2016. As per the petitioner, despite making numerous requests to the respondent for appointment of the arbitrator, so that she could get her due amount from the respondent, nothing has been done by the respondent. Therefore, the present petition may be allowed and arbitrator may be appointed for adjudication of the present dispute *inter se* the parties.

2. Learned counsel for the petitioner has argued that for adjudication of the present dispute, the arbitrator was required to be appointed, however the respondent inspite of obeying the order for appointment of the arbitrator, later on maintained the review petition before this Court, which was dismissed. She has further argued that to adjudicate the lis *inter se* the parties, the present petition deserves to be allowed and arbitrator is required to be appointed. Learned counsel for the petitioner, in support of her contentions, placed reliance upon the judgment rendered by the Division Bench of Hon'ble Supreme Court in ***North Eastern Railway and others*** vs. ***Tripple Engineering work***, (2014) 9 SCC 288. The relevant extract of the judgment is as under:

> ***"6. The "classical notion" that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short "the Act") must appoint the arbitrator as per the contract between the parties saw a significant erosion in ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India v. Bharat Battery Mfg. Co. (P) Ltd. wherein following a three-Judge Bench decision in Punj Llyod Ltd. v. Petronet MHB Ltd. it was held that once an aggrieved party files an application under***

Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious."

3. On the other hand, learned counsel for the respondent has argued that the respondent vide letter dated 29th December, 2015, has already appointed Mr. Vishal Panwar, Advocate, as Arbitrator and the same was conveyed to the petitioner Annexures **R-1** and **R-2**. Learned counsel for the respondent has further argued that as in compliance to the order, passed by a Coordinate Bench of this Court in CMPMO No. 405 of 2014, arbitrator has already been appointed, so the present petition deserves to be dismissed.

4. To appreciate the arguments of learned counsel for the parties, this Court has gone through the records in detail.

5. At the very outset, Clause 23 of the agreement **(Annexure A-1)**, executed *inter se* the parties, provides that in case any dispute arise between the parties, the same to be solved by the arbitrator, to be appointed by the second party and the decision of the arbitrator shall be final and binding on both the parties. Meaning thereby that in case of any dispute, the arbitrator shall be appointed by the respondent.

6. A Coordinate Bench of this Court on 1st October, 2015, passed an order on CMPMO No. 405 of 2014 and allowed the petitioner to withdraw her suit by further directing the respondent to appoint the arbitrator within a period of one month therefrom, as per the condition No. 23 of agreement. However, despite said order, the respondent had not appointed the arbitrator within one month and in reply filed by the responent, it has been specifically mentioned that vide letter dated 29th December, 2015, Mr. Vishal Panwar, Advocate, has already been appointed as Arbitrator. Though, order of the Court was to appoint the arbitrator within a period of one month, however appointing the arbitrator beyond one month is not a compliance of the order, passed by this Court.

7. The Hon'ble Supreme Court in **Indian Oil Corporation Limited** vs. **Raja Transport Limited**, (2009) 8 SCC 520, has held as under:

"48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(I) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them

under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure.

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

(I) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

8. In view of the law, as discussed hereinabove, This Court finds that as the respondent has failed to appoint the arbitrator within a period of one month and the matter is yet to solved, it will be appropriate to appoint another arbitrator. So, the present petition is allowed and Mr. J.S. Bhogal, Senior Advocate, is appointed as Arbitrator to adjudicate the lis *inter se* the parties. The arbitrator is directed to enter into reference within a period of two weeks from the date of receipt of the copy of this order. Thereafter, the petitioner is directed to file claim petition within a period of two weeks. Reply/counter claim may be filed by the respondent within a further period of three weeks. The pleadings, including rejoinder and counter-claim, if any, shall also be completed by the parties within a period of eight weeks after entering into reference by the arbitrator. Thereafter, the arbitrator will afford an opportunity to the parties to place on record the documents, if they intend to do so and evidence in any form by following the procedure with the consent of the parties. Registry to immediately inform Mr. J.S. Bhogal, Senior Advocate about the passing of the order, by sending a copy of this order to him. The arbitrator will be entitled for the fee as per law.

9. In view of above, the petition, so also pending application(s), if any, shall stand(s) disposed of.

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

Munna Ram .....Appellant.
Versus
Smt. Tara Devi & another .....Respondents.

RSA No. 477 of 2006
Reserved on : 16.5.2018
Decided on : 21.5.2018

Transfer of Property Act, 1882- Section 41- Bonafide Purchaser- Plaintiff filing suit for specific performance of agreement to sell with respect to suit land executed by defendant No.1 in his favour – Also praying for setting aside of sale deed executed by defendant No. 1 qua suit land in favour of defendant No. 2 being subsequent to agreement to sell in question - Defendant No.1 admitting execution of agreement to sell in favour of plaintiff - Whereas defendant No.2 taking plea of his being a bonafide transferee for consideration without notice – Suit decreed by trial court and appeal filed by defendant No. 2 was dismissed by First Appellate Court- Regular Second Appeal – Held - Transferee is bound to show that he had taken reasonable care to ascertain that transferor had power to make transfer - Where transferee fails to discharge this onus, he cannot be said to be a bonafide purchaser - Suit land was in proximity to transferee's (Defendant No.2) own land – Possession of suit land was with plaintiff and he was cultivating it – Defendant No.2 was aware of plaintiff's possession over suit land - No evidence on record suggesting that transferee/defendant No.2 ever inquired as to how plaintiff was in possession of land purchased by him (transferee) – Therefore, transferee (defendant No.2) was not a bonafide purchaser- Regular Second Appeal dismissed – Judgments of lower Courts upheld.

(Para-15 and 16)

For the appellant: Mr. Karan Singh Kanwar, Advocate.
For the Respondents: Ms. Jyotsana Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The suit of the plaintiff/respondent No.1 herein (for short "the plaintiff") for rendition of a decree, for specific performance of contract, stood decreed, by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by defendant No.1/appellant herein, the latter Court dismissed the appeal besides obviously upheld the trial Court's judgment and decree, hence, the instant appeal.

2. Briefly stated the facts of the case are that admittedly respondent No.2 herein/defendant No.1 (for short "defendant No.1) was recorded as co-sharer on land comprised in Khewat Khatauni No. 55/186, measuring 3 bighas 5 Biswas, situated at Mauza Kotga Kando, Tehsil Kamroo, and another parcel of the land in khata Khatauni No. 15/41 to 52 measuring 49 bighas 16 biswas in Mauza Kuner Dhamon, Tehsil Paonta Sahib, District Sirmaur, H.P. The said land came to him from his mother Dropti. By an agreement to sell of 7.11.1997 (Ex.PW-2/A), he agreed to sell 2 bighas 4 biswas out of the said land (referred to as suit land) to the plaintiff for a sale consideration of Rs.20,000/- out of which he received a sum of Rs.15,000/- as earnest money from the plaintiff and handed over the possession of the suit land on the spot. Since then, the plaintiff claims herself to be in possession of the suit land. However, by the said agreement of sale, defendant No.1 agreed to execute the registered sale deed on which the plaintiff was to pay the rest of the sale consideration of Rs.5,000/- to defendant No. 1. The plaintiff's grievance is that, though, she was ready and willing to perform her part of contact, however defendant No.1

has been delaying the execution of sale deed on one pretext or the other. Ultimately, he by a registered sale deed of 28.4.1998 sold the suit land to the appellant (referred to as defendant No. 2) which sale is illegal and void. Hence, she laid the present suit for specific performance of contract alongwith the suit for the decree of consequential relief of permanent injunction restraining the defendant from interfering, trespassing and alienating the suit land.

3. In written-statement filed by defendant No.1, he reasserted the case of the plaintiff as regards his having executed sale agreement with her. His case is that sale deed Ex.DW-2/A was got executed from him under pressure and threat by defendant No.2 and the same is without sale consideration.

4. The suit was contested by defendant No2 and he has filed written statement, wherein, he has taken preliminary objections on the ground of maintainability. On merits, he asserts that defendant No.1 executed a valid registered sale deed in his favour on 18.2.1998 after receiving full sale consideration and has handed over the possession of the suit land to him. It is his further case that he is bona fide purchaser for value and without any notice.

5. The plaintiff filed replication to the written statement of the defendants wherein, she denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for decree of specific performance of contract, as alleged? OPP

2. Whether the defendant No.1 agreed to sell 2-4 bighas of land from his share as alleged ?OPP

3. Whether the sale deed executed by defendant No.1 in favour of defendant No.2 is illegal null and valid and not binding on rights of the plaintiff as alleged? OPP

4. Whether the plaintiff is entitled for injunction as prayed? OPD2

5. Whether the suit is not maintainable? OPD2

6. Whether the defendant No.2 is the bonafide purchaser without notice as alleged ?OPD 2

7. Whether the plaintiff has no cause of action as alleged? OPD1

8. Whether the aforesaid agreement is the result of pressure and threat as alleged? OPD1

9. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence decreed the suit of the plaintiff. In an appeal, preferred therefrom, by the defendant No.2 before the learned First Appellate Court, the latter Court dismissed the appeal, and, upheld the findings recorded by the learned trial Court.

8. Now the defendant No.2/appellant herein has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded, in its impugned judgment(s) and decree(s), by the learned Courts below. When the appeal came up for admission, on 1.6.2007, this Court, admitted the appeal, on, the hereinafter extracted substantial question of law:-

"Whether there has been misreading of evidence by both the Courts below in regard to issue No.1."

Substantial question of Law.

9. Ex.PW-2/A embodies therein, the, relevant contract of sale hence executed inter-se co-defendant No.1 vis-a-vis the plaintiff. Visibly the execution of Ex.PW-2/A, occurred, prior to

execution, of a sale deed inter-se co-defendant No.1 vis-a-vis co-defendant No.2, sale deed whereof is borne, in, Ex.DW-2/A. A candid besides an unequivocal recital, is, borne in Ex.PW-2/A qua, the, apt liquidations, of the entire sale consideration, by the plaintiff vis-a-vis co-defendant No.1, hence occurring at the time contemporaneous vis-a-vis its execution, and, also recitals, are, carried therein vis-a-vis, in contemporaneity thereof, also, delivery of possession, of, the suit land being hence made by co-defendant No.1 vis-a-vis the plaintiff.

10. In aftermath, with the execution of Ex.PW-2/A, hence apparently, occurring prior to execution of Ex.DW-2/A, and, with the afore-referred recitals occurring, in, Ex.PW-2/A, being rendered corroboration thereto, by, hence, the testification(s), of, apt marginal witnesses (PW-2 Ghasi Ram, and, PW-3 Rati Ram), and, with theirs also making echoings' in their respectively recorded testifications vis-a-vis, its valid and due execution, inter-se the plaintiff, and, defendant No.1, thereupon, the plaintiff would be entitled, to, derive the apt leverage, from, the provisions embodied, in, **Section 53A of the Transfer of Property Act, 1882,** provisions whereof are extracted hereinafter-

> **1[53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that 2[***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]**

11. Contrarily the plea, espoused by co-defendant No.2, of his being, an ostensible owner of the suit property, arising, from his being a transferee, for, consideration and without notice, would, on evidence in satiation thereof, being testified by the witnesses' concerned would rather disable, the, plaintiff to claim rendition of a decree of specific performance also would rather concomitantly disable, the, plaintiff to invalidate Ex.DW-2/A.

12. Nowat, for determining, the, trite factum probandum, of existence, of proof in display of valid, and, due execution, of Ex.PW-2/A, (i) it is imperative to allude, to the testifications' rendered, by the marginal witnesses vis-a-vis Ex. PW-2/A, (ii) who while deposing, respectively as PW-2 and PW-3, therein made echoings vis-a-vis, the valid and duly execution of Ex.PW-2/A, inter-se the plaintiff, and, co-defendant No.1, (iii) besides, in their respectively recorded depositions, they proceeded, to, also make articulations bearing consonance, with, the recitals occurring therein, (iv) especially qua, in contemporaneity vis-a-vis its execution, the entire sale consideration being liquidated by the plaintiff vis-a-vis co-defendant No.1, (v) also, in contemporaneity vis-a-vis its execution, the, possession of the suit land being delivered by co-defendant No.1, to the plaintiff. The afore-referred testifications, of PW-2 and PW-3, were not concerted to be shred of their efficacy, even during the ordeal, of, the learned counsel for defendant No.2, hence, subjecting them to cross-examination, thereupon, it is to be concluded, of, the afore-referred testifications hence acquiring a hue of conclusivity.

13. The effect of conclusivity being acquired by the afore-referred testifications', rendered by PW-2 and PW-3, is, of co-defendant No.2 also acquiescing qua the plaintiff, prior, to

execution of Ex.DW-2/A inter-se him, and, defendant No. 1, hence holding possession, of, the suit khasra Numbers. However, the effect, of, the aforesaid inference may be scuttled by evidence, existing on record (i) displaying qua given the improximity of the abode of co-defendant No.2 vis-a-vis the suit khasra Numbers, hence his being disabled, to, discover, the aforesaid factum. However with co-defendant No. 2 while stepping into the witness box, rather, in his cross-examination hence making a clear echoing, of his land, occurring in proximity vis-a-vis the suit khasra number, rather bolsters an inference, of his holding , the apt knowledge of the plaintiff prior to the execution of Ex.DW-2/A inter-se him, and, co-defendant No.2, hence holding possession of the suit khasra Numbers.

14. The effect of the aforesaid apt knowledge, hence, acquired by co-defendant No.2, also galvanizes a concomitant inference of his being precluded, to, espouse of his being construable to be a transferee without notice, for consideration nor hence he can hence derive any benefit, of, the statutory provisions borne in **Section 41 of the Transfer of Property Act,** provisions whereof stand extracted hereinafter:-

> **"Section 41 in The Transfer of Property Act, 1882**
>
> **41. Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."**

15. Significantly with his holding knowledge, qua, the aforesaid relevant facet, he is construed to be also holding "notice" of execution, of Ex.PW-2/A inter-se the plaintiff, and, co-defendant No.1, (I) especially, when, the connotation, of, the statutory parlance, "notice" occurring, in Section 41, of, the Transfer of Property Act, (ii) is of its embodying therein, the, apposite knowledge of the subsequent vendee vis-a-vis the prior thereto, validly and duly executed Ex.PW-2/A inter-se the plaintiff, and, co-defendant No.1.

16. Be that as it may, even defendant No.2, in his examination-in-chief, has not made any echoing, for erecting any conclusion, of, his prior to execution of Ex.DW-2/A inter-se him and co-defendant No.1, his holding, hence, possession of the suit land, (i) nor also the testification rendered by defendant No.2, especially the one existing in the latters' cross-examination, wherein, he, rather with nebulousness, hence, makes echoings, of his being unaware vis-a-vis the factum of delivery, of, possession by co-defendant No.1 to the plaintiff (ii), also cannot, with any firmness, erect any inference qua in contemporaneity vis-a-vis the execution of Ex.DW-2/A inter-se co-defendant No.1, and, co-defendant No.2, the latter proceeding to take delivery, of, possession, hence, of the suit khasra Nos. Natural corollary thereof, is qua the unrebutted testifications' rendered respectively by PW-2, and, by PW-3 vis-a-vis, the, plaintiff holding hence possession, of, the suit khasra Nos. (iii) when stands entwined therewith, and, further when entwining therewith, the, marked admission existing, in, the cross-examination of defendant No.2, of, his owning land, abutting, the suit khasra Number, all hence squaring, off, an inference qua his perse holding knowledge vis-a-vis the suit land, being, cultivated by the plaintiff, (iv) and, hence leading, to an inevitable inference of co-defendant No.2, abysmally failing to prove qua his, being a transferee, for valuable consideration and without notice vis-a-vis, the, apt prior thereto valid execution, of Ex.PW-2/A, inter-se the plaintiff, and, co-defendant No.1 (v) thereupon, with, proof emanating, from, the respectively rendered testifications by PW-2, and, by PW-3 vis-a-vis (a) its valid and due execution (b) vis-a-vis delivery of apt possession in contemporaneity thereof, and, the apt redeeming of the entire sale consideration, in, contemporaneity vis-a-vis execution, of Ex.PW-2/A (vi) thereupon rather the plaintiff being entitled, not only, to a decree of specific performance, but, also his being entitled to get the benefit, of, the apt provisions embodied, in, Section 53A of the Transfer of Property Act.

17. In view of the above, the appreciation, of, the evidence by the learned Courts below, does not suffer, from any infirmity as well as perversity. Consequently, I find no merit in this appeal, which is accordingly dismissed, and, the judgment and decree of the learned Courts below, is, maintained, and, affirmed. Substantial question of law is answered accordingly. Records be sent back forthwith. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Kamal Kishore .....Appellant
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 144 of 2018
Decided on : 25.5.2018

Code of Criminal Procedure, 1973- Section 345- **Indian Penal Code, 1860-** Section 228- Contempt in presence of court - Procedure thereof – Held - After taking cognizance, Court is required to give an opportunity to contemnor to lead evidence in support of his reply – Additional Sessions Judge didn't give any opportunity to contemnor to lead evidence – Conviction for offence under Section 228 of I.P.C. thus illegal and set aside – Appeal allowed. (Paras-2 and 3)

For the appellant: Mr. Mohit Thakur, Advocate.
For the Respondent: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs., for the respondent.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeal stands directed, against, the order of imposition of the fine, upon, the appellant, pronounced by the learned Additional Sessions Judge-II, Solan, District Solan, H.P. in case No. 24ASJ-II/4 of 2018, for his committing an offence, punishable under Section 228, of, the Indian Penal Code. The aforesaid order would be validated by this Court, only, when, the apt procedure prescribed under Sections 345 of the code of Criminal Procedure, provisions whereof stand extracted hereinafter, visibly begets satiation:

> "**345. Procedure in certain cases of contempt.- (1)** When any such offence as is described in Section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and may, at any time before the arising of the Court on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.
>
> (2) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender as well as the finding and sentence.
>
> (3) If the offence is under section 228 of the Indian Penal Code (45 of 1860), the record shall show the nature and stage of the judicial proceeding in which

the Court interrupted or insulted was sitting, and the nature of the interruption or insult."

Even, though, a reading of the afore extracted provisions, borne, in Section 345 Cr.P.C., empowers the Court concerned, to, upon an offence borne, in, Section 228 IPC, being prima facie committed, by the offender concerned, to, hence, during the course of the day, whereat, the offence is purportedly committed, to take cognizance thereon, (i) yet, the further mandate engrafted therein qua the Court being also enjoined, to, afford a reasonable opportunity, to, the offender concerned, in showing cause, the, reason, for the punishment being not visited upon him, for his allegedly committing an offence punishable under Section 228 IPC, also enjoins evident meteing, of, completest adherence thereto.

2. Even though, taking of cognizance, by the, learned Additional Sessions Judge-II, on the very date, when the alleged offence, was, committed is within the domain of Section 345 Cr.P.C, (i) yet, within the apt mandate engrafted, in, the provisions of Section 345 Cr.P.C, a reasonable opportunity was also enjoined to be afforded, to, the offender, by the Court concerned, (ii) mandate whereof appears to be infracted, by, the learned Court concerned, (iii) infraction whereof, arises, from the factum, of, directions being meted, to the offender, to, hence during the course of the day rather furnish his reply, to, the apposite show cause notice. The affording, of, a reasonable opportunity to the offender concerned, by the Court, does enjoin upon the Court concerned, to hence afford him a reasonable time, within which, he may furnish an appropriate valid reason, for his alleged penal dereliction. Furthermore, the connotation, of, the apt aforesaid phrase, is, of its also encapsulating, an apt opportunity, being afforded to the offender, to, in consonance with, his reply, to the show cause notice hence also adduce evidence in support thereof. However, the learned Additional Sessions Judge-II, has, apart, from giving the shortest possible time, to the appellant, to reply to the show cause notice, also, has thereafter rejected it, without, affording an opportunity to the appellant, to adduce his apt evidence rather hence has infracted, the, aforesaid connotation, borne by the phrase "to afford a reasonable opportunity".

3. In view of the above discussion, I find merit in this appeal which is accordingly allowed and the impugned order of the learned trial Court stands reversed and set aside. Accordingly, the respondent/accused stands acquitted. All pending applications also disposed of accordingly.

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

Ranjana Devi. …Petitioner

Versus

State of H.P. & others. …Respondent.

CWP No. 6821 of 2012
Date of Decision: 26.5.2018

Grant-in-Aid (PTA) Rules, 2006- Release of grant- Petitioner, who was continuously working as a PTA Lecturer since 19.5.2008 but was not paid a single penny, sought release of grant in aid for her services – State contesting her claim on ground that petitioner was appointed purely as a temporary measure and also after instructions dated 3.1.2008 directing School authorities to stop making appointment by PTA and not to accept joining of PTA appointed teacher - Held – Though petitioner was appointed after instructions dated 3.1.2008 but State permitted her to continue teaching for 10 years – Consent of State in allowing her to continue is apparent on record – State found to have released grant in aid in favour of other teachers appointed by PTA after instructions dated 3.1.2008 – In these circumstances, State cannot discriminate against petitioner - Petition allowed – State directed to release grant in aid to petitioner from date of appointment.

(Paras- 6, 10 & 15)

For the Petitioner: Mr.Sanjay Verma, Advocate, vice Mr.P.P. Chauhan, Advocate.
For the Respondents: Mr.Shiv Pal Manhans & Ms.Rameeta Kumari, Additional Advocate Generals with Mr.Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

Present petition has been filed seeking direction to the respondents to release of grant-in-aid to the petitioner w.e.f. 19.5.2008 till date under Grant-in-Aid PTA Rules, 2006 (herein after referred to as GIA Rules), for her services as PTA Lecturer (Hindi) in Government Senior Secondary School, Mandal, Tehsil Jubbal, District Shimla, H.P.

2. Petitioner has placed on record certificate of passing MA (Hindi) and B.Ed. on 21.10.2003 and 23.9.2008, respectively to establish that she is possessing academic qualification prescribed for the post as per Recruitment and Promotion Rules.

3. Petition is contested by respondents-State by filing reply wherein appointment of petitioner as Lecturer (Hindi) on PTA basis in the concerned school w.e.f. 19.5.2008 has not been disputed, rather has been admitted. However, it is contended that her appointment was made as a temporary measure till the joining of regular incumbent and also that she was appointed subsequent to the instructions dated 3.1.2008 issued by respondents-State, directing to stop selection/appointment by PTA and not to accept joining of PTA provided teachers after the issuance of said instruments. It is also stated in reply that only those PTA appointees are entitled for grant-in-aid, who fulfils the requisite qualification provided under Recruitment and Promotion Rules against their posts. However, the eligibility of petitioner having qualification of MA (Hindi) and B.Ed., has not been specifically denied in the reply, nor any other academic qualification required for the post in question, has been disclosed.

4. Objection of non-joinder of necessary party has also been taken by stating that concerned PTA which has appointed petitioner has not been made party in the present petition. Concerned PTA is not necessary party as appointment of petitioner by the said PTA is not disputed rather is admitted by the respondents-State and for release of grant-in-aid, there is no role of PTA and grant-in-aid is to be released by respondents only on the recommendations of Principal concerned. Therefore, PTA may be a proper party but is not a necessary party whose non-joinder is not fatal.

5. The issue in present writ petition is not between the petitioner and PTA, but between the petitioner and the respondents-State, as though petitioner was appointed by PTA but it is the State which has permitted her to continue teaching the classes for about 10 years and that too without paying a single penny in grant-in-aid or otherwise. Schools have been opened by the respondents-State but without teachers, existence of schools is meaningless. Therefore, after opening the schools, to provide teachers in those schools is the primary function of the State. Though, it is also a serious issue that the State cannot shirk from its duty to provide well qualified regular teachers to the students by permitting PTA to appoint teachers in schools and allowing them to continue for such a long period under the garb of stop gap arrangements. But, despite the fact that it is depreciable arrangement, such arrangement does not absolve the State from paying admissible remuneration to petitioner appointed by PTA in the Government School against vacant post, which has not been filled up by appointing a regular teacher by respondents-State. Undoubtedly, no one can be permitted to teach the students in Government Schools without express or implied consent of the State and the omissions and commissions on the part of State establish consent for appointment and continuation of the petitioner as PTA teacher.

6. Undisputedly, petitioner has been appointed on 19.5.2008 after issuance of instructions dated 3.1.2008. Learned counsel for the petitioner has referred para 3 of judgment passed by Division Bench of this Court in CWP No. 2549 of 2015, titled Hem Raj Sharma Vs.

State of H.P. and others, decided on 7.8.2015, wherein it has been recorded that three teachers, namely, Indira Devi, Kauran Devi and Mukand Lal who were appointed on PTA basis after 3.1.2008 were also being paid grant-in-aid and the said fact was not denied by respondents-Department in the said writ petition. It is also pointed out that Hem Raj Sharma, petitioner in CWP No. 2549 of 2015, was also appointed after 3.1.2008, but after considering the relevant Rules and instructions including GIA Rules, the Division Bench has directed to pay the grant-in-aid to the said Hem Raj Sharma and the said judgment has attained finality and also stands implemented by the respondents.

7. Relying upon pronouncement of the Division Bench's judgment in Hem Raj Sharma's case (supra), co-ordinate Bench of this Court in CWP No. 358 of 2015, titled Chander Parkash Sharma Vs. State of H.P. & others has also directed to release the grant-in-aid to Chander Parkash Sharma, petitioner therein, who was appointed on 20.9.2008 i.e. after the issuance of instructions dated 3.1.2008. Reliance has also been placed on CWP No. 2638 of 2015, titled Devi Saran Vs. State of H.P. and others decided by co-ordinate bench of this Court on 16.9.2016, wherein petitioner appointed on 7.4.2008, was held to be entitled for grant-in-aid.

8. Learned counsel for the petitioner has also relied upon the judgments passed by Division Bench of this High Court in CWP No. 929 of 2017, titled Sonika Chaudhary Vs. State of H.P. & another, decided on 3.4.2018 and judgment passed by co-ordinate Bench of this Court in CWP No. 226 of 2010 titled as Promila Devi Vs. State of H.P. & others, decided on 2.4.2015, with plea that in compliance of directions therein, respondents have released grant-in-aid.

9. Plea of payment of grant-in-aid in above referred cases remained unrebutted. Respondents are availing services of the petitioner till date but are not willing to release grant-in-aid to her, despite the fact that she is performing the same duty, as being performed by other PTA teachers to whom grant-in-aid is being released.

10. GIA Rules were notified vide notification No. EDN-A(Kha)7-3/2006, dated 29-06-2006. Thereafter, the State has circulated clarification/administrative instructions on "Grant-in-Aid" to PTA Rules, 2006, vide communication dated 2nd August, 2006/19th August, 2006, wherein Principal was advised to distance himself from selection of a candidate by the PTA and was directed to advise the PTA to constitute a selection committee comprising of President PTA, Secretary PTA and Subject Specialist/Expert, as provided in the said notification.

11. It is strange behavior on the part of the State that for the teaching students, petitioner is eligible, but for making payment of grant-in-aid, she is being considered ineligible for want of certain formalities to be performed by PTA on behalf of respondents-State. In case her appointment was defective or illegal, she should not have permitted to continue for 10 years. There is no dispute about the eligibility of the petitioner for her appointment as Science teacher.

12. Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. In India, since ancient era, State is always for welfare of citizens being guardian and protector of their rights. Primary duty of State is welfare of people and exploitive actions of rulers have always been deprecated and history speaks that such rulers were always reprimanded and punished. "Rule of Law" was and is Fundamental Principle of "Raj Dharma". Dream of our forefathers, to establish "Rule of Law" after independence, has emerged in our Constitution. Exploitation by State has never been expected on the part of State as the same can never be termed as 'Rule of Law', but the same is arbitrariness which is antithesis of 'Rule of Law'. To make law, to ameliorate exploitation, is duty of State and in fact State has also framed laws to prevent exploitation. But in present case State is an instrumental in exploitation which is contrary to essence of the Constitution.

13. In an identical matter, co-ordinate Bench of this Court in a judgment dated 10.4.2015, passed in CWP No. 8692 of 2012, titled as Lata Kumari Vs. State of H.P. & Others, directing the State to release grant-in-aid to the person appointed prior to issuance of notifying GIA Rules 2006, has observed as under:-

"9. The matter can be looked from a different angle. Indisputably the petitioner had been appointed and assigned the duties to teach the students and such duties have been continuously performed by her. Then can the respondents, who are model employers, be permitted to act with total lack of sensitivity and indulge in "Begar", which is specifically prohibited under Article 23 of the Constitution of India.

10. The State government is expected to 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. A model employer should not exploit its employee and take advantage of their helplessness and misery. In the present case the conduct of the respondents falls short of expectation of a model employer.

11. It is not the case of the respondents that petitioner has not been discharging her duties diligently, honestly and faithfully. Therefore, in such circumstances while demanding her legitimate due by way of grant in aid under the Rules, the petitioner has not asked for the moon.

12. In view of the aforesaid discussion, there is merit in the petition and the same is allowed and the respondents are directed to release the grant-in-aid to the petitioner as per the 'Parent Teacher Association Rules, 2006' from the date of promulgation of the Rules. No costs."

14. Aforesaid observations are fully applicable in present case also.

15. In view of above discussion and the pronouncements of this Court referred herein-above, petition is allowed and the respondents are directed to release the grant-in-aid to the petitioner from the date of her appointment on or before 31.7.2018, after adjusting amount as per Rules, if any, paid to her. Petitioner shall also be entitled for all other consequential benefits, which have been extended by the respondents-State to other similarly situated persons. Respondent No. 2 shall file compliance affidavit within two weeks after 31.7.2018.

16. Petition is disposed of in aforesaid terms, so also the pending application(s), if any.

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

Renuka Devi ...Petitioner

Versus

State of H.P. & others. ...Respondent.

CWP No. 384 of 2017
Date of Decision: 26.5.2018

Grant-in-Aid (PTA) Rules, 2006- Release of grant- Petitioner engaged as a Science Teacher by PTA on 29.8.2007 – She rendered services for 11 years yet not paid anything – Petition filed for release of grant in aid – State contesting petition on ground that remuneration, if any, is to be paid by PTA or School Management Committee (SMC) - Held – Though petitioner was engaged after instructions dated 3.1.2008 but State permitted her to continue teaching for 10 years – Consent of State in allowing her to continue is apparent on record –State found to have released grant in aid in favour of other teachers appointed by PTA after instructions dated 3.1.2008 – In

these circumstances, State cannot discriminate against petitioner- Petition allowed – State directed to release grant in aid to petitioner from date of appointment. (Paras- 6, 8 & 15)

For the Petitioner: Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.

For the Respondents: Mr.Shiv Pal Manhans & Ms.Rameeta Kumari, Additional Advocate Generals with Mr.Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge (oral)

Petitioner was appointed as Science teacher on 29.8.2007 by PTA concerned against the vacancy of TGT (Science) for the reasons that regular Science teacher had proceeded on extra ordinary leave. Initially, petitioner was appointed at a remuneration of Rs.500/- per month, which was increased from time to time as Rs.1300, Rs.2000/- and Rs.3000/- .

2. Petitioner has passed her B.Sc. Examination on 17.6.2006, completed her Bachelor of Education (B.Ed.) on 31st August, 2007 and qualified Teachers Eligibility Test (TET) for the post of Science teacher. Petitioner is rendering her services continuously since her appointment by PTA vide resolution No. 8, dated 29.8.2007, but grant-in-aid as provided under Grant-in-Aid PTA Rules, 2006 (herein after referred to as GIA Rules), has not been released in her favour, constraining her to file present petition.

3. State has contested the petition by stating in reply that petitioner was appointed by the concerned PTA by passing a resolution Annexure P-2 and therefore, PTA and SMC has to make arrangement from PTA fund for making payment of remuneration to the petitioner as she is not covered and entitled for grant-in-aid under GIA Rules, 2006.

4. Respondents have also taken objection that in view of ratio of law laid down in CWP No. 1310 of 2009, titled Manju Bala Vs. State of H.P. and others, present petition is not maintainable against the respondents. This plea of respondents is misconceived as evident from the operative part of judgment in the said case, reproduced in reply to the writ petition. In the said case, the issue of appointment by PTA in terms of Grant-in-Aid Rules was subject matter and writ petition was held to be maintainable against the appointment or termination or such other allied grievances only in case the appointment has been made by PTA in terms of Grant-in-Aid Rules. In present case neither the petition has been filed against appointment nor the petitioner has been terminated and the writ has also not been filed against the PTA for denial of benefit on the part of PTA, but against non grant of grant-in-aid, which is to be granted by respondents-State only and for any action or inaction on the part of respondents-State, writ is definitely maintainable against it.

5. The issue in present writ petition is not between the petitioner and PTA, but between the petitioner and the respondents-State, as though petitioner was appointed by PTA but it is the State which has permitted her to continue teaching the classes for about 11 years and that too without paying a single penny in grant-in-aid or otherwise. Schools have been opened by the respondents-State but without teachers, existence of schools is meaningless. Therefore, after opening the schools, to provide teachers in those schools is the primary function of the State. Though, it is also a serious issue that the State cannot shirk from its duty to provide well qualified regular teachers to the students by permitting PTA to appoint teachers in schools and allowing them to continue for such a long period under the garb of stop gap arrangements. But, despite the fact that it is depreciable arrangement, such arrangement does not absolve the State from paying admissible remuneration to petitioner appointed by PTA in the Government School against vacant post, which has not been filled up by appointing a regular teacher by respondents-State. Undoubtedly, no one can be permitted to teach the students in Government Schools without express or implied consent of the State and the omissions and

commissions on the part of State establish consent for appointment and continuation of the petitioner as PTA teacher.

6. An objection of non-joinder of necessary party has also been taken by stating that concerned PTA, which has appointed petitioner, has not been made party in the present petition. Concerned PTA is not necessary party as appointment of petitioner by the said PTA has not been disputed by respondents rather admitted and for the reasons that for release of grant-in-aid, there is no role of PTA and Grant-in-aid is to be released by respondents only on the recommendation of principal concerned. Concerned PTA, at the most, may be proper party whose non-joinder is not fatal.

7. Learned counsel for the petitioner submits that similarly situated persons, even appointed after appointment of petitioner, have also been extended benefits of grant-in-aid, either on their demand by the Department on its own or in compliance of various orders passed by this Court. Petitioner has referred para 9 of judgment of this Court passed in CWP No. 2928 of 2015, titled Balbir Singh Vs. State of H.P. and others, wherein it has been referred that candidate appointed on 10.10.2007, without having requisite academic qualification but with qualification of MA only, was also paid grant-in-aid by respondents.

8. Learned counsel for the petitioner has also relied upon the judgments passed by a Division Bench of this High Court in CWP No. 2549 of 2015, titled Hem Raj Sharma Vs. State of H.P. and others, decided on 7.8.2015 and judgments of co-ordinate benches of this Court in CWP No. 2638 of 2015 titled Devi Saran Vs. State of H.P. and others decided on 16.9.2016 and CWP No. 358 of 2015 titled Chander Parkash Sharma Vs. State of H.P. and others decided on 1.7.2016, wherein the persons appointed even after issuance of instructions dated 3.1.2008 directing to stop the selection/appointment by Parent Teachers Associations and not to accept joining of such appointees, have also been held entitled for grant-in-aid and the said judgments stand implemented by respondents. Further it is also pointed out that in Hem Raj's case supra, it has been recorded that three teachers, namely, Indira Devi, Kauran Devi and Mukand Lal who were appointed on PTA basis after 3.1.2008 were also being paid grant-in-aid and the said fact has not been denied by respondents-Department in the said writ petition.

9. Reliance has also been put by learned counsel for the petitioner on pronouncement of Division Bench of this Court passed in CWP No. 929 of 2017 titled Sonika Chaudhary Vs. State of H.P. & another decided on 3.4.2018 and judgment passed by co-ordinate Bench of this Court in CWP No. 226 of 2010 titled as Promila Devi Vs. State of H.P. & others decided on 2.4.2015 with plea that in compliance of directions therein respondents have released grant-in-aid.

10. Plea of payment of grant-in-aid in above referred cases remained unrebutted. Respondents are availing services of the petitioner till date but are not willing to release grant-in-aid to her, despite the fact that she is performing the same duty, as being performed by other PTA teachers to whom grant-in-aid is being released.

11. GIA Rules were notified vide notification No. EDN-A(Kha)7-3/2006, dated 29-06-2006. Thereafter, the State has circulated clarification/administrative instructions on "Grant-in-Aid" to PTA Rules, 2006, vide communication dated 2nd August, 2006/19th August, 2006, wherein Principal was advised to distance himself from selection of a candidate by the PTA and was directed to advise the PTA to constitute a selection committee comprising of President PTA, Secretary PTA and Subject Specialist/Expert, as provided in the said notification.

12. In present case, appointment of petitioner has been made by resolution Annexure P-2, which has been duly signed by President PTA, Member Secretary PTA along with other members. Member Secretary is none else, but the Head Master of the said school. After her appointment till date, she is continuously teaching the students like other similarly situated teachers for last 11 years.

13. It is strange behavior on the part of the State that for the teaching students, petitioner is eligible, but for making payment of grant-in-aid, she is being considered ineligible for want of certain formalities to be performed by PTA on behalf of respondents-State. In case her appointment was defective or illegal, she should not have permitted to continue for 11 years. There is no dispute about the eligibility of the petitioner for her appointment as Science teacher.

14. During the course of arguments, learned Additional Advocate General submits that he has recent instructions to say that the post against which petitioner is working, is that of TGT Science Medical Group, whereas the petitioner is B.Sc. (Non-medical). No such plea has been raised in the reply. However, if it is taken into consideration even at this time, it is evident from the appointment letter that petitioner was appointed against post of TGT Science and there was no mention of medical or non medical. Moreover, she is continuously teaching the students for the last 11 years and for teaching students she is quite eligible and for grant-in-aid, she is being considered ineligible with plea that vacancy is for TGT (Medical) and she is TGT (Non-medical). In any case, there was no impediment to the State to make arrangement of a teacher having requisite qualification for the post, during last eleven years. Therefore, this plea at this stage is not sustainable for denying grant-in-aid.

15. It is not for the first time that in the Education Department persons having the qualification of TGT (Non-medical) has been allowed to work against TGT (Medical) in numerous cases when someone has to be adjusted at a particular place, frequent Mal-adjustments, in these two categories, are made by the Department by posting TGT (Non-medical) against TGT (Medical) and vice versa. Therefore, on this count, petitioner's entitlement for grant-in-aid cannot be denied.

16. Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. In India, since ancient era, State is always for welfare of citizens being guardian and protector of their rights. Primary duty of State is welfare of people and exploitive actions of rulers have always been deprecated and history speaks that such rulers were always reprimanded and punished. "Rule of Law" was and is Fundamental Principle of "Raj Dharma". Dream of our forefathers, to establish "Rule of Law" after independence, has emerged in our Constitution. Exploitation by State has never been expected on the part of State as the same can never be termed as 'Rule of Law', but the same is arbitrariness which is antithesis of 'Rule of Law'. To make law, to ameliorate exploitation, is duty of State and in fact State has also framed laws to prevent exploitation. But in present case State is an instrumental in exploitation which is contrary to essence of the Constitution.

17. In an identical matter, co-ordinate Bench of this Court in a judgment dated 10.4.2015, passed in CWP No. 8692 of 2012, titled as Lata Kumari Vs. State of H.P. & Others, directing the State to release grant-in-aid to the person appointed prior to issuance of notifying GIA Rules 2006, has observed as under:-

> *"9. The matter can be looked from a different angle. Indisputably the petitioner had been appointed and assigned the duties to teach the students and such duties have been continuously performed by her. Then can the respondents, who are model employers, be permitted to act with total lack of sensitivity and indulge in "Begar", which is specifically prohibited under Article 23 of the Constitution of India.*
>
> *10. The State government is expected to 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. A model employer should not exploit its employee and take advantage of their helplessness and misery. In the present case the conduct of the respondents falls short of expectation of a model employer.*

11. It is not the case of the respondents that petitioner has not been discharging her duties diligently, honestly and faithfully. Therefore, in such circumstances while demanding her legitimate due by way of grant in aid under the Rules, the petitioner has not asked for the moon.

12. In view of the aforesaid discussion, there is merit in the petition and the same is allowed and the respondents are directed to release the grant-in-aid to the petitioner as per the 'Parent Teacher Association Rules, 2006' from the date of promulgation of the Rules. No costs."

18. Aforesaid observations are fully applicable in present case also.

19. In view of above discussion and the pronouncements of this Court referred herein-above, petition is allowed and the respondents are directed to release the grant-in-aid to the petitioner from the date of her appointment on or before 31.7.2018, after adjusting amount as per Rules, if any, paid to her. Petitioner shall also be entitled for all other consequential benefits, which have been extended by the respondents-State to other similarly situated persons. Respondent No. 2 shall file compliance affidavit within two weeks after 31.7.2018.

20. Petition is disposed of in aforesaid terms, so also the pending application(s), if any.

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

Sahil Chaudhary .....Petitioner.

Versus

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

Cr.MMO No. 139 of 2018
Decided on: 26.05.2018

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 323, 376 and 506- **Information Technology Act, 2000**- Section 67A- Petition for quashing of FIR and consequent proceedings on ground of compromise between parties and that FIR was registered on account of misunderstanding - State contesting petition on ground of seriousness of offences - On facts, it was found that complainant and accused were having love affairs for the last 3-4 years- Parties had compromised all disputes with intervention of local Panchayat – Accused had agreed to marry victim/complainant – Both of them major – Chances of conviction bleak if trial is allowed to continue - Held – Inherent powers to quash FIR and criminal proceedings may be exercised to secure ends of justice and prevent abuse of process of Court – In given circumstances, petition allowed and FIR quashed. (Paras-7, 8 and 10)

Cases referred:

Gian Singh V. State of Punjab and another, (2012) 10 SCC 303

Narinder Singh and others V. State of Punjab and another, (2014) 6 SCC 466

Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others V. State of Gujarat and another (2017) 9 SCC 641

For the petitioner: M/s Ashok Chaudhary, Bhuvnesh Sharma and Ramakant Sharma, Advocates

For the respondents: Mr. R.P. Singh and Mr. Kunal Thakur, Dy.A.G for respondent No.1. Respondent No.2 present in person.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Consequent upon the order passed yesterday on 25.05.2018, accused-petitioner Sahil Chaudhary has been produced in the custody of Constable Vinod Kumar No. 666, Constable Manish Kumar No. 526 and under the supervision of HC Kiran Kumar No. 119 of Police Line, Dharamshala, District Kangra, H.P.

2. This petition under Section 482 of the Code of Criminal Procedure has been filed with a prayer to quash FIR No. 1/18, Annexure P-1 registered in Women Police Station, Dharamshala District Kangra, H.P. against the accused-petitioner on 13.03.2018 under Sections 323, 376 and 506 IPC and Section 67(A) of the Information and Technology Act. The complainant is respondent No.2 herein. The grounds on which the FIR has been sought to be set aside and quashed are that during the course of investigation of the case, the complainant party and also the parents of the accused have compromised all disputes with the intervention of local Gram Panchayat, Kaned at Dharamshala on 3rd April, 2018. The compromise so arrived at before the Gram Panchayat is Annexure P-2. The settlement so arrived at with an understanding that the accused-petitioner will solemnize marriage with complainant-respondent No.2. She, therefore, is no more interested to prosecute the accused-petitioner any further in this case. According to her, they are in love with each other for the last 3-4 years being student of the same school i.e., Government Senior Secondary School, Mandal, District Kangra, H.P. The respondent-complainant has executed the affidavit, Annexure P-3. According to her, she was compelled by the circumstances to report the matter to the police as a result of some misunderstanding between them. According to her, now they both are ready and willing to solemnize marriage. Even their parents have also consented for their marriage. It is in this background, this petition came to be filed in this Court.

3. Respondent No.2-complainant is present in person. Her statement has been recorded separately. Even the statement of the accused-petitioner, who has been produced in custody by the police, has also been recorded separately. Besides, the joint statement of parents of respondent No.2-complainant and that of accused-petitioner who are also present in person have also been recorded separately. The crux of the averments in the petition and statement so recorded is, therefore, that neither respondent-complainant nor her parents are interested in prosecuting the accused-petitioner any further in the criminal case registered against him vide FIR, Annexure P-1. On the other hand, not only the accused-petitioner and respondent-complainant but their parents are also in favour of marriage of the accused-petitioner and respondent No.2-complainant. Not only the accused-petitioner but the respondent-complainant is also major. She even was major at the time of commission of alleged offence also. It is in this background, the question as to whether FIR, Annexure P-1 to this petition, deserves to be quashed and set aside or not, has to be determined.

4. Before coming to answer the question ibid, it is desirable to take note of the law applicable in a case of this nature. A Larger Bench of the Hon'ble Apex Court in ***Gian Singh*** V. ***State of Punjab and another, (2012) 10 SCC 303*** has laid down the guidelines to be followed by the High Courts while considering a question of quashing FIR on the basis of compromise. It has been held in this judgment that the High Court in exercise of inherent powers vested in it under Section 482 of the Code of Criminal Procedure may quash FIR/criminal proceedings in a case where the offence allegedly committed by the accused though is not compoundable, however, the victim and accused have settled the differences amicably. Such powers can be exercised only in appropriate cases, having arisen out of civil, mercantile, commercial, financial, partnership or such other transactions of like nature including matrimonial or the case relating to dowry etc., in which the wrong basically is done to the victim. This judgment also takes note of the fact that FIR on the basis of compromise should not be quashed in a case of serious nature like rape, dacoity and corruption etc., having serious impact in the society.

5. The Apex Court in ***Narinder Singh and others*** V. ***State of Punjab and another, (2014) 6 SCC 466*** while quashing the FIR in a case registered under Section 307 of the Indian Penal Code has held as under:

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

6. The Apex Court in a recent judgment titled ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others*** V. ***State of Gujarat and another (2017) 9 SCC 641*** has reiterated the broad principles need to be followed while considering the prayer for quashing the FIR and consequential criminal proceedings on the basis of compromise, which reads as follow:-

> "16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :
>
> **16.1.** Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;
>
> **16.2.** The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.
>
> **16.3.** In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;
>
> **16.4.** While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;
>
> **16.5.** The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute,

revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

7. As per the ratio of law laid down by the Apex Court in the judgment ibid, the inherent powers to quash criminal proceedings should be exercised to secure the ends of justice or to prevent the abuse of process of any Court. Also that, criminal proceedings should be quashed in those cases where the possibility of conviction is remote and the continuation of the criminal proceedings would cause oppression and prejudice, of course, as per law laid down. There should be due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed even if the victim or the family of the victim have settled the dispute. It has further been held in this judgment that such offences are not private in nature but have serious impact upon the society also. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

8. Such being the legal position, in normal circumstances, this Court would have not entertained the petition in view of non-compoundable offences heinous and serious in nature have allegedly been committed by the accused-petitioner. In this case besides, commission of offence punishable under Sections 323, 506 IPC and 67(A) of the Information Technology Act, the offence punishable under Section 376 IPC is also alleged to have been committed by the accused-petitioner. The offence punishable under Section 376 IPC is grievous and heinous in nature and considered an offence against the society at large. However, the Hon'ble Apex Court in ***Parbatbhai Aahir's*** case cited supra, has emphasized that when the parties have reached at some settlement and on the basis thereof the petition for quashing the criminal proceedings is filed, the guiding factor would be to secure (i) ends of justice or (ii) to prevent abuse of process of

any Court. While exercising the powers, the High Court is to form an opinion to achieve either of the above two objectives.

9. Also that, while excersizing its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the proceedings. Not only this, it has also been emphasized in this judgment that where the offences are purely private in nature and do not concern with public policy, the prayer to quash the proceedings involving non-compoundable offences on the basis of compromise can be excersized.

10. Now, if coming to the given facts and circumstances, true it is that the offence punishable under Section 376 IPC allegedly committed by the accused-petitioner is grievous and heinous in nature. While it is private in nature as respondent No.2-complainant is the victim of such offence and at the same time, such an offence has a serious impact upon the society also. The mitigating circumstances herein, however, are that the accused-petitioner and respondent No.2-complainant being in love right from their school days, had acquaintance with each other. As a matter of fact, they both wanted to solemnize marriage, however, on being visited by adverse circumstances, the accused-petitioner came to be arrested in the case registered at the instance of respondent No.2-complainant. She is now not going to depose against the accused-petitioner any further as has come in her statement recorded separately. Not only this, but she has already executed an affidavit (Annexure P-3) to this effect. She is major and even at the time of the commission of alleged offence also, she had already attained the age of majority. She is a young girl of 20 years of age. The accused-petitioner is aged 23 years. Not only they, but their parents are also in favour of their marriage so that they could settle themselves in their life. In the light of such mitigating circumstances, it would be harsh and oppressive not only to the accused-petitioner and respondent No.2-complainant, in case criminal proceedings are allowed to continue. Learned Single Judge of Punjab and Haryana High Court, under similar circumstances has quashed the FIR registered under Section 376 and 506 IPC in ***CRM-M-3577-2018*** titled ***Lovely*** V. ***State of Punjab*** and ***another*** decided on 9.3.2018.

11. Therefore, in view of what has been said hereinabove and law laid down by way of various judicial pronouncements, including the recent one in ***Parbatbhai Aahir's*** case supra, allowing the criminal proceedings to continue against the accused-petitioner would not only be harsh and oppressive to the accused-petitioner and respondent No2-complainant, but would also be against the spirit of the law laid down, hence amounts to abuse of process of Court.

12. Above all the proceedings are at initial stage as challan has also not been filed. Therefore, when the settlement as arrived at immediately after the alleged commission of offence, liberal approach is required to be taken in the matter of quashing the pending criminal proceedings against the accused-petitioner. The accused-petitioner and respondent No.2-complainant intend to solemnize marriage and live in the company of each other as husband and wife. Not only the accused-petitioner in his statement recorded separately has undertaken to make the life of respondent No.2-complainant comfortable in the matrimonial home, but similar undertaking has been given by his parents also in their joint statements recorded separately. The quashing of criminal proceedings would, therefore, be in their better interest.

13. For all the reasons hereinabove and in the peculiar facts and circumstances of the present case, this petition is allowed. Consequently, FIR No. 1/18, Annexure P-1, registered against the accused-petitioner in Women Police Station, Dharamshala, District Kangra under Sections 323, 376, 506 IPC and Section 67(A) of the Information and Technology Act is ordered to be quashed and set aside. Since the accused-petitioner is in jail after his arrest in this case, therefore, he be set free forthwith, if not required in any other case. The Registry to prepare the jail warrants accordingly.

14. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

An authenticated copy of this judgment be sent to learned trial Court for record/compliance.

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

Jagdish Ram .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr. MMO No. 263 of 2016
Reserved on: 22.05.2018
Decided on: 29.05.2018

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 406 and 420- Quashing of FIR and consequent proceedings – Petitioner seeking quashing of FIR and consequent criminal proceedings - On facts, petitioner was found to have purchased khair trees of complainant and others – He cut and converted them into logs and sold to an industrialist – However, he did not pay amount of trees to owners at all – Held –Dishonest intention to deceive owners despite selling logs by petitioner to Industrialist prima facie exists – Charges were rightly framed by trial court- High Court refused to quash FIR and consequent proceedings.

(Paras- 6 and 9)

Cases referred:

M/s Maheshwari Oil Mill vs. State of Bihar, 1978 Criminal Law Journal 659
Laiq Ram vs. State of H.P., 1990 Criminal Law Journal 1350

For the petitioner: Mr. Anil Kumar, Advocate.
For the respondent: Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code"), has been maintained by the petitioner, for quashing of F.I.R. No. 69/10, dated 23.06.2010, under Sections 406 and 420 of the Indian Penal Code, registered at Police Station Bhawarna, District Kangra, H.P. alongwith consequent proceedings arising out of the said F.I.R., pending before the learned Additional Chief Judicial Magistrate, Palampur, District Kangra, H.P.

2. The facts necessary for adjudication of the present petition are that the residents of Village Dagera made allegations against the petitioner that they have sold their 761 Khair trees to the petitioner, who is a contractor, which were converted into Khair wood and sold to Priya Katha Udhyog main Chintpurni, however the petitioner has not made the payment of Rs. 7,00,000/- of said trees, to the villagers. On the basis of which, F.I.R. No. 90/10, dated 23.06.2010, under Sections 406 and 420 IPC was registered against the petitioner. Learned trial Court on 25.04.2016, framed the charge against the petitioner.

3. Learned counsel for the petitioner has argued that even if the entire facts, which have come on record are taken into consideration, no offence is made out against the petitioner and the continuation of trial against him, is an abuse of the process of law. On the other hand,

learned Additional Advocate General has argued that the learned Court below has considered the material, which was before the Court and even framed the charge against the petitioner, so it cannot be said at this moment that there is no case against the petitioner. He has further argued that there is sufficient material on record to proceed against the petitioner, so the present petition may be dismissed. In rebuttal, learned counsel for the petitioner placed reliance upon the judgment rendered by a Coordinate Bench of this Court in **Arjun Kalia** vs. **Ashok Kumar and another's Case** (Cr. MMO No. 186 of 2014) and prayed that present petition may be allowed and F.I.R. No. 69/10, dated 23.06.2010, under Sections 406 and 420 of the Indian Penal Code alongwith all consequent proceedings arising out of the same, may be quashed.

4. To appreciate the arguments of learned counsel for the parties, this Court has gone through the records in detail.

5. The charge framed by the learned Court below reads as under:

"In case: State Versus Jagdish Ram

Charge

I, Amit Mandyal, Addl. Chief Judicial Magistrate, Palampur do hereby, charge you accused as under:-

That in the year 2010, you accused dishonestly induced Leela Devi, Sahib Singh, Dharamvir, Partap Chand, Dhian Chand, Parmodh Singh, Joginder Singh, Sanjay Kumar, Ranbir Singh, Parkash Chand, Man Chand, Udham Singh, Shammi Kappor, Om Parkash, Surender Kumar, Parsinda Ram, Hoshiar Singh, Bidhi Chand, Bachittar Singh and Partap Singh to deliver their khair trees to you at place Dagera, Tehsil Palampur and had cut and removed khair trees from the lands of persons aforesaid and thereafter did not pay price of khair trees amounting to Rs. 27,025/-, Rs. 28,000/-, Rs. 14,600/-, Rs. 9800/-, Rs. 4250/-, Rs. 6,000/-, Rs. 1250/-, Rs. 2300/-, Rs. 3350/-, Rs. 4500/-, Rs. 57,400/-, Rs. 3000/-, Rs. 95,550/-, Rs. 5100/-, Rs. 40,850/-, Rs. 14,000/-, Rs. 6250/-, Rs. 50,200/-, Rs. 33850/- and Rs. 47,900/- respectively to them and thereby committed an offence of cheating punishable under Section 420 of Indian Penal Code and within my cognizance.

And, I hereby, direct that you be tried by this court on the aforesaid offences."

xxx xxx xxx

It appears that while framing the charge, the learned Court below has considered the material aspects of the case. Now, while exercising the powers under Section 482 of the Code, which as per the learned counsel for the petitioner are wide enough to even quash the entire proceedings, including the charge. While exercising such powers, this Court has to take into consideration the fact that if no case is made out against the petitioner after going through the records, the proceedings can be or required to be quashed. However, in this case, firstly the petitioner has argued on the charge in the learned Court below, but even the learned Court below has come to the conclusion with regard to the fact that the charge is required to be framed. Meaning thereby, that there was *prima facie* case against the petitioner to frame charge. Now this fact has also required to be re-appreciated while considering the factum of exercising jurisdiction under Section 482 of the Code.

6. This Court *prima facie* finds it clear that the petitioner has cut 761 trees of khair and sold it to Priya Katha Udhyog Main Chintpurni, but he has not paid Rs. 7,00,000/- to the land owners and his intention was to take away the khair trees, without paying an amount. Even after selling the trees to the said firm, he has not paid the amount to the land owners. The non-payment of the amount to the land owners even after selling the trees to the said firm, shows that the intention of the petitioner was to deceive the land owners and dishonestly keep their money with him.

7. A Coordinate Bench of Hon'ble Patna High Court in **M/s Maheshwari Oil Mill** vs. **State of Bihar**, 1978 Criminal Law Journal 659, has held has under:

> ***"8. With regard to the case against the petitioner in respect of the mustard oil and maize, it is obvious that the petitioner has stated certain facts in defence so as to show that there was no offence in respect of those two items. It is well known that in the matter of quashing this Court does not enter into an inquiry of disputed facts, and thereafter hold in favour of the accused. Upon the First Information Report it is not contended that it discloses no offence in respect of those two items. The investigation cannot, therefore, be said to be in respect of allegations which do not disclose any offence. For that reason the investigation by the police into these allegations made, cannot be quashed."***

8. A Coordinate Bench of this Hon'ble High Court in **Laiq Ram** vs. **State of H.P.**, 1990 Criminal Law Journal 1350, has held has under:

> ***"6. I have gone though the voluminous record of this case. After the registration of this case, the Police has investigated this case to a great extent. The petitioner is not the only accused in the case. There are many others who have processed these applications at different stages. They have also been included as accused. It is not in the interest of the petitioner to extract the evidence against him as, I apprehend, that may not prejudice his defence in the case. However, it cannot be said that there is no case at all against the petitioner. The petitioner has attested many of the disputed applications in issue as President of Gram Panchayat. Now only investigation can reveal the degree of role and the extract culpability of the petitioner in the matter."***

9. In view of the above discussion and the law as cited supra, this Court finds that at this stage *prima facie* case is against the petitioner and there is nothing on record to quash the proceedings against the petitioner after exercising the powers under Section 482 of the Code, which are otherwise required to be exercise sparingly. As far as the judgment (supra) cited by the learned counsel for the petitioner is concerned, the same is not applicable to the facts of the present case, as in the present case there is a clear-cut deceitment *prima facie* on record and no civil proceedings are pending, as was in the case referred hereinabove.

10. The net result of the above discussion is that present petition sans merit, deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of. Parties through their counsel are directed to appear before the learned trial Court on **25th June, 2018.**

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

National Insurance Company Ltd. ...Petitioner.

Versus

Smt. Satya Devi & others ...Respondent.

CMPMO No. 97 of 2018
Decided on : 29.5.2018

Motor Vehicles Act, 1988- Section 174- **Code of Civil Procedure, 1908-** Order 1 Rule 10 and Order XXI Rule 11 - Motor Accidents Claims Tribunal while executing award directing insurer to pay amount deducted by it as TDS with interest from date of its deduction – Petition against by insurer – Held – In these circumstances, Income Tax Department was a necessary party before

Executing Court – Matter remanded to Claims Tribunal to implead Income Tax Department as a party and proceed further in accordance with law. (Para-3)

For the Petitioner:	Ms. Devyani Sharma, Advocate.
For the Respondents:	Mr. J.L Bhardwaj, Advocate, for respondents No. 1 to 5. Mr. Vinay Kuthiala, Sr. Advocate with Mr. Diwan Singh Negi, Advocate, for respondent No 7.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The learned MACT-II, Solan, upon a petition, cast under the provisions of Order 21 Rule 11(2) C.P.C, allowed the execution petition, and, also directed the insurer, to, release a sum of Rs. 1,28,619/- vis-a-vis the claimants, besides, it also directed that the aforesaid amount, shall carry thereon hence interest @ 8% per annum, from the date of deduction, till, payment thereof. The insurer, is aggrieved therefrom, hence, has filed the present petition before this Court.

2. Given this Court, in a judgment recorded, on, 30.6.2017 in CMPMO No. 376 of 2016 titled as ***Oriental Insurance Company Ltd. Versus Satya Devi and others***, appended with the present petition, as Annexure P-7, making the hereinafter extracted directions, hence, in consonance therewith, alike directions are meted, upon, the litigants hereat, except, the liability, of, interest visited upon them, qua principal sums, being comprised @ 8% per annum.

> **"6. In view of above discussion, this petition is disposed of directing respondent No. 5 Income Tax Officer, Ward No. II, Mandi to refund the TDS to the petitioner/Insurance Company within ten weeks from date of receiving information thereof, which shall be supplied by petitioner/Insurance Company within two weeks from today, as per Rules applicable and petitioner company is also directed to make payment of balance amount of compensation along with interest, if any received by it from the Income Tax Department to the claimants/respondents, within four weeks from the date of receipt of refund, failing which petitioner company shall also be liable to pay interest @ 9% perannum on the said amount with effect from 5.1.2016 till payment/deposit. Petition is disposed of in aforesaid terms. Interim order dated 3.10.2016 passed in CMP No. 8043 of 2016 also stands vacated in above terms. The Motor Accident Claims Tribunal, Bilaspur is directed to proceed further accordingly."**

3. Noticably, the Income Tax Department, was not arrayed, as a party, by the learned Executing Court, and obviously the array of litigants, was not thereat complete, despite, it being both a necessary, and, a proper party, nor, also the apt version, as would, emerge from the Income Tax department, did not hence emerge therefrom. Even if the version, as may come, forth from the Income Tax Department, may, ultimately suffer the ill-fate, of, it being axed, given the pronouncement made, in CMPMO No.376 of 2016 supra, (i) nonetheless, for enabling the inclusion, of, the Income Tax Department, in the array of co-respondents, dehors no scribed motion being made therebefore, by the litigants thereto it was yet incumbent upon the learned Executing Court, to, suo moto esnure its occurrence, in, the memo of parties. Even if the aforesaid infirmity is cured by this Court, under, previously recorded order(s), hence this Court may not be constrained, to, direct an order of remand, being made vis-a-vis the learned Executing Court, for, enabling, it, to after completing the array of all proper litigants,AND, its thereafter making an order afresh upon the apt executing petition, AND, in consonance with verdict supra. However, hereafter all the learned MACTs concerned, are, directed to, positively

ensure that in matters alike herewith, the income tax department is impleaded as a party, in the array, of, co-respondents. Copy of this order be circulated to all concerned.

Pending applications, if any, also stand disposed of.

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

Akshay Doegar .....Non-applicant/Plaintiff
Versus
Kanwar Vijay Singh ....Applicant/Defendant

OMP No. 477 of 2016 in
Civil Suit No. 60 of 2006
Reserved on: 22.05.2018
Decided on: 31.05.2018

Code of Civil Procedure, 1908- Order VIII Rule 1 (3)- Leave to file documents – Defendant filing application for placing certain documents on record, which he could not file along with his written statement – Application dismissed by trial court – Petition against - On facts, documents were found to have come into existence only after filing of written statement – As such, application to file documents allowed. (Paras-7 and 9)

Case referred:
Brahm Dass vs. Onkar Chand and another, Latest HLJ 2009 (HP) 384

For the non-applicant/plaintiff: Mr. R.L. Sood, Sr. Advocate, with Mr. Sanjeev Kumar, Advocate.
For the applicant/defendant: Mr. Y.P. Sood, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present application, under Order 8, Rule 1(3), read with Section 151 of the Code of Civil Procedure, has been maintained by the applicant-defendant, with a prayer that he may be permitted to place and prove on record the documents, filed with this application. As per the applicant, the present suit has been filed by the non-applicant/plaintiff on the allegations that on account of the litigation instituted by the applicant-defendant against him, he could not complete the construction of his building within time, which caused financial loss of rental income to him. It has also been alleged by the non-applicant that he suffered damage and loss of reputation due to litigation and time spent on defending cases and various cases were instituted against him with the only intention to harass him. It has been further averred in the application that the non-applicant/plaintiff has completed his evidence and now the case is fixed for the evidence of the applicant-defendant and the applicant-defendant in his evidence intends to prove the documents, which could not be placed on record at the time of filing of written statement, as these documents were not in existence at that time and have come in existence after the filing of the written statement. So, the present application may be allowed and the applicant-defendant may be permitted to place and prove the documents mentioned hereinbelow. The documents which the applicant intends to place and prove on record are as under:

(a) Copy of Jamabandi with respect to the land comprised in Khata/Khatauni No. 116/144, Khasra No. 1290/983, measuring 173.40 sq. mts. In the ownership of Shri Akshay Doegar, situated at Mauza Up Mohal

Chhota Shimla, Khas, Tehsil and District Shimla, H.P. for the year 2012-13.

(b) Copy of Jamabandi for the year 2012-13, Khata/Khatauni No. 1/1, Khasra No. 1291/983, situated at Muza Up Mohal, Chhota Shimla Khas, Tehsil and District Shimla.

(c) Copy of proceedings of 28th and 29th meeting of Single Umbrella Committee of Municipal Corporation, Shimla, dated 07.08.2013 and 09.07.2013.

(d) Copy of letter No. MCS/AP/870/-6811-12, dated 05.12.2013 from Commissioner, Municipal Corporation, Shimla to Secretary (T. & C.P.) to the Government of Himachal Pradesh, Shimla.

(e) Copy of letter No. TCP-F(6)-25/2014, dated 31.07.2014 from the Secretary (T & C.P.), Government of Himachal Pradesh to the Commissioner, Municipal Corporation, Shimla.

2. Reply to the application has been filed, wherein it has been averred that the documents sought to be placed on record were admittedly in existence and in the knowledge of the applicant prior to the evidence of the plaintiff, as the dates of the same vary from 2012 to 2014. The applicant purposely waited for closing of the evidence of non-applicant/plaintiff and thereafter with malafide intention, moved the present application. It has been further averred in the reply that if the said documents are permitted to be placed on record, the non-applicant/plaintiff will be highly prejudiced, so the present application may be dismissed.

3. Learned counsel for the applicant-defendant has argued that the application is to place on record the documents, which have come into existence after filing of the written statement and earlier the applicant was having no opportunity to produce these documents on record. Learned counsel for the applicant-defendant in support of his contentions placed strong reliance upon the decision rendered by a Coordinate Bench of this Court in **Brahm Dass** vs. **Onkar Chand and another's** case.

4. On the other hand, learned Senior Counsel appearing on behalf of the non-applicant/plaintiff has argued that the suit has been filed for the action, which has accrued only upto the year 2006 and since the matter also stands adjudicated by the Division Bench of this Court with the observations that the applicant-defendant has dragged the non-applicant/plaintiff in unnecessary litigation, these documents cannot be allowed to be produced on record at this moment. He has further argued that the documents are irrelevant, as the damages are only claimed by the non-applicant/plaintiff upto the filing of the suit, so the present application deserves dismissal.

5. In rebuttal, learned counsel for the applicant-defendant has argued that as per the law laid down by this Hon'ble Court in **Brahm Dass** vs. **Onkar Chand and another's** case, the present application deserves to be allowed and documents, as mentioned above are required to be placed on record.

6. To appreciate the arguments of learned counsel for the parties, this Court has gone though the records in detail.

7. The documents which the applicant-defendant wants to produced on record, are the documents, which came into existence after filing of the written statement. As per the learned counsel for the applicant-defendant by way of producing aforesaid documents, he wants to show that the building was not in a position to be used earlier. However, this aspect is disputed by the learned Senior Counsel appearing on behalf of the non-applicant/plaintiff and he pleaded that the damages are calculated, as the building was not allowed to be put to use and completed due to the acts of the applicant-defendant.

8. A Coordinate Bench of this Court in **Brahm Dass** vs. **Onkar Chand and another**, Latest HLJ 2009 (HP) 384 has held as under:

"5. The documents are ought to be produced in court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, however, the documents can be produced subsequently with the leave of the court. Whether the documents are relevant or not could not be decided at the stage of considering the application under order 7 Rule 4(3) of the Code of Civil Procedure and this question was to be determined at the stage of arguments. The learned trial Court has also misconstrued the judgment rendered by he Hon'ble Supreme court cited in the order. There is no specific bar to produce the documents at the stage of hearing with the leave of the court. The court endeavour must be to adjudicate the lis effectively and if certain documents could not be filed with the plaint until and unless serious prejudice is caused to the other side, the same must be permitted to be produced on record. The other party also gets an opportunity to rebut the evidence produced by the parties during the hearing. The court has to exercise the jurisdiction for the production of the documents liberally.

It is settled principle that opportunity should be afforded to the parties to produce their evidence and state their case before the Court. The Court has to exercise the jurisdiction in favour of the production of the evidence instead of scuttling it. The courts should not permit the parties to indulge in dilatory tactics to stall the proceedings. The court has discretion and generally speaking it will be wise exercise of the discretion to permit the production of the evidence and the question to be decided in each case in the light of the particular circumstances."

9. In view of the above discussion and the law cited hereinabove, this Court finds that the discretion to permit the production of the documents on record is required to be exercised in favour of the applicant-defendant to meet the ends of justice. Accordingly, the present application is allowed and the documents, the applicant-defendant wants to produce on record are permitted to be produced on record. The application stands disposed of.

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

Chandermani ....Appellant.

Versus

State of H.P. ....Respondent.

Cr. Appeal No. 294 of 2015.
Reserved on: 17th May, 2018.
Date of Decision: 31st May, 2018.

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Sections 342 and 376(2)(f)- Accused, a priest (Gur) of local deity was tried and convicted by trial court on allegations that he called prosecutrix to his house to cure her so that she could bear a child, and then wrongfully confined and raped her – Appeal against- Accused contending before High Court that prosecutrix was not believable as she had made improvements in her deposition during trial on material particulars including factum of penetration vis-à-vis narration given in FIR and statement recorded under Section 164 Cr.P.C. - On facts, High Court found that victim was not cross-examined with reference to previous statements - Held – Since no cross examination was done by defence upon prosecutrix with respect to improvements made in her statement on oath

during trial vis-à-vis statement given under Section 154 and under Section 164 Cr.P.C., version given in court cannot be ignored and has to be accepted as correct. (Para-10)

Indian Evidence Act, 1872- Section 145- Previous statement - Use of - Held- Statement recorded under Section 164 Cr.P.C. is not a substantive evidence - It can be used by defence for contradiction or by prosecution for corroboration as per Section 145 of Evidence Act - Statement given on oath during trial is a substantive evidence - Unless witness is contradicted with his previous statement with respect to alleged improvements, statement given on oath cannot be ignored. (Para- 10)

Cases referred:
George vs. State of Kerala, 1998(4) SCC 605
Guruvindapalli Anna Rao v. State of A.P., reported in 2003 CRI. L. J. 3253

For the Appellant:	Mr. Anup Chitkara and Ms. Sheetal Vyas, Advocates.
For the Respondent(s):	Mr. Hemant Vaid, Addl. Advocate General with M/s Vikrant Chandel and Yudhbir Singh Thakur, Deputy Advocate General for the respondent-State.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The accused/appellant, is, aggrieved by the verdict of conviction and consequent sentence, imposed upon him, for his committing an offence punishable under Section 376(2)(f) of the IPC, and, also vis-a-vis the apposite conviction, and, the consequent sentence, imposed upon him, for his committing an offence under Section 342 of the IPC.

2. The facts relevant to decide the instant case are that the marriage of the prosecutrix was solemnized about five years back, but no child was born to her. The family members of the prosecutrix thereafter took the shelter of local deity Bala Kameshwar for treatment to procure child. On 2.5.2013, the local deity Bala Kameshwar had come in the village of the prosecutrix at village Katwandi in connection with some birth day. The father-in-law of the prosecutrix had also gone there. The accused was Priest-cum-Spokes person of deity (Gur) and he had asked the prosecutrix to come to his house on 13.5.2013 for taking the holly water. On 13.5.2013, the prosecutrix along with her mother-in-law Smt. Teji Devi had gone to the house of the accused at about 10 a.m. The accused asked the mother-in-law of the prosecutrix to go back from the spot and told that the prosecutrix shall be sent after five days. The accused told the prosecutrix that he would start the treatment after 10 p.m. The accused took the prosecutrix in his kitchen and put two circles of flour on the floor and put one glass of water on the same. Some rice and flower put inside the glass. The accused lifted the shirt of the prosecutrix and put three lines on the stomach of the prosecutrix with Bhabhuti (holly ash). He has also told that there was Devta in the private part of the prosecutrix and accused asked the prosecutrix to take off her salwar. When the prosecutrix refused, the accused forcibly after threatening opened the salwar of the prosecutrix. The accused asked the prosecutrix to turn around. The accused put his hand from behind on the waist of the prosecutrix and picked her up. The accused immediately opened her pyzama and tried to come on the prosecutrix. When the accused tried to come on the prosecutrix, the prosecutrix kicked him and came to the side of the accused. Thereafter, she went away from the kitchen and went to another room. The prosecutrix bolted her room from inside. The accused knocked at the door of the prosecutrix, but she did not open. The prosecutrix made telephone call to different persons. At about 8.30 a.m. on next day, the mother-in-law and father-in-law of the prosecutrix and other persons came there and took the prosecutrix out of the room. The prosecutrix thereafter went to the police station and gave application to the police on the basis of which FIR was registered. The police thereafter carried and concluded all the investigation(s) formalities.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report, under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the learned trial Court.

4. The accused/appellant herein stood charged, by the learned trial Court, for, his committing offences, punishable under Section 342, and, under Section 376 (2)(f) of the IPC. In proof of the prosecution case, the prosecution examined 15 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/ appellant herein, for his hence committing the aforesaid offences.

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

7. On the other hand, the learned Addl. Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The prime evidence, espoused, by the prosecution, to unflinchingly nail the charge, against, the accused, (i) is comprised in the testification, rendered, by the prosecutrix, who, stepped into the witness box as PW-2. (ii) She in her testification, has, rendered a version, bearing absolute consonance, with, the echoings made by her, in, her application, comprised in Ex.PW2/A, application whereof stands addressed, to, the Incharge, Police Station, Gohar, in sequel, whereto, the apposite FIR, borne, in Ex.PW15/A, hence, was registered. She has also in her testification, (iii) rendered, echoings in concurrence, with the ones borne in Ex.PW2/D, exhibit whereof comprises her statement, recorded, under Section 164 of the Cr.P.C., before the learned Judicial Magistrate, Chachiot at Gohar. She has also made a disclosure qua Ex.PW2/D being volitionally, made by her. However, the learned counsel appearing, for the appellant/accused, has, contended with vigour, (iv) that her statement, does not carry any iota, of, creditworthiness nor is amenable, for, any credence being imputed thereto, (v) AND for succoring the aforesaid argument(s), he has drawn the attention of this Court, to, certain testified improvements and contradictions, made by her, vis-a-vis her statement, borne in Ex.PW2/D. The apposite testified improvements, contradictions, and, embellishments vis-a-vis Ex.PW2/D, (vi) are, contended to be highlighted, by the prosecutrix in her cross-examination, making, an admission qua hers omitting, to, in Ex.PW2/A, hence, make any articulation (a) qua after the accused lifting her from behind, his, ensuring qua his penis making contact with her private part; (b) of the prosecutrix, omitting, to in Ex.PW2/A, hence, record any bespeaking, of, the accused applying, “bhabhuti”, on her private part. The efficacy, of the aforesaid submission addressed, before this court, by the learned counsel appearing, for the appellant for hence, his, thereupon assaying to tear apart the, creditworthiness, of the testification rendered qua the occurrence, by the prosecutrix, is contrarily rather effaced (c) by the factum of the prosecutrix subsequent thereto, under Ex.PW2/D, exhibit whereof, comprises, her statement recorded under Section 164 of the Cr.P.C., before, the learned Magistrate concerned, rather making the aforesaid echoings. Conspicuously, even if, the prosecution case, is, solitarily rested upon ex.PW2/A, and, even if

subsequent thereto, hence, testified improvements, are, made by the prosecutrix qua the genesis, of, the occurrence, borne, in Ex.PW2/D, especially, qua the factum (i) of the accused applying, "Bhabhuti", on her private part; (ii) his making contact of his private part, with her private part, (iii) would yet not render the prosecution case, to founder, for the reasons (a) of the prosecutrix in her testification, embodied, in her examination-in-chief, rather making a candid unequivocal disclosure, of, Ex.PW2/D being volitionally recorded, (b) AND, testification whereof, rather remaining uneroded, given the learned defence counsel while subjecting her, to cross-examination, not making any endeavour, to, hence rip apart, its veracity. Furthermore, upon a reading, of, the cross-examination of the prosecutrix, by the learned defence counsel, the latter yet, during, course thereof, omitted to, confront her with the afore referred purportedly improved articulations, vis-a-vis, the ones borne in Ex.PW2/A, (c) thereupon, it being ensuably firmly inferable, qua the defence, acquiescing qua the occurrence spelt out by the prosecutrix, in Ex.PW2/D, hence, carrying an aura of truth, besides veracity, (d) contrarily hence the version, borne therein not being ingrained with any vice of falsehood, dehors, any improvements or embellishments, occurring therein vis-a-vis the ones borne in Ex.PW2/A, (e) nor hence it can be concluded, of the testification, rendered by prosecutrix, AND, bearing concurrence with the recitals, borne in ex.PW2/D, being amenable for, its, being discarded, given it being purportedly imbued, with, any stench of any prevarication or with any stain, of, improvements or embellishments, vis-a-vis, the versions, qua the occurrence, spelt out in Ex.PW2/A. In sequel thereto, this Court is constrained, to, impute sanctity to the version qua the occurrence, as, testified by the prosecutrix.

10. Be that as it may, the learned counsel, appearing for the accused, has contended with vigour, that the statement of the prosecutrix, recorded, under Section 164 of the Cr.P.C., (i) whereupon much dependence, is laid, by this Court, for imputing creditworthiness, vis-a-vis, the testification, rendered, by the prosecutrix, (ii) being not construable to be a substantive piece of evidence, and, hence he contends that any reliance thereon, is inapt. In making the aforesaid submission, the learned counsel appearing for the appellant, places reliance, upon a verdict rendered, by the Hon'ble Apex Court, in a case titled as ***George vs. State of Kerala, 1998(4) SCC 605***, the relevant paragraph No.36 whereof is extracted hereinafter:-

> "36. We may now turn to the evidence of P.W.50, detailed earlier. From the judgment of the trial Court we notice that the substantial parts of its comments, (quoted earlier) are based on his statement recorded under Section 164 Cr.P.C. and not his evidence in Court. The said statement was treated as substantive evidence; as would be evident from the following, amongst other observations made by the learned trial Court:-
>
> > "If Ext. P.42 (the statement recorded under Section 164 Cr.P.C.) is found to be a genuine statement it can be used as an important piece of evidence to connect the accused with the crime".
>
> In making the above and similar comments the trial Court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under Section 164 Cr.P.C. cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him. Instead of appreciating the evidence of P.W.50 from that perspective the trial Court confined its attention mainly to his statement so recorded and discredited him."

However, in making the aforesaid submission, the learned counsel, appearing for the appellant, has hence committed an apparent fallacy, arising, from his misreading, the truest signification, of the hereinabove extracted, relevant paragraph, of George's case (supra). The reason, for making, the aforesaid conclusion, arises, from the factum, (i) given, even if the statement recorded under Section 164 of the Cr.P.C., by the prosecutrix, before, the learned Magistrate concerned, is unamenable, for its being used, as a substantive evidence, yet with apt para thereof, further mandating therein, of its being usable, for corroborating or confronting, the maker thereof, hence renders it usable, by the learned defence counsel, for confronting therewith hence the

prosecutrix, for, thereafter her veracity, being fathomed. Since, the prosecutrix, in her testification, embodied, in her examination-in-chief, had made a clear echoing, qua her statement borne in ex.PW2/D, being rendered volitionally, before, the learned Magistrate, and, also hence thereupon, has, meted corroboration, vis-a-vis, her testification, wherein she ascribes, vis-a-vis, the accused, incriminatory roles, qua (i) qua after the accused lifting her from behind, his ensuring qua his private part making contact, with, her private part; (ii) of the accused accused applying "bhabhuti" on her private part, (iii) testifications whereof, though, purportedly improving upon, the initial version vis-a-vis occurrence, borne, in Ex.PW2/A, yet, with this Court, for the reasons aforestated, discounting, all effects thereof, (iv) thereupon, it was imperative, for, the learned defence counsel, to also confront her, with her statement borne in Ex.PW2/D, for hence, unveiling, from her, the apposite contradictions, occurring therein vis-a-vis her testification rendered on oath, especially qua the aforesaid facets, (v) also for hence eliciting, from her, the factum of hers, in making, gross improvements besides embellishments, vis-a-vis, her initial statement qua the occurrence, borne in Ex.PW2/A, thereupon, her testification being belitted qua its solemnity. However, the aforesaid apt permissible user, of Ex.PW2/D, by the defence counsel, for hence contradicting, maker thereof, contradictions whereof, would emerge upon hers being confronted therewith, by the learned defence counsel, during, the course of his subjecting her to cross-examination, apparently remained unavailed, (vi) whereupon, in, the learned defence counsel, rather omitting to confront her with her statement, borne in Ex.PW2/D also concomitantly, his, omitting to unearth therefrom, qua its carrying, a version ridden with rife improvements or contradictions, vis-a-vis, the one embodied in Ex.PW2/A, (vii) thereupon, concomitantly, AND, as a natural corollary, the omissions aforesaid of the learned defence counsel, constrain an inference, from this Court of hence, the learned defence counsel, acquiescing to the factum of the maker, of Ex.PW2/D, rendering the apt encapsulated version borne therein, besides qua hers hence rendering it volitionally, and, also his acquiescing qua it carrying therein, a truthful version qua the occurrence.

11. Be that as it may, even if, the Hon'ble Andhra Pradesh High Court, in a case titled, as ***Guruvindapalli Anna Rao v. State of A.P.,*** reported in ***2003 CRI. L. J. 3253***, the relevant paragraph 7, whereof stands extracted hereinafter:-

> "7. We would like to put one more discrepancy on record, viz., that while recording evidence, the learned II Additional Sessions Judge had summoned the I Additional Munsif Magistrate, Tenali (PW.10) to prove the statement of P.W.1 recorded by him under Section 164 Cr.P.C. This Court has already ruled if any Magistrate records the statement of a witness under Section 164 Cr.P.C, it is not necessary for the Sessions Judges to summon that Magistrate to prove the contents of the statement recorded by him. This Court has already ruled that when a Magistrate, discharging his official functions as such, records the statement of any witness under Section 164 Cr.P.C, such statement is a 'public document' and it does not require any formal proof. Moreover, it is seen that the learned II Additional Sessions Judge, Guntur, while recording the evidence of the I Additional Munsif Magistrate, Tenali (PW.10), has exhibited the statement of P.W.1 recorded by the Magistrate as Ex.P.10. As a matter of fact, such statement cannot be treated as a substantive piece of evidence. Such statement can be made use of by the prosecution for the purpose of corroboration, or by the defence for contradiction, under Section 145 of the Evidence Act. Therefore, the II Additional Sessions Judge, Guntur, is directed to note the provisions contained in Section 145 of the Evidence Act. Even if a statement is recorded by a Magistrate, it is not a substantive piece of evidence, but it is only a previous statement."

(i) has propounded therein the trite exposition of law, of statement of a witness, recorded under Section 164, of the Cr.P.C., being construable to a public document, and, it not requiring any formal proof, besides its mandating therein, of, the summoning of the Magistrate, being not imperative, for proving hence, contents thereof, (ii) yet even if, the learned defence counsel has made the aforesaid omission, and, even if, for hence, efficacious proof being adduced qua validity

of Ex.PW2/D, on all fronts, did not enjoin, the summoning, of the Magistrate concerned, (iii) nonetheless, when, it was yet open for the learned defence counsel, to, at an appropriate stage, by casting an application, under Section 311 of the Cr.P.C., hence endeavour, to, seek pronouncement, of an affirmative order(s) thereon, especially, for summoning the Magistrate concerned, (iv) AND, upon, whose hence stepping into the witness box, he was hence enabled, to rip apart, the tenacity of the prosecutrix's deposition, qua hers, making, it volitionally, also, was hence, rather enabled, to, impinge the validity, of, the certificate appended thereunderneath, by the Magistrate concerned, (v) on score, of, it being made mechanically, AND, cursorily, without, his ensuring, qua, all the apt recitals occurring therein, being a sequel of her free volition, besides being bereft of any iota oF any stain, of, hence maker thereof, being tutored or hers making it, under, the behest or guidance, of, certain vested interests. Since, the aforesaid endeavour, stood unassayed, by the learned defence counsel, thereupon, this Court, with reinforced vigour, hence, concludes, of, the defence accepting, the factum (a) of truthfulness of the certificate, appended, by the Magistrate, underneath, the statement recorded before him, by the prosecutrix; (b) of hence the defence acquiescing qua all the recitals borne therein, hence carrying a vital aura of truth, besides, hence the prosecution, on anvil thereof, rather proving the charge against the accused.

12. The learned counsel, appearing, for the accused/appellant, has yet proceeded, to make a contention before this Court (i) that the genesis of the occurrence, is contrived besides invented, especially when her husband, who testified as PW-3, renders an echoing, of his, on 13.05.2013 receiving a telephonic call, from, his wife, after 10 p.m., whereat, she communicated to him, the occurrence, besides when the prosecutrix in her deposition, comprised in her cross-examination, renders an echoing, of hers, also from her cell phone, making, a call at Police Station, Gohar, hence, the police officials, of Police Station, Gohar, were, enjoined, to, with promptitude , hence, enter a rapat against the accused, (ii) thereupon, he contends that omissions thereof, besides rather, with, the prosecutrix, on the day subsequent, to the occurrence, making, an application vis-a-vis the occurrence, comprised in Ex.PW2/A, to, the Incharge Police Station, Gohar, (iii) also hence constrain, an inference, of the version comprised, in Ex.PW2/A, rather being contrived besides invented. However, the efficacy, of the aforesaid submission, is withered by (a) PW-11 in his deposition, borne in his examination-in-chief, making, a clear echoing, of his, on 13.5.2013, hence, receiving a phone call, on the landline telephone, of the Police Station, and, his also further testifying, qua his inability to hear the voice, from, the other side. The aforesaid deposition of PW-11, cannot, be construed to be incredible, hence, when he clearly deposed qua inaudibility of voice of the maker of the cell phone call, on the landline telephone number, of, the police station concerned, thereupon, hence his being concomitnatly disabled to record a rapat, (b) thereupon, it cannot be concluded that the version qua the occurrence comprised, in Ex.PW2/A, and, Ex.PW2/D, being either contrived or invented.

13. Lastly but not unimportantly, an immense vigour, vis-a-vis the testification qua the occurrence rendered by the prosecutrix, is acquired, from her testification, qua hers, belabouring the accused with kick blows, for, hence repulsing his perpetrating an assault upon her, (i) the aforesaid testification rendered by PW-2, is proven by PW-1, given his during the course, of, his examination-in-chief, proving the apt MLC, prepared, by him, qua the accused, as, borne in Ex.PW1/B also his testifying, of, upon his examining, the accused, his noticing (a) minor contusion on dorsal surface on right hand, (b) and contusion on dorsal surface of left hand, (c) and his also testifying that the probable duration, of injuries being 8 to 9 hours, (d) consequently with the duration of the injuries being relatable, to, the timing(s) of the occurrence, (e) and, with the injuries, divulged in Ex.PW1/B, standing neither explained nor the learned defence counsel, contesting, the apt revelations, existing, in Ex.PW1/B, (f) thereupon, it is to be reiteratedly concluded that the version testified, by the prosecutrix, being rendered in consonance with Ex.PW2/A, and with Ex.PW2/D, especially qua the factum, of, hers, hence delivering kick blow(s), upon, the accused for thereupon hers repulsing his penal misdemeanors, whereupon, it acquires

formidable vigour, besides also hence the accused, obviously, makes apt acquiescence(s) therewith.

14. In summa, with the testimony, rendered by the prosecutrix qua the occurrence, being both credible, and, inspiring, thereupon, any testification, rendered, by other prosecution witnesses, who, subsequent to the occurrence arrived, at the place of occurrence, besides any purported inter se contradictions, occurring, in their respectively rendered versions, is both insignificant and inconsequential nor hence, this Court is enjoined to make any allusion thereto.

15. Nowat, the learned counsel, appearing, for the appellant, has contended with vigour, that, an appropriate sentence, being imposable upon the accused, being vis-a-vis, qua attempt to commit rape, and, hence he contends, that, the conviction of the accused under Section 376(2)(f), rather being unmeritworthy. However, the aforesaid espousal, made before this Court, by the learned counsel, for the appellant, is ummeritworthy, for the reasons (a) with the apt amendment(s) being brought, on, the statute book w.e.f. 3.2.2013, and, with the relevant occurrence hence taking place subsequent thereto, thereupon, the apt amended provisions, of, Section 376, IPC, in consonance wherewith the accused, was, charged, being squarely attracted hereat. However, the learned counsel, appearing for the appellant, has contended, that, though the amended definition of rape, as, borne in Section 375 of the IPC, does appertain, to the occurrence, yet he contends that clause (c) thereof, clause whereof stands extracted hereinafter:-

> " Section 375- Rape-
>
> (a).....
>
> (b).....
>
> (c). manipulates any part of the body of a woman so as to cause penetration into vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> ....."

through carrying bespeakings, of, "manipulates any part of the body of woman so as to cause penetration into vagina", hence the ascribeable, apt connotation, thereof being qua it being also obviously imperative, for, the accused, to penetrate, his penis into the vagina of the prosecutrix. However, the aforesaid connotative ascription(s), vis-a-vis, the apt portion of clause (c) of Section 375 of the IPC, is unacceptable, as, the parlance borne, by the phrase "manipulates any part of the body of woman so as to cause penetration into vagina", is, of the mere touching, of, any part of the body, of the woman, being, "of" all facilitative processes, hence, employed by a man, on any part of the body of the woman, comprised, in caressing(s), leading to titillation(s) , arousals, and excitement(s), all hence being rendered rather penally inculpable stratagem(s), employed by a man, to, hence cause a woman, to permit him, to penetrate his penis into her vagina, AND, all the caressings, of, private parts of a woman, comprising, hence all causes, all whereof, carrying an intrinsic mens rea, for, bearing the apt facilitative end, AND, all falling within the apt domain thereof.

16. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence not suffering from any gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

17. Consequently, the appeal is dismissed. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Geeta Devi Since deceased) through her legal representatives ..Appellant/plaintiff.

Versus

Devi Ram & Ors. ..Respondents/defendants.

RSA No. 290 of 2006.
Reserved on : 26th May, 2018.
Decided on : 31st May, 2018.

Code of Civil Procedure, 1908- Order XXVI, Rule 10(2)- Examination of Commissioner – Power of Court – First Appellate Court appointing local commissioner for demarcation of lands of parties – Plaintiff filing objections to report of Commissioner and also moving application under Order XXVI Rule 10(2) for his examination in Court - On finding that demarcation was carried out by Commissioner as per procedure laid in Land Records Manual, First Appellate Court declining plaintiff's request for examining of commissioner in Court and after taking his report into consideration, dismissing suit of plaintiff - Regular Second Appeal - Held - Report of Local Commissioner and evidence taken by him becomes part of record – Court has discretion to allow or refuse examination of commissioner in Court for ascertaining validity of his report – Party cannot claim examination of local commissioner in a Court as a matter of right – His examination in Court may be refused for valid reasons – Since, demarcation was conducted by Commissioner as per the procedure laid in Land Records Manual, therefore, his examination in court was not necessary – Judgment of First Appellate Court upheld - Regular Second Appeal dismissed. (Paras-7 and 8)

Himachal Pradesh Land Revenue Act, 1954- Sections 107 and 171 (xix) – Held – Section 171 (xix) excludes jurisdiction of Civil Court in matters relating to any question connected with or arising out of demarcation of boundaries of estates carried out under Sections 108 to 111 of Act – Demarcation of estate/holdings carried out under Section 107 of Act, is specifically excluded from Section 171 (xix) of Act - Therefore, in appropriate cases Civil Court can appoint a local commissioner for determination of boundaries of estate, even if there was a previous demarcation of same land by a Revenue Officer - High Court upheld order of First Appellate Court in appointing commissioner for demarcation of lands of parties and relying upon his report notwithstanding that there was already a demarcation report of revenue officer in respect of suit land -Ram Lal vs. Krishan Dutt, Latest HLJ 2012 (HP) 633 held per incuriam – Appeal of plaintiff dismissed. (Paras– 7 and 9)

Case referred:
Ram Lal vs. Krishan Dutt, Latest HLJ 2012 (HP) 633

For the Appellant:	Ms. Megha Kapoor, Advocate.
For Respondent No.1:	Mr. Vinod Gupta, Advocate vice to Mr. N.S. Chandel, Advocate.
	Respondents No.2, 4 and 5 already ex-parte.
	Respondent No.3 stands deleted.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction besides for rendition of a decree, for possession, stood partly decreed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the defendants, the

latter Court allowed their appeal besides obviously reversed the trial Court's judgment and decree.

2. Briefly stated the facts of the case are that the plaintiff had instituted the suit for permanent prohibitory injunction and for possession wherein, it was pleaded that the plaintiff and proforma defendants were owners in possession of the land measuring 1-11 bigha, comprising khasra No.276/255, situated in village Jandot. The defendants had no right, title or interest in the suit land. The defendants had threatened to raise construction on the suit land. On 19.5.1993, the defendants had started digging the suit land with a purpose to raise construction thereon. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections of maintainability, locus standi, cause of action valuation of the suit and estoppel. On merits, it was alleged that the defendants were owners in possession of land bearing Khasra No.378/260, situated adjoining the suit land. The defendants had constructed the house only on their own land. It was denied that the defendants had started digging the suit land with a purpose to raise construction on the same. In nutshell the defendants refuted the entire case of the plaintiff and they had prayed for dismissal of the suit.

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

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

1. Whether the plaintiff is owner in possession of the suit land along with proforma defendant, as alleged?OPP.
2. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed? OPP.
3. Whether the plaintiff is entitled for possession of the suit land in alternative?OPP.
4. Whether the suit is not maintainable? OPD.
5. Whether the plaintiff has no locus standi to file the suit? OPD
6. Whether the plaintiff has no cause of action to file the suit? OPD.
7. Whether the suit is not properly valued for the purpose of court fee and jurisdiction?OPD.
8. Whether the plaintiff is estopped to file the suit due to his own act and conduct?OPD.
9. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom, by the defendants/respondents herein, before, the learned First Appellate Court, the latter Court allowed the appeal, and, reversed the findings recorded by the learned trial Court.

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

a) Whether the rejection of the application filed by the plaintiff before the lower Appellate Court under Order 26, Rule 10(2) for examination of the local commissioner as witness is wrong, illegal and the impugned judgment and decree deserves to be set aside on this very ground alone?

Substantial question of Law No.1:

8. The learned trial judge, had, partly decreed, the plaintiff's suit, and, in his rendering the apposite decree, he relied, upon, the apt demarcation report, borne in Ex.PW2/A, wherewith tatima borne in Ex.PW2/B, stood, hence, appended. However, in an appeal, carried therefrom, by the aggrieved defendants, before the learned first appellate Court, the latter Court, upon, an application moved therebefore, by the defendants, AND, cast under the provisions of Order 26, Rule 9 of the CPC, proceeded to hence appoint, Tehsildar, Ghumarwin, (i) to determine the boundaries of the adjoining estates of the contesting parties, (ii) and, upon the aforesaid, executing the apposite commission, he submitted his report, before the learned Appellate Court, whereon, the latter Court, hence, placed reliance, and, reversed the findings recorded, by the learned trial Court. The learned Appellate Court also by recording a detailed disaffirmative order, upon, CMP No. 5 of 2006, carrying the apposite objections, preferred therebefore by the plaintiff, vis-a-vis, the report of the demarcating officer, besides also, upon an application preferred, before it, by the plaintiff under Order 26, Rule 10(2) of the CPC, for, calling the Local Commissioner as a witness, hence, dismissed both the apposite objection, AND, rejected the plaintiff's prayer, for, summoning the Local Commissioner, as a witness, (iii) by making a firm conclusion, that, the report furnished by the Tehsildar, Ghumarwin, being a sequel, of, his meteing absolute adherence, vis-a-vis the apt procedure prescribed in the H.P. Land Records Manual, (iv) adherence whereof, is, ad nauseum delineated therein, to be comprised, in the apt ascertainments of pacca points, by the demarcating officer, bearing evident consonance, with, the apt musabi, carried thereat by him. The learned counsel appearing for the appellant/plaintiff, has submitted, before, this Court that (v) in the learned first Appellate Court, hence, rejecting the application preferred thereat, by the plaintiff, AND, cast under the provisions of Order 26, Rule 10(2) of the CPC, it has thereupon infracted the mandate borne therein, infraction of mandate whereof, hence, has caused great prejudice, to, the right(s) of the plaintiff/appellant herein. The validity of the aforesaid espousal, made ,by the counsel for the aggrieved plaintiff, before this Court, qua hence, the mandate of Order 26, Rule 10(2) of the CPC, provisions whereof stand extracted hereinafter, being not meted the apt fullest adherence, is to be hence gauged besides fathomed, by making an incisive, and, circumspect reading thereof:-

> **"10. Procedure of Commissioner.-** (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the court.
>
> (2) Report and depositions to be evidence in suit—The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the court or, with the permission of the court, any of the parties to the suit may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.
>
> (3) Commissioner may be examined in person—Where the court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

A specific mandate is enshrined therein, of, the report furnished, by the local commissioner concerned, and, the evidence taken by him, being construable to be evidence, hence, in the apposite lis, and, it also forming part of the record, (i) yet the court also being conferred with a discretion, given the occurrence therein, of, coinage "may", to, on any of the litigant, making, a scribed motion before it, for personally examining, the local Commissioner, vis-a-vis, the recitals occurring, in his report, deny or grant, the apposite permission,besides for its being facilitated, to, ascertain, vis-a-vis, the validity(ies) or truth thereof. However, a perusal of the demarcation report, submitted by the Tehsildar, Ghumarwin, bespeaks of his prior, to hence demarcating, the, contiguous estates of the litigating parties, his ascertaining, the relevant pacca points, and,

qua ascertainments of pacca points, by the Local Commissioner, the litigating parties also purveying their written consent. He, in his report, unravels, qua his carrying, (a) detailed demarcation, of, various apt khasra numbers, whereat, at some places, a difference of ½ Karam being found, yet it being ignored. There, also, occurs a candid, and, clear recital, in, the report of the demarcating officer qua the plaintiff along with her son, being present, on the spot, and, hers, on conclusion of the demarcation, without making any objections qua it, rather leaving the spot. A close and circumspect perusal of the demarcation report, reveals, of the local commissioner concerned, hence, carrying the demarcation, of, the contiguous estates, of, the litigating parties, hence, in accordance with law. Consequently, in the learned Appellate Court, hence, dismissing, the objection preferred therebefore, by the plaintiff, vis-a-vis, the demarcation report, as also, in its dismissing the application preferred thereat, by her, under Order 26, Rule 10(2) of the CPC, has hence not committed any legal error. The reason being (a) the drawing, of the apt subjective satisfaction being well merited, arising, from, the rejection, of, the apt objections as reared therebefore by the objector/plaintiff, being founded upon, sound, good and tangible reason(s), (b) thereupon with non surfacing, of, any iota of evidence, vis-a-vis, hence for eroding, the apt validity thereof or truth thereof; (c) for emergence whereof, alone the exercising, of, the apt discretion, for summoning the Local Commissioner concerned, was imperative, (d) besides, rather when the summoning, of, the local commissioner, would be facilitative of his being meted suggestion(s), all, bearing compatibility with the apt objections, objections whereof rather stood tenably dismissed, (e) thereupon, the summoning, of, the Local Commissioner, was, unnecessary, AND, also redundant.

9. Even, though, at this stage, the learned counsel appearing, for the plaintiff/appellant, has contended with vigour, that, with a clear pronouncement hence occurring, in, Section 107 of the H.P. Land Revenue Act, provisions whereof stand extracted hereinafter, (i) AND, with the Revenue Officer concerned,on anvil thereof, hence preparing the demarcation report, borne in Ex.PW2/A, whereto apt tatima borne in Ex.PW1/B stood appended, hence, absolute reliance thereupon, rather, was placeable, (ii) hence, he contends that the appointment, of, a local commissioner, by the learned First Appellate Court, was outside, the statutory domain, of Section 107, of, the H.P. Land Revenue Act, provisions whereof read as under:-

> **"107. Power of Revenue Officers to define boundaries.** - (1) A Revenue Officer may, for the purpose of framing any record or making any assessment under this Act or on the application of any person interested, define the limits of any estate, or of any holding, field or other portion of an estate, and may, for the purpose of indicating those limits, require survey marks to be erected or repaired.
>
> (2) In defining the limits of any land under sub-section (1) the Revenue Officer may, cause survey-marks to be erected on any boundary already determined by, or by order of any Court, Revenue Officer or Forest Settlement Officer, or restore any survey-marks already set up by, or by order of any Court or any such Officer."

In making the aforesaid submission, he has also placed reliance, upon, a decision of this Court, rendered, in a case titled as ***Ram Lal vs. Krishan Dutt***, reported in ***Latest HLJ 2012 (HP) 633***, the relevant paragraph No.5 whereof stand extracted hereinafter:-

> "5. The issues were framed and the parties led their evidence. When the suit was listed for final arguments, an application under Order 26, Rule 9 of the Code of Civil Procedure was moved by the petitioner/defendant to appoint the Local Commissioner on the ground that the demarcation was not conducted by the Revenue Officer in accordance with the instructions of the Financial Commissioner and also that his application was rejected by the Assistant Collector 1st Grade for re-demarcation. Learned counsel for the petitioner also submitted that there was a boundary dispute, as such, the demarcation was required to be got conducted by the Revenue Expert, thus the impugned order is wrong. A perusal of the pleadings of the parties does not show any-where that the petitioner herein had raised boundary

> dispute. The respondent/plaintiff alleged encroachment on the basis of the demarcation report of the Assistant Collector 1st Grade, who had already conducted the demarcation in the presence of the parties. Such a demarcation under Section 107(1) of the H.P. Land Revenue Act, 1954, is quasi-judicial in nature and, statutory function, therefore, even the Collector in his supervisory jurisdiction under Section 12 of the Act can also not set aside the demarcation given by the Assistant Collector, but however, if after notice to the affected parties, the Collector is satisfied that the order requires modification or reversal, he is to report the case to the Financial Commissioner, who alone is empowered to pass such order as he think fit under Section 17(4) of the Act. Therefore, the demarcation already given by the Assistant Collector earlier in the presence of the parties which was not assailed cannot be upset by a Local Commissioner."

However, this Court, is in, total disagreement with the aforesaid submission also the aforesaid judgment relied, upon, by the learned counsel for the plaintiff, is not applicable vis-a-vis the facts of the case at hand, (i) the reason being, the verdict supra recorded in Ram Lal's case (supra), being *per incuriam* vis-a-vis, the, provisions borne, in, Section 171 of the H.P. Land Revenue Act, provisions whereof, ad nauseam, hence, delineate(s) the arenas and fronts, whereupon, the Civil Courts, are, barred to exercise jurisdiction, the apt clause (xix) whereof, stands extracted hereinafter:-

> "**171. Exclusion of jurisdiction of civil Courts in matters within the jurisdiction of Revenue Officers**.- Except and otherwise provided by this Act-
>
> .....
>
> (xix) any question connected with or arising out of or relating to any proceedings for the determination of boundaries of estates subject to river action under sections 108, 109, 110 and 111 respectively of Chapter VII;"

whereto an allusion is imperative. The hereinabove extracted, apt appertaining hereat clause, squarely oust(s) the jurisdiction, of, Civil Courts, vis-a-vis "any question connected with or arising out of or relating to any proceedings for the determination of boundaries of estates, subject to river action, under, sections 108, 109, 110 and 111". However, yet, the provisions, borne in Section 107 of the H.P. Land Reenue Act, do not occur therein, whereas, if the legislative intent, was, also to include, them, within, clause (xix) to Section 171 of the H.P. Land Revenue Act, its occurrence therein was imperative, alongwith, all succeeding therewith provisions, borne, in Chapter-VIII of the Act. Contrarily, hence the specific exclusion, of, section 107, of, the Act, in clause (xix) to Section 171, of, the Act, gears, an inference of the apt exclusionary mandate embodied therein, not, being extendable, vis-a-vis, the determination, of boundaries by the Revenue Officer concerned, on an apt application preferred, by the litigant concerned, under Section 107 of the H.P. Land Revenue Act. Consequently, the Civil Court concerned, enjoys, the apt jurisdiction, upon, a motion being made before it, AND, cast under the provisions of Order 26, Rule 9 of the CPC, to hence appoint a Local Commissioner, for determining, the boundaries of the contiguous estates, of the litigating parties, AND, as a natural corollary thereof, the civil court, is also bestowed, with an apposite jurisdiction, to, for valid reasons, hence impute sanctity thereto, AND, to also benumb the demarcation report prepared by the revenue officer, exercising power under Section 107 of the Act, given the predominant jurisdiction, for, testing the validity of, one or the other squarely vesting, in a civil Court. In sequel, the aforesaid submission addressed before this Court, by, the learned counsel appearing for the plaintiff/appellant, is rejected.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Substantial questions of law No.1 is answered in favour of the respondent, and, against the appellant.

11. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 123/13 of 2004/2000 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

M/s ALPAR Appliances .....Petitioner/defendant.
Versus
Leela Dutt .....Respondent/Plaintiff.

CMPMO No. 531 of 2017.
Reserved on : 21st May, 2018.
Date of Decision: 31st May, 2018.

Indian Evidence Act, 1872- Section 65(c)- 'Lost' - Meaning of - Petitioner/defendant filing application before trial court seeking its leave to prove photocopy of GPA executed by him in favour of 'K' on ground that original was 'untraceable' - Trial court declining request on ground that no FIR/report with police was lodged and thus 'loss' of original GPA not proved – Petition against – Held – Word 'Lost' as embodded in Section 65(c) of Act does not necessarily imply factum of document being provenly stolen and it includes within its ambit cases of 'sudden disappearance' and misplacing of documents caused by sheer inadvertence of litigant – Insistence on proof of filing FIR/Report with respect to document in question before granting leave is totally misplaced – Order of trial Court set aside - Petition allowed – Petitioner granted permission to prove photocopy of GPA executed by him in favour of 'K' particularly when he (defendant) was being sued in suit through 'K'. (Paras-4 to 10)

For the Petitioner: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the Respondent : Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During the pendency of the plaintiff's suit, for rendition of a decree for permanent prohibitory injunction, for, restraining the defendant, from, causing interference, damage and encroachment, vis-a-vis, the suit khasra numbers, an application, cast under the provisions of Section 65 of the Indian Evidence Act, was, instituted before the learned trial Court, by the defendant/applicant/petitioner herein, wherein, it sought leave of the Court, to, tender into evidence, a, photo copy of the general power of attorney, as, bestowed by the applicant, upon one Krishan Kumar, on the ground of original thereof, being not traceable, despite, best apt endeavours, hence, made by the applicant, for, locating it.

2. The application was contested, by the plaintiff/respondent herein. The contest was anvilled, upon, the factum, of, prior thereto, the conditions, occurring, in the provisions, of Section 63 of the Indian Evidence Act, requiring theirs being meted the completest satisfaction, and, the application being moved with an ulterior motive, merely, for prolonging or protracting the trial of the suit.

3. The learned trial Court, upon, considering the respective contentions, of the parties, declined, the apposite leave, to the applicant/petitioner herein, (i) the reason which

stood assigned by the learned trial Court, was, anvilled, upon, want of lodging of FIR, and, rapat by the applicant/petitioner herein, for, hence the applicant prima facie establishing qua it being lost or being untraceable, (ii) thereupon, it concluded, of, with the mandate, of apposite clause (3) of Section 65, of the Indian Evidence Act, rather foisting, an imperative condition qua emanations, of, prima facie, proof qua the original rather being lost or destroyed, condition whereof, rather remaining not accomplished to the completest, hence, it declined, the apposite leave to the applicant/petitioner herein. The petitioner herein/defendant being aggrieved therefrom, hence, has instituted the instant petition, before this Court.

4. Primarily, the defendant/petitioner herein, was being sued, through, one Krishan Kumar, and, it appears that the aforesaid Krishan Kumar, was, watching and taking care, of the interest, of the defendant, in the apt litigation, visibly under an apposite power of attorney, executed in his favour by the defendant. Consequently, hence, for the plaintiff, to, maintain the lis, against, the defendant, he ought not be objecting vis-a-vis the apposite leave being granted, by the learned trial Court, qua, the photo copy, of, the original general power of attorney, hence, being tendered into evidence. Dehors, the above necessity, of the apposite leave, being granted qua the relevant purpose, (i) the learned trial Court, while, declining the espoused relief vis-a-vis the applicant, anvilled, it, upon, with no rapat or FIR being lodged, hence per se, it, being not ineferable of the original GPA being lost or destroyed, hence it pronounced a disaffirmative verdict, upon the apposite application. The afore assigned reason, by the learned trial Court, is, though *stricto sensu,* hence, falling within the ambit of the apposite clause (c) of Section 65 of the Indian Evidence Act, provisions whereof stand extracted hereinafrer:-

> "(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;..."

(ii) nonetheless, the making, of, a strict construction thereto besides assigning any connotation, to the phrase "or lost" qua hence there being a statutory enjoined concomitant necessity, qua, a rapat or an FIR, being lodged, may, ultimately erode, the spirit, and, the worth of the aforesaid provision, as the phrase "or lost", does not, necessarily embody therewithin, the factum of its being provenly stolen, (iii) whereupon, alone, there would, arise a necessity, of lodging of an FIR, and, a rapat with the police station, rather it also embodies, within its ambit, the factum of its sudden disappearance, or it, by sheer inadvertence, hence, being misplaced, by the litigant concerned, hence, the original being untraceable. The assigning of the aforesaid, parlance, to the phrase "or lost", and, when pleadings in consonance therewith, also occur in the apposite application, thereupon, it was improper for the learned trial Court, to, insist, of, there being any prior thereto, dire necessity, of the applicant, hence lodging any apt FIR or a rapat.

5. Furthermore, the learned counsel appearing, for the respondent/plaintiff, has, contended that the apt prior thereto provisions, borne, in Section 63 of the Indian Evidence Act, provisions whereof, stand extracted hereinafter:-

> "63. Secondary evidence.—Secondary evidence means and includes—
>
> (1) Certified copies given under the provisions hereinafter contained1;1;"
>
> (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
>
> (3) Copies made from or compared with the original;
>
> (4) Counterparts of documents as against the parties who did not execute them;
>
> (5) Oral accounts of the contents of a document given by some person who has himself seen it. Illustrations
>
> (a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original."

also enjoin meteings, of, completest accomplishment thereto. However, apt completest satiation, is meted to the apposite sub section (2), of Section 63, of the Indian Evidence Act, given, a photo copy, coming within, the apt statutory ambit of its preparation, occurring, by mechanical process, from the original, sequel thereof is, of, the declining, of the apposite leave, being thoroughly inappropriate, AND, arising from a gross misapplication, of, mind, by the learned trial Court.

6. For the foregoing reasons, the instant petition is allowed and the order impugned before this Court is quashed and set aside. In sequel, the application preferred by the petitioner herein, before, the learned trial Court, under the provisions, of, Section 65 of the Indian Evidence Act, is allowed, and, the petitioner is permitted, to, prove the photo copy of power of attorney, by adducing it, as secondary evidence thereof. The parties are directed to appear, before, the learned trial Court, on 11th June, 2018. However, it is made clear that the observations made hereinabove, shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of. Records, if received, be sent back forthwith.

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

Ram Sorup Chauhan ....Appellant.
Versus
Devi Lal & others ....Respondents.

Cr. Appeal No. 193 of 2018
Reserved on: 26th May, 2018.
Date of Decision: 31st May, 2018.

Code of Criminal Procedure, 1973- Section 378- Appeal by complainant/victim against judgment of acquittal - On complaint of victim that accused wrongfully restrained him when he was working in his field with JCB and then they took him to their house, confined there and gave beatings to him and his wife, accused were tried for different offences and eventually acquitted by trial court – Appeal against by complainant - Complainant arguing before High Court that judgment of acquittal is based on gross mis-appreciation of evidence by trial court – On facts, High Court found that statement of complainant was not corroborated by medical evidence, eye witnesses did not support his case, no recovery of stick(s) was effected either from place of occurrence or from accused, complainant himself gave some sticks to I.O. alleged to have been used by accused- Further, FIR in respect of same incident was recorded at instance of accused also but charge sheet was silent as what happened to FIR of accused – Held – Prosecution case is not proved beyond reasonable doubts – Judgment of trial court upheld – Appeal of complainant dismissed. (Paras-10 to 13)

For the Appellant: In person
For Respondents No.1 to 5: Mr. B.C. Verma, Advocate.

For Respondent No. 6: Mr. Hemant Vaid, Addl. A.G., with Mr. Y.S. Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The complainant/victim, is aggrieved, by the order, of acquittal recorded by the learned trial Court, vis-a-vis the accused, while rendering, a pronouncement upon a Cr. Case No. 602 of 2011.

2. The facts relevant to decide the instant case are that on 29.10.2010 at about 11.30 a.m., near Devi Mandi, Rangol, Shimla, when the complainant Ram Swaroop was working in his field with JCB Machine, accused, namely, Devi Lal, Shish Ram, Kalawati, Sheela, Minakshi and Soraj, armed with sticks, wrongfully restrained the complainant from the the said work and confined the complainant and his wife inside their house. The accused gave beatings to the complainant and his wife and caused simple injuries on their person. The matter was reported to the police. The Police recorded the statement of the complainant under Section 154 of the Cr.P.C., to the aforesaid effect and recorded the FIR. After registrations of the FIR, the police completed all the codal formalities.

3. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed before the learned trial Court.

4. The accused stood charged by the learned trial Court for theirs committing offences punishable under Sections 147, 148, 341, 342 read with Section 149 of the IPC. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication.

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

6. The complainant/informant, stands, aggrieved by the judgment of acquittal recorded in favour of the accused/respondents. He, has concertedly, and, vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondents herein, has with considerable force and vigour, also contended qua the findings of acquittal recorded by the learned trial Court rather standing based on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The informant/complainant, while stepping into the witness box, as PW-4, has, in his testification made echoings in concurrence, with, all the recitals, borne in Ex.PW4/A, and, in Ex.PW7/A. His testification is lent succor by PW-9, one Yashwant Singh, his relative. However, PW-1, PW-5 and PW-10, all reneged, from their, respectively recorded previous statements, in writing. During the course of theirs being declared hostile, on a request, made by the APP concerned, whereafter, they were subjected, to an ordeal, of, an exacting cross-examination, hence, by the APP concerned, yet therein nothing emerged from each, for hence an

inference being recorded, qua their respective, renegings, from, their previous statements recorded, in writing being falsified or theirs hence lending vigour, to the genesis of the prosecution case, embodied in Ex.PW7/A.

10. Be that as it may, mere factum of PW-1, PW-5 and PW-10, the purported independent witnesses, to the occurrence, respectively reneging, from, their previous statements, recorded in writing, may not hence coax, any inference, from this Court, qua the versions hence respectively deposed by PW-4 and PW-9, being discardable, (i) merely, on anvil of PW-9, being related to PW-4, hence, his testifying an interested version qua the occurrence, (ii) unless, the testification rendered, by PW-4, and, by PW-9 are also established, to acquire succor, from the MLC borne in Ex.PW12/A, and, from the recitals borne in Ex.PW4/B, whereunder, the clothes, of the complainant, and, two sticks were handed over, by the complainant, to, the investigating officer concerned. Also when evidence surges forth, in display, of Ex.PW4/B, being proven, to be, validly and efficaciously recorded.

11. Nowat, the apposite MLC, comprised in Ex.PW12/A, proven by PW-12, merely makes, a, disclosure of simple injuries, occurring, on the person of the complainant. The aforesaid factum, does assume critical importance, given the complainant, making vivid echoings, of all the accused being armed with sticks, and each repeatedly with users thereof, belabouring him, (i) importantly when the closest and utmost compatibility inter se hence the user of sticks by each of the accused, on the person of the complainant, vis-a-vis, the injuries occurring, upon, his person, was a dire proven necessity, (ii) whereas, despite the complainant, making, vivid echoings, of each, of the accused, being armed with sticks, and, each with user thereof belabouring him, yet with occurrence merely of simple injuries, on his person, injuries whereof, are, depicted in Ex.PW12/A, does, contrarily boost an inference, qua there occurring, a rife incompatibility, inter se, the users, of, sticks by each of the accused, upon, the person of the complainant, vis-a-vis, the minimal injuries occurring therein, (iii) besides, obviously the further concomitant sequel, being of, all the ascriptions, by, the complainant vis-a-vis each of the accused, qua theirs respectively being armed with sticks, hence, each belabouring him, with blows thereof, necessarily, falling in the realm of skepticism.

12. Apart therefrom, the complainant was also enjoined, to prove efficacious recovery, of, sticks, by the Investigating Officer, at the instance, of each of the accused. Apparently, hereat the sticks, purportedly used, by each of the accused, for, theirs hence belabouring, the victim/complainant, were not recovered, under any apt recovery memo, signatured by each of the accused, nor preceding therewith, the apt disclosure statements, of each of the accused, were recorded. However, the complainant/victim, under memo Ex.PW4/B, handed over this clothes, and, two sticks, to, the Investigating Officer, handing(s) over whereof, occurred on 31.10.2010, whereas, the relevant incident, occurred, two days prior thereto, inasmuch as, on 29.10.2010. Even if, despite the afore referred, omission, of the Investigating Officer concerned, assumingly, any efficacy is to be imputed vis-a-vis Ex.PW4/B, yet imputation of any efficacy thereto, may be sustainable, only, when the handing(s) over, of the blood stained clothes, and, sticks by the complainant/victim, to, the Investigating Officer, were made in prompt sequel to the incident, or the sticks were evidently found at the site of occurrence, whereupon, reiteratedly, the apposite recoveries, made, under memo Ex.PW4/B, would acquire some probative tenacity. Contrarily, hereat, with, apparent belated handing(s) over, of, sticks, and, of the blood stained clothes, by the complainant, to, the Investigating Officer, hence, rather occurring, does, dispel all efficacies thereof, (i) rather enables, this Court to erect, an inference, of, the sticks, being not found at the site of occurrence, rather their handing over by the complainant, to the Investigating Officer, being a sequel of sheer contrivance besides invention, (ii) rendering, all, the recitals, in respect thereof, borne in Ex.PW4/B, to be unworthy of any credence, (iii) AND, also with the complainant handing over two sticks, to the Investigating Officer, whereas, he attributes vis-a-vis each of the accused, incriminatory role(s) of each wielding sticks, with users whereof, they belaboured him also hence stems a conclusion, of there occurring, incompatibility inter se, the sticks handed over by the complainant, to the Investigating Officer, through memo borne in Ex.PW4/B, vis-a-vis, the accused, numbering five,

qua each of whom, he, rather imputes qua their belabouring him, with users thereof, (iv) all whereof also remained not recovered nor handed over by them under any aptly prepared memos, vis-a-vis, the Investigating Officer concerned, rather were handed over, under an inefficaciously prepared memo, borne in Ex.PW4/B, by the victim to the Investigating Officer concerned, (v) renders, hence, the prosecution case to be founder.

13. Furthermore, the Investigating Officer has in his cross-examination, acquiesced to a suggestion, of the accused also filing an FIR vis-a-vis the incident, in respect whereof, Ex.PW7/A was lodged, and, he has also acquiesced, to a further suggestion put to him, by the learned defence counsel, during, the course of his being subjected to cross-examination, of his omitting, to make any reference thereto, in the report filed under Section 173 of the Cr.P.C., before, the learned Magistrate concerned, (i) nor he is able to bring forth, any apt communication, vis-a-vis, the fate of the cross FIR, lodged by the accused, (ii) whereas, he was enjoined to hold, conjoint investigation(s), with respect to both the FIRs, and, consequently, the Magistrate concerned, was, also enjoined to hold conjoint trial thereof, (iii) whereupon, also the truth qua the incident would obviously emerge, (iv) absence whereof, contrarily fosters an inference, of, the Investigating Officer, hence, smothering the truth of the occurrence, (v) rendering hence open an inference, qua, the trite factum, of the site of occurrence, receding, into the realm, of skepticism, (vi) besides its becoming extremely hazardous, for this court to form, a clinching conclusion, vis-a-vis, the complainant herein or the complainant, in the cross FIR, lodged with respect to the same occurrence, being the apt aggressor(s). Reiteratedly, hence, with haziness, and, doubt seeping into the prosecution case, thereupon, the interested testimonies of PW-4, and, of his relative, PW-9, are subsumed, by the testifications rendered, by PW-1, PW-5 and by PW-10, besides by the inefficaciously, and, fictitiously prepared Ex.PW4/B.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court, does not suffer, from, a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

15. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Shambu Mahto & Ors. ....Respondents.

Cr. Appeal No. 413 of 2011.
Reserved on: 3rd May, 2018.
Date of Decision: 31st May, 2018.

Indian Evidence Act, 1872- Section 9 – Test Identification Parade – Non-holding of - Effect – Held – Accused were already known to witness since before incident – In such circumstances, non-holding of test identification parade during investigation is insignificant – Identification of accused during trial is sufficient. (Para-13)

Indian Penal Code, 1860- Sections 302 and 304(ii)- Offence whether murder or culpable homicide not amounting to murder? – Held – Nature of injuries, part of body of deceased - where injuries were caused and weapons used are relevant for inferring intention of accused – Trial

Court convicted only accused 'S' for offence under Section 304(ii) of Code and acquitting him for offence under Section 302 of Code - Other accused were acquitted of all offences – State filing appeal against conviction of 'S' for offence under Section 304(ii) of Code and against acquittal of other accused - On facts, High court found that deceased was assaulted by accused with iron rods and pipes on head – There were multiple fractures of frontal and parietal bones – Further held, intention of accused was to commit murder of deceased- Reasoning of trial court that deceased did not die on spot and possibility of his surviving after treatment, for convicting one of accused 'S' for offence under Section 304(ii) of Code is perverse – Participation of other accused along with 'S' in commission of offences also established on record – All accused convicted of offences under Sections 147, 148 and 302 read with Section 149 of Code – Appeal of State allowed. (Paras- 15 and 17)

For the Appellant:	Mr. Hemant Vaid, Addl. Advocate General with Mr. Y. S. Thakur, Deputy Advocate General.
For Respondent No.1:	Mr. Praveen Chandel, Advocate vice Mr. Surender Sharma, Advocate.
For Respondents No.2 to 5:	Mr. H.S. Rana, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The learned trial Court, upon, charges framed against the accused, vis-a-vis, offences punishable under Sections 302, 147, 148, 149 of the IPC, pronounced an order of conviction, upon, accused/convict Shambu Mahto under Section 304, Part-II of the IPC, and, imposed sentence(s), upon him, to, undergo rigorous imprisonment for a period of 7 years, and, also imposed fine of Rs.10,000/-, and, in default of payment of fine amount, he, was, further sentenced to undergo rigorous imprisonment for one year. However, other co-accused, were, acquitted for the charges, respectively framed against them, vis-a-vis, offences punishable under Sections 302, 147, 148 and 149 of the IPC. The State of H.P., being aggrieved by the aforesaid pronouncement, hence, through the instant appeal, has concerted to beget its reversal.

2. The prosecution case, in brief, is that on 17.10.2009 at about 9.30 p.m. telephonic information ws received from Malhotra hospital that one person has received injury on his head. On this information SI Liaq Ram, H.C. Kuldeep Singh, No.1, C. Gurmal Singh, No.212, visited Malhotra hospital, where Sanjay Kumar was lying in an injured condition. His companions were also present there. SI Liaq Ram filled form NO.24.39 for obtaining MLC and Medical Officer has stated that Sanjay Kumar was not able to give statement and the injured was referred for treatment to Nalagarh hospital. The companion of Sanjay Kumar, Ramu Verma gave statement under Section 154 of the Cr.P.C., before S.I. Liaq Ram to this effect that he is a conductor for the last two months with trcuk No. HR-38A-5343. On 17.10.2009, due to Diwali fair, the truck which were engaged for carrying goods of Inox Air Products Company, Burawala were made stationary in the parking of the company. At about 9 P.M., HE, Bharat, Devi Din, Dal Bahadur, Ashok Kumar, Sanjay Kumar and Kali were preparing food in front of the parking of the company. By that side there is a room of the company, where the drivers used to resident and int hat room Shambu, Pappu alias Pawan, Rajiv, Sita Ram etc., were there. All the aforesaid persons after entering into conspiracy came from the room carrying rods in their hands and told as the smoke is coming out and no food will be prepared there. On this, Sanjay Kumar told them that why the food will not be prepared and then Shambu etc., told that it is their will. On this they all started altercation with Sanjay Kumar and made attempt to kill him. Shambu gave rod blow on the head of Sanjay and others also gave rod, leg and fist blows to him. Due to beatings Sanjay Kumar became unconscious and fell down. The all rescued Sanjay Kumar from the clutches of Shambu etc. They also received simple injuries on their persons, in this process Sanjay Kumar was removed from the spot and was taken to Malhotra Hospital, Baddi for treatment. The police

also visited there and Sanjay Kumar was sent for further treatment to Chandigarh and Devi Din, Dal Bahadur, Ashok Kumar etc., accompanied him to Chandigarh.

3. According to Ramu Verma, Shamby and his other companions were having enmity with Sanjay Kumar and the enmity was due to vehicles (trucks) which fact was told some days ago by Sanjay Kumar to him. They all are having enmity with him and in this way Sambu and Sita Ram, Pawan, Rajiv etc. have made attempt to kill Sanjay Kumar. On the basis of aforesaid statement, earlier FIR was registered against the accused, under Section 307, 323, 324 read with Section 34 of the IPC. SI Laiq Ram during the curse of the investigation, visited the spot and on the demarcation of Ramu Verma, prepared site plan. He also took photographs of the spot. The blood stained stone(s) were lying on the spot. In front of the room, where the drivers used to reside, there stove and other food preparing material were lying. The blood stained soil and stone were taken into possession vide separate memo by the police and was put in a plastic envelope and the envelope was put in the cloth parcel and cloth parcel was sealed with seal impression R. Statements of the witnesses were recorded. On 19.11.2009, Sanjay Kumar, died in PGI Chandigarh. The Investigating Officer obtained the postmortem report and also took the photographs of the body of the deceased and thereafter offence under Section 307 of the IPC was omitted and offence under Section 302 was included against the accused. Thereafter, the police carried the investigations.

4. On conclusion of the investigation, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed before the learned trial Court.

5. The accused/respondents stood charged by the learned trial Court, for, theirs committing offences, punishable under Sections 302, 147, 148, and, under Section 149 of the IPC. In proof of the prosecution case, the prosecution examined 23 witnesses. On conclusion of recording, of, the prosecution evidence, the respective statement(s) of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, each of the accused claimed innocence, and, pleaded false implication in the case.

6. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, upon, accused Shambu Mahto, for his hence committing, an offences punishable under Section 304, Part-II of the IPC. However, the other accused were acquitted of the offences charged.

7. The State of H.P., stands aggrieved, by the aforesaid findings recorded, by the learned trial Court. The learned Additional Advocate General, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, vis-a-vis accused Shambhu Mahto, for his committing an offence punishable under Section 304, Part-II, and also findings of acquittal, recorded by the learned trial Court, vis-a-vis accused Sita Ram, Bhola Mahto, Rajiv Kumar, and, Pawan Kumar, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material, on record. Hence, he contends qua the findings aforesaid, warranting their reversal, by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced, by findings of conviction, of the accused/respondents, for theirs committing offences punishable, under, Section 302, 147, 148, 149 of the IPC.

8. On the other hand, the learned defence counsel have with considerable force and vigour, contended qua all the apt findings, recorded by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

9. 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.

10. The prosecution case, is, anvilled, upon, direct evidence, bespoken by ocular witnesses, to the occurrence. The prime prosecution witness, who, stepped into, the witness in

support of the prosecution case, is, PW-1 (Devi Deen). In his testification, comprised in his examination-in-chief, (a) he ascribes vis-a-vis co-accused Shambu, an incriminatory role of his wielding, rod Ex.P-1, and, with user thereof, his striking blows, upon, the head of deceased Sanjay, wherefrom, he testifies, of, blood hence oozing therefrom, (b) co-accused Bhola is ascribed, an incriminatory role of his wielding, an iron pipe, Ex.P-2, (c) co-accused Sita Ram, is, ascribed an incriminatory role, of his, wielding a tyre liver, Ex.P-3, (d) and vis-a-vis other co-accused, PW-1 in his testification embodied, in his examination-in-chief, assigns, the apt incriminatory roles, of theirs belabouring the deceased with kick and fist blows. However, at the end of his examination-in-chief, whereat, he stood, shown Ex.P-4 and P-5, he has testified, of theirs, being the apt weapon(s) of offences, which at the relevant time, stood wielded by co-accused, other than, accused Bhola, Shambu and Sita Ram.

11. The learned counsel, appearing for the accused/respondents, have contended with vigour, that all incrimnatory ascriptions, vis-a-vis, co-accused Rajiv Kumar, and, Pawan Kumar, of, theirs respectively wielding Ex.P-4, and, Ex.P-5, arising, from PW-1, at the end, of, his examination-in-chief, making echoings, of the aforesaid weapons, at the relevant time, being hence wielded by them, and, with user thereof, theirs hence purportedly striking blows, upon, the deceased, rather is rendered incredible, (i) emphatically, when, in the preceding part, of his examination-in-chief, PW-1 contrarily bespeaks, of, the aforesaid rather belabouring the deceased Sanjay, with, kick and fist blows. However, the strength of the aforesaid submission, is torpedoed (ii) by the learned defence counsel, while, subjecting PW-1, to cross-examination, his purveying an affirmative suggestion, qua, the deceased being inflicted with blows, of rods, by the accused, whereto an apposite affirmative answer, emanated, from PW-1, (iii) besides subsequent thereto, the learned defence counsel, hence, meteing an affirmative suggestion to PW-1, qua, of, after the initial blow, with, user of rod being inflicted, by accused Shambu, on the head of deceased Sanjay, his falling onto the road, (iv) whereafter, his being continuously, for five minutes, hence, belaboured, with iron rods, whereto, also an affirmative answer also emanated, from, PW-1, (v) thereupon, an inevitable inference, being foreclosed qua, hence, the defence acquiescing, of, accused Shambu, Bhola, Sita Ram, Rajiv Kumar and Pawan Kumar, respectively wielding Ex.P-1, Ex.P2, Ex.P3, Ex.P-4 and Ex.P-5, and, with users thereof, theirs hence inflicting blows, on, the head of the deceased. (vi) Dhors, the exculpatory effect, if any, germinating, from, PW-1, in the opening part, of, his examination-in-chief, rather making an echoing, of, only co-accused Shambu, Bhola and Sita Ram, respectively wielding Ex.P-1, P-2 and P-3, and, theirs, with, users thereof, inflicting blows, on the head, of, deceased Sanjay, (vii) nor thereupon also the identification of Ex.P-1 to Ex.P-5, by PW-5, at the end of his examination-in-chief, whereat, the aforesaid weapons, of, offences, were shown to him, even if assumingly, contradicts the earlier therewith, part of his examination-in-chief, whereat, he attributes, incriminatory roles vis-a-vis co-accused Rajiv Kumar, and, Pawan Kumar, of, theirs inflicting kick and fist blows, upon deceased Sanjay, is likewise hence rendered redundant besides inconsequential.

12. The testimony of PW-1, is, meted corroboration by PW-2 (Dal Bahadur), another eye witness, to the occurrence. He alike PW-1, upon, Ex.P-1, P-2, P-3, P-4 and P-5, being shown to him in Court, has unflinchingly testified of theirs, being respectively used by accused Shambu, Bhola, Sita Ram, Rajiv Kumar and Pawan Kumar, in theirs, hence, striking the relevant blows, upon, deceased Sanjay. The aforesaid testification, occurring, in the examination-in-chief of PW-2, is, not concerted to be ridden, of, its imminent truthfulness, by the learned defence counsel, by his putting apposite suggestions, for, hence shattering veracity(ies) thereof. The aforesaid testifications, rendered by PW-1 and PW-2, also apparently are not gripped, with, any vices, of, gross improvements, and, embellishments, vis-a-vis, their previously recorded statements in writing nor their respective testification, are stained, with any pervasive vice of any inter se or intra se contradiction, (I) thereupon, they acquire vigour, in establishing the charges, against, the accused. Furthermore, with their respective testifications, being corroborated, by the statement of other eye witness, to the occurrence, namely, Ramu Verma (PW-20), who, in his testification hence renders, a version in corroboration, to versions, rendered by of PW-1, and, also by PW-2,

thereupon, all the aforesaid, in tandem version(s), rendered by all the aforesaid ocular witness qua the occurrence, hence, visibly acquire apt tenacity(ies).

13. Be that as it may, even any purported frailty, hence gripping, the apt ocular efficacious testifications, rendered in proof of the charges, arising, from theirs, hence, identifying the accused in Court, (i) without prior thereto, any valid test identification parade, being carried by the Investigating Officer concerned, is also scuttled, by PW-1 in his testification, comprised, in his examination-in-chief, making, a, vivid bespeaking, of, earlier in the year 2008, during, the Holi festival, hence a quarrel occurring inter se deceased Sanjay, and, the accused, (ii) thereupon, when hence he was holding a clear graphic etching, in his memory, qua the identity of the accused, (iii) thereupon, reiteratedly, his identifying the accused in Court, without prior thereto, a valid test identification parade being held, is also rendered insignificant. Apart therefrom, an immense vigour, to, the ocular testifications, rendered, by the aforesaid eye witnesses, to the occurrence, is, garnered, by Ex.PW3/A, EX.PW4/A, Ex.PW5/A, Ex.PW6/A, Ex.PW6/B, Ex.PW6/C, Ex.PW6/D, Ex.PW6/E, exhibits whereof, respectively carry thereon, the signatures besides thumb impressions, of each of the accused, besides thereon stand appended, the signatures, of, all the witnesses thereto, (iv) AND, with clear underlined recitals, borne therein vis-a-vis each of the accused, hence identifying, the place of occurrence, does obviously, comprises, a potent incriminatory material, vis-a-vis each of the accused, especially when hence they display knowledge thereof besides their apt participation. Thereupon, immense momentum vis-a-vis, efficacies thereof, is mobilized from (a) occurrence of respectively uncontested signatures, and, thumb impressions thereon, of, each of the accused and (b) recitals borne therein being proven by the witnesses thereto, and, all the latters' testifications remaining uneroded, during, the course of their, exacting cross-examination, by, the learned defence counsel.

14. Moreover, the testifications, rendered by the ocular witnesses, to the occurrence, assigning therein, the apt users, respectively by the accused, of, weapons of offence, respectively borne in Ex.P-1 to P-5, (i) is also lent succor, by the disclosure statement, comprised in Ex.PW5/A, rendered, before, the Investigating Officer, by co-accused Shambu, exhibits whereof also stand(s) signatured, by, both the witnesses thereto, (ii) wherein, he has vividly disclosed, the place of keeping, and, hiding hence of weapons of offence, respectively wielded, by each of the accused, in pursuance whereto, the apt recovery(ies) of weapons of offence, was effectuated, vide memo Ex.PW18/A, whereon also the signatures, of, co-accused Shambu exist besides signatures also exist thereon, of, marginal witnesses thereto, (iii) all aforesaid acquire immense formidability, given, co-accused/convict Shambu, not, contesting the existence of his signatures thereon, rather, (a) with the marginal witnesses, to, disclosure statement borne in Ex.PW5/A, and, vis-a-vis Ex.PW18/A, prepared, in sequel, vis-a-vis, preparation , of, Ex.PW5/A, AND, whereunder the weapons of offence, respectively borne in Ex.P1 to P5, stood recovered, at, the instance of accused Shambu, (b) hence rendering firm unflinching testifications qua valid preparations thereof, testifications whereof remained uneroded, during, the course of theirs being subjected, to, a scathing cross-examination, especially also vis-a-vis, the truthfulness of all recitals, borne therein, besides qua valid makings thereof, by the Investigating Officer, at the instance of the accused, (iv) thereupon the aforesaid proven exhibits, hence, supply vigour vis-a-vis the credible testifications, of, ocular witnesses to the occurrence. At this stage, the learned counsel, appearing for the appellant, submits that the aforesaid exhibits acquire efficacy, if any, only vis-a-vis accused, Shambu, and, not vis-a-vis other co-accused, given (i) other co-accused not recording, before, the Investigating Officer concerned, their respective apt disclosure statements, (a) nor any recoveries being effectuated, in pursuance thereof. However, the aforesaid submission, is blunted by (b) this Court imputing credence, vis-a-vis, the incriminatory acquiescences, emanating, from, the defence, arising, from the defence rather putting hence incriminatory apposite suggestion, vis-a-vis, the ocular witnesses, whereto, apt acquiescences emanated thereto, from each, (c), whereupon, all, the incriminatory acquiescences, hence, nail the charge against the accused.

15. Dehors, the aforesaid unequivocal corroborative evidence, being adduced by the prosecution, vis-a-vis, each of the accused, the learned trial Court, rather proceeded, to, vis-a-vis, the other co-accused, excepting, co-accused/convict Shambu, hence record findings of acquittal, merely, on anvil of (a) the postmortem report borne in Ex.PW13/A, proven by PW13 (Dr. S.P. Mandal), not, making clear pronouncements, in compatibility, with, the testifications, of the apt ocular witnesses, wherein, they rather make clear unequivocal echoings, of, the deceased being inflicted apt blows, by each of the accused, with user of, weapons of offences, respectively borne in Ex.P-1 to P-5, (b) especially, when for hence any inter se compatibility, occurring, inter se, the apt ocular testifications, vis-a-vis, the postmortem report, borne in Ex.PW13/A, the latter, was, enjoined to also carry revelations, qua upon the head of the deceased, there, hence occurring multiple fractures. However, the aforesaid reason is *ipso facto, is,* rendered frail, and, its effect, is, also over ridden, by the hereinafter extracted relevant portion, of, the postmortem report:-

> "Oblique stitched lacerated woud 13x4 cm xbone deep present on the left side frontal and parital region of the scalp, started 4.5 cm above the middle of left eyebrow going backward and slightly lateral upto 12 cm above the left mastoied. The margins were blue contused and irregular. The wound shows multiple fractures of bones. On removal of the scalp subaponeurotic haematoma was present all over the scalp. A slightly depressed fracture corresponding to the above injury with multiple fracture of left side frontal and parietal bones coronal sutire was separate and are fissured fracture of right parietal bone was found."

The aforesaid extracted portion, of, the postmortem report, when makes, clear articulations, of multiple fractures, occurring, on the left side of frontal, and, parietal bones, and, also it making, a clear articulation, of, the coronal sutire, being separated, and, fissured fracture of right parietal, being found. (i) Thereupon occurrence, of, the aforesaid, underlinings, in the postmortem report, borne, in Ex.PW13/A, does apparently, nail a conclusion, of the learned trial Court, hence, misreading the hereinabove extracted portion, of the postmortem report, and, hence its making the aforesaid inapt conclusion, (ii) whereas, rather its close circumspect reading, making, a palpable display, of multiple fractures, occurring, on the apt portion, of, the body of the deceased, (iii) thereupon, the ocular testifications rendered, by the apt eye witnesses, to, the occurrence, qua user thereon, of the apt weapons of offence, hence successively by each of the accused, being neither imbued with any stain of untruthfulness, nor with any taint, of, any concoction or invention. Preeminently, hence, the effect of the aforesaid manner, of reading, of the apt hereinabove extracted portion, of the postmortem report, alongwith, the credible testifications, of the ocular witnesses, to the occurrence, does bring forth, (iv) a natural sequel of the prosecution, conclusively proving, the charge against the accused, and, also the concomitant ensuing inference therefrom, is, of the verdict of acquittal pronounced, upon co-accused Sita Ram, Bhola, Rajiv Kumar and Pawan Kumar, except accused Shambu, vis-a-vis, the charges respectively framed against them, under Section 302, 147, 148, 149 of the IPC, being not embedded, upon, any proper, and, mature appreciation, of evidence on record, rather the apt verdict, being a sequel of a gross mis-appraisal, of, evidence germane to the charge(s). Even otherwise, with preeminence, of, credible ocular evidence vis-a-vis medical evidence, does also, assumingly, if there is, any, incompatibility inter se them, hence subsumes, all purported exculpatory effects thereof.

16. Nowat, it has to be determined, whether the accused are amenable, for being punished, for, commission of offence(s) punishable, under, Sections 302, 147, 148, read with Section 149 the IPC or whether the verdict, of, the learned trial Court, qua rather punishment, being imposable, upon the accused for commission of offence(s) punishable under Section 304-II of the IPC, is to be validated, even vis-a-vis other co-accused. For determining, the validity of the apt pronouncement, made by the learned trial Court, AND, for it being applied, vis-a-vis, all co-accused, it is apt to bear in mind, the apt exceptions borne in Section 300 of the IPC, exceptions whereof, stand extracted hereinafter:-

> "Exception 1.—**When culpable homicide is not murder.**—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and

sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

(First) —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

(Secondly) —That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

(Thirdly) —That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills. Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

> Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.
>
> Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.
>
> Illustration
>
> A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

A reading of the aforesaid provisions, for, hence its mandate being attracted hereat, renders an inference, of, a mandate being carried, therein, (I) qua emergence of proof vis-a-vis the apt espousal(s), of, the defence hence falling within the domain, of, the apposite exceptions, carved out in Section 300 of the IPC. However, hereat rather with clear candid and credible testifications, hence, standing rendered by the apt ocular witnesses, to the occurrence, and, also other connected, afore referred, potent incriminatory evidence, standing adduced, by the prosecution against each of the accused, contrarily making, (i) a clear pronouncement of the accused, carrying the relevant mens rea, to, by their respective incriminatory acts, cause death of the deceased, (ii) nor with the aforesaid defence(s), being espoused, by any of the accused, (iii) thereupon, it was unbefitting, for the learned trial Court, to pronounce, vis-a-vis Shambu, an order of conviction, under Section 304, Part-II of the IPC, nor also it is befitting for this Court to alike therewith, pronounce an order, hence, convicting the other co-accused, also, for commission of an offence, punishable under Section 304, Part II, of the IPC, rather as borne out, from, the material on record, all the accused are liable to be convicted, under, Sections 302, 147, 148 and read with Section 149 of the IPC. Conspicuously, also with all, the aforesaid credible evidence, vividly pronouncing, upon theirs carrying, the apposite mens rea, to commit the offences charged AND no evidence making any bespeaking qua any visible surging forth, hereat, of, any of the aforesaid exceptions concerned, for hence rendering the accused being punished, for an offence construable, to be culpable homicide not amounting to murder, thereupon, concomitantly, hence, the provisions of Section 304 Part-II of the IPC, remain unattracted hereat, nor any, punishment in consonance therewith, is imposable, upon the accused.

17. Before firmly, drawing, the aforesaid inference, it is also important, to allude to the frailty, of, the reasons, as assigned by the learned trial Court, for, convicting the accused Shambu, for, commission of an offence punishable under Section 304, Part-II of the IPC. The learned trial Court in making, the inapt order, of conviction, upon, accused Shambu, for commission, of offence under Section 304-II of the IPC, has, (i) founded it, upon the factum, of, upon the deceased being provided adequate treatment, (ii) there being a possibility of his life being saved, (iii) especially when he did not suffer his demise on the spot, (iv) and, with PW-13, prior to his stepping, into the witness box, being not shown, Ex.P-1 by the Investigating Officer, nor hence, with PW-13 rendering his opinion thereon, especially vis-a-vis qua its user, upon, the relevant party of the body of the deceased, besides prior to his stepping into the witness box, PW-13 not making, any clear voicing qua the injuries noticed to be occurring in Ex.PW13/A, upon the head of the deceased, being causable by apt users thereof, (v) hence, convict Shambu being amenable for conviction, for, his committing an offence punishable under Section 304-II of the IPC, and, not for an offence punishable under Section 302 of the IPC. However, the effect, if any, of the aforesaid inference, is torpedoed, by the factum of PW-13, during, the course of his examination-in-chief, on his thereat being shown, Ex.P-1, his rather therein, making, a vivid pronouncement, of, with user thereof, injuries noticed by him in Ex.PW13/A, upon the head of the deceased, hence being causable. The apt corollary thereof, is of, even if, Ex.P-2 to Ex.P-5, stood, shown to him, during, the course of his being subjected to cross-examination, by the

learned defence counsel, whereas, no suggestion thereafter being put to him, for falsifying their user, by the respective accused, hence when stands entwined, with, the afore referred incriminatory evidence, rather facilitates, hence, the opening of an inference, qua each of the accused, carrying the relevant mens rea, to cause demise of the deceased, and, hence each of them being liable for theirs, being, punished for the offences charged.

18. For the foregoing reasons, the instant appeal is allowed and the judgment rendered by the learned trial Court is set aside. Consequently, the accused/respondents are convicted for theirs committing offences punishable under Sections 302, 147, 148 read with Section 149 of the IPC. The convicts/accused/respondents herein be produced before this Court on 21/06/2018 for theirs being heard on quantum of sentence.

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

Vikas Sharma .....Petitioner/Plaintiff.

Versus

Varun Sharma & Ors. .....Respondents/Defendants

CMPMO No. 124 of 2015.
Reserved on : 21st May, 2018.
Date of Decision: 31st May, 2018.

Code of Civil Procedure, 1908- Order XL Rule 1 – Appointment of receiver – Held – Court has discretion in matter of appointment of receiver – However, applicant must show that he prima facie, has excellent chance of succeeding in suit – Plaintiff and one of defendants, both were claiming succession to office of 'Mahant' – Plaintiff claiming succession on basis of custom and usages under which only eldest son of last preceding 'Mahant' is to succeed – Defendant 'V' claiming succession on basis of will though he was not eldest son of last preceding 'Mahant' – Plaintiff seeking appointment of receiver for management of affairs of 'Gaddi' during pendency of suit – Held – Prima facie, plaintiff has a good case claiming succession to office of 'Mahant' as per custom and usages- Appointment of receiver to manage affairs and property of 'Gaddi' was found necessary – High Court upheld order of trial court appointing receiver for managing affairs of 'Gaddi' – Order of District Judge interfering with order of trial court and declining appointment of receiver, set aside – Petition allowed. (Para- 3 and 4)

For the Petitioner: Mr. Bimal Gupta, Senior Advocate with Ms. Rubeena Bhat, Advocate.
For the Respondents : Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff, claims succession, to the Guru Gaddi Baba Jhalla Ji. He has prayed, for rendition of a declaratory decree, qua his being entitled to inherit, the Guru Gaddi Baba Jhalla Ji, besides has sought a declaration, qua, defendant No.2, being disentitled to declare himself, as, the Mahant (Jhalla Ji). The substratum, of the claim reared, in the plaint, by the plaintiff, is, squarely rested, upon, there existing customs and traditions, whereunder, succession, to, the Guru Gaddi Baba Jhalla Ji, is bestowable only upon the eldest surviving son, of the preceding Mahant, of, Guru Gaddi Baba Jhalla Ji. Furthermore, the plaintiff avers, of, one Gurdiyal Singh, erstwhile Mahant, of, Guru Gaddi Baba Jhalla Ji, executing a will, on 26.07.2008, in consonance, with, the apt customs and usages, whereunder, he appointed, the plaintiff, being his eldest grand son, to succeed vis-a-vis, the Guru Gaddi Baba Jhalla Ji, upon,

occurrence, of, demise of one Virender Sharma. However, Virender Sharma, upon, occurrence of his demise, on, 22.09.2012, is, disclosed to be survived, by only female issues, and, his widow one Indra Sharma, rather collusively appointing, and, declaring defendant No.2, one Varun Sharma, the youngest grand son, of, one Gurdiyal Singh, to be the Mahant, of, Guru Gaddi Baba Jhalla Ji. In sequel, the plaintiff, avers qua hence derogation vis-a-vis the customs enjoined to be revered, qua succession, to the spiritual seat of Mahant of Guru Gaddi, Baba Jhalla Ji, hence, occurring, derogation whereof, is comprised in the plaintiff, despite, being the eldest grand son, of, Gurdiyal Singh, also, his being bequeathed, the Guru Gaddi Baba Jhalla Ji by his grand father, one Gurdiyal Singh, who, during his life time held the spiritual seat, of, Guru Gaddi Baba Jhalla Ji, rather his youngest grand son, defendant No.2 Varun Sharma, declaring himself, to be the Mahant, of, Guru Gaddi Baba Jhalla Ji.

2. Written statement to the plaint, was, instituted by defendants No.2 to 5, wherein they denied the claim, of the plaintiff, especially, the one occurring, in, the apposite paragraph No.2, contains, a denial, of, their existing custom, tradition, and, usages, vis-a-vis, the succession to the spiritual seat, of Mahant to Guru Gaddi Baba Jhalla Ji, comprised, in the eldest male concerned, being alone entitled to occupy the seat of Mahant of Guru Gaddi Baba Jhalla Ji. It is also contended, in the apposite paragraph No.2, of, the written statement furnished, to, the corresponding paragraph thereof, qua the Guru Gaddi Baba Jhalla Ji, being a spiritual seat, and, succession thereto being only, on, spiritual merit. The learned trial Court, during, the pendency of the suit, on an application cast under the provisions of Order 40, Rule 1 of the CPC, provisions whereof stand extracted hereinafter:-

> **"1. Appointment of receivers.-** (1) Where it appears to the court to be just and convenient, the court may by order—
>
> (a) appoint a receiver of any property, whether before or after decree;
>
> (b) remove any person from the possession or custody of the property;
>
> (C) commit the same to the possession, custody or management of the receiver; and
>
> (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.
>
> (2) Nothing in this rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

by the plaintiff/petitioner herein, for hence appointing, a receiver for managing the funds of the apposite Guru Gaddi Baba Jhalla Ji, allowed the apposite application, whereas, the learned Appellate Court, upon the defendant instituting, an appeal therefrom before it, allowed, the latter's appeal. The plaintiff/petitioner herein is aggrieved therefrom, hence, has instituted the instant petition before this Court.

3. The respective Wills propounded by the plaintiff, and, by defendant No.2, Varun Sharma, respectively, of Gurdiyal Singh, and, of one Virender Sharma, the apposite preceding Mahants, of, Guru Gaddi Baba Jhalla Ji, yet remain to be pronounced, to be validly executed. Moreover, the customs, traditions and usages, espoused by the plaintiff, governing, the inheritance, to, the spiritual seat of Mahant, of , Guru Gaddi Baba Jhalla Ji, AND, as comprised in the eldest son, being solitarily entitled to succeed thereto, are, also under contest. However, the contention raised by defendant No.2, one Varun Sharma, in respect of the aforesaid claim nor the propagation made by the plaintiff in respect thereof, is anvilled, upon, any prima facie material, in support(s) thereof, yet existing on record. However, the apt paragraph 2, of the plaint, makes a graphic/uncontroverted disclosure qua hence succession, to the spiritual seat of Mahant of Guru Gaddi Baba Jhalla Ji, being bestowed, upon, the eldest son, of, the preceding

Mahant, of, Guru Gaddi Baba Jhalla Ji, (I) thereupon, it is prima facie hence inferable qua the relevant customs, usages, and, traditions, rather hence enjoining succession to the apt spiritual seat, of, Mahant of Guru Gaddi Baba Jhalla Ji, by the eldest son, of, the preceding Mahant, of Guru Gaddi Baba Jhalla Ji, prima facie, may be, acquiring some tenacity, dehors, no documentary material in respect thereof yet existing, on record. If so, defendant No.2, Varun Sharma, who, is the youngest grand son, of, one Gurdiyal Singh, the latter whereof, in his life time, held, the apt spiritual seat, of, Mahant of Guru Gaddi Baba Jhalla Ji, and, who bestowed in prima facie conformity, with, the afore referred customs AND, also, bequeathed the spiritual seat of Mahant of Guru Gaddi Baba Jhalla Ji, upon the plaintiff, given the preceding Mahant, one Virender Sharma, being survived by only female issue(s), (ii) does apparently confer vis-a-vis the plaintiff, dehors the apposite wills, being yet not proven, to be validly executed, a right superior to the claim, foisted, by defendant No.2, Varun Sharma, to hence succeed to the spiritual seat, of Mahant, of, Guru Gaddi Baba Jhalla Ji.

4. The aforesaid trite factum, does override, and, benumb, all the conclusions, made by, the learned Appellate Court, contrarily, hence the mandate, of, the Hon'ble High Court Madras, in a case titled as ***T. Krishanaswamy Chetty v. C. Thanguvelu Chetty and others,*** reported in ***AIR 1955 Madras 430,*** the relevant portion whereof, is, extracted hereinafter, qua upon existence, of, imminent proof, of the plaintiff prima facie, holding an excellent chance of succeeding, the Court hence appointing a receiver for the relevant purpose, does obviously, hereat, attain satisfaction.

> "(1) The appointment of a receiver pending a suit is a matter relating, resting in the discretion of the Court.
>
> (2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has a very excellent chance of succeeding in the suit.
>
> (3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration.
>
> (4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. It would be different where the property is shown to be 'in medio', in the enjoyment of no one. And
>
> (5) The Court, on the application made for appointment of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame."

Sequel thereof, is, that with the spiritual seat of Mahant, of Guru Gaddi Baba Jhalla Ji, being blessed, with offerings, by its, followers, and, also its possessing immense assets, and, funds, thereupon, for ensuring the proper management, of all, the apt assets, appertaining, to the Guru Gaddi Baba Jhalla Ji, and, for appropriate management, of the all the offerings, made to the Guru Gaddi Baba Jhalla Ji, thereupon, the appointment of a receiver, as made by the learned trial court, is required to be validated.

5. For the foregoing reasons, the instant petition is allowed and the order render by the learned District Judge concerned in Civil Misc. Appeal No. 04-CMA/14 of 2014 is set aisde, whereas, the order rendered by the learned trial Court on 28.12.2013 is affirmed and maintained. The parties are directed to appear, before, the learned trial Court, on 11th June, 2018. However, it is made clear that the observations made hereinabove shall have no bearings on the merits of the case. No order as to costs. All pending applications also stand disposed of. Records, if received, be sent back forthwith.

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

National Insurance Company Limited ...Petitioner
Versus
Dil Kumari and others ...Respondents

CMPMO No. 166 of 2018
Decided on: 01.06.2018

Employees Compensation Act, 1923- Section 4**- Income Tax Act, 1961**- Section 194A(3)(ix)- Execution of award – Insurance company depositing compensation amount with Commissioner after deducting part towards income tax as TDS- However, Commissioner directing insurer to pay amount deducted as TDS – Petition against by insurer – Held – Compensation payable for bodily injuries or death suffered in a motor accident is in nature of damages and not an income – No amount could have been deducted by insurer towards TDS – Directions issued to Income Tax Officer to refund TDS to insurer so that same could be paid to claimants.

(Paras-5, 7 and 8)

Cases referred:
Court on its own motion vs. The H.P. State Cooperative Bank Ltd. and others, 2014 (Suppl.) Him.L.R. (DB) 2575

For the petitioner: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. Vinay Kuthiala, Senior Advocate, with Mr. Diwan Singh Negi, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

Present petition has been filed against direction passed by the Commissioner under Employees' Compensation Act, Paonta Sahib, District Sirmaur, H.P. (hereinafter referred to as 'the Commissioner') in Execution Petition No. 56/2016 (22/10 of 2016), titled Dil Kumari and others versus National Insurance Company Ltd., filed by claimants/respondents No. 1 to 5 for payment of balance amount of ₹ 47,248/- alongwith interest, which were not paid by the petitioner/Insurance Company to the claimants/respondents but were deducted as TDS for income tax on interest payable to the claimants/respondents on compensation awarded in their favour under Employees' Compensation Act and deposited with respondent No. 6 through Income Tax Officer, Nahan.

2. Facts of the case, in brief, are that the respondents/claimants filed a claim petition being Claim Petition No. 17-ECA/2 of 2011/09 under Section 3 of the Workmen Compensation Act (now Employees' Compensation Act) for compensation on account of death of Shri Tikka Ram Tharu, who, while working as a conductor, died in an accident, dated 5th December, 2009. The Commissioner allowed the petition on 9th December, 2014, by awarding a sum of ₹ 3,79,592.50/- alongwith 12% interest with effect from 5th January, 2010 till its deposit. The petitioner-insurance company, being the insurer, was directed to indemnify the insured.

3. In pursuance to the award, the petitioner-insurance company deposited a sum of ₹ 5,68,586/- vide cheque No. 516815, dated 18th March, 2015 in the Court of the Commissioner after deducting an amount of ₹ 47,248/- towards TDS (20%) on the interest component payable on the compensation amount, which was deducted by the petitioner-insurance company in compliance of Section194 (A)(IX) of the Income Tax Act, 1961. The tax was deposited with respondent No. 6-Income Tax Officer (TDS), Nahan.

4. In execution petition preferred by the claimants/respondents for payment of balance amount of compensation, the Commissioner, vide impugned order, has directed to attach movable property of respondent-petitioner herein for realization of ₹ 75,017/- (₹ 47,248/- + interest).

5. Section 194-A of Income Tax Act, 1961, clearly provides that any person, not being an individual or a Hindu undivided family, responsible for paying to a 'resident' any income by way of interest, other than income by way of interest on securities, shall deduct income tax on such income at the time of payment thereof in cash or by issue of cheque or by any other mode. Compensation awarded under Motor Vehicles Act or Employees' Compensation Act in lieu of death of a person or bodily injury suffered in a vehicular accident, is a damage and not an income and cannot be treated as taxable income.

6. It is well settled that interest awarded by the Motor Accident Claims Tribunal on a compensation is also a part of compensation upon which income tax is not chargeable as also held by the Division Bench of this Court in **Court on its own motion vs. The H.P. State Cooperative Bank Ltd. and others,** reported in **2014 (Suppl.) Him.L.R. (DB) 2575** and reiterated in **CWP No. 460 of 2014,** titled **Shiv Ram Sharma vs. Union of India and others,** and other connected matters vide decision dated 3rd June, 2015. The same principle will be applicable in the present case also.

7. Therefore, in view of abovesaid decision, deduction of income tax by petitioner/Insurance Company on the interest accrued/awarded on the compensation deposited by the petitioner/Insurance Company is illegal and is contrary to the law of land.

8. In view of above discussion, this petition is disposed of directing respondent No. 6-Income Tax Officer, Nahan to refund the TDS to the petitioner/Insurance Company within ten weeks from date of receiving information thereof, which shall be supplied by petitioner/Insurance Company within two weeks from today, as per Rules applicable and petitioner company is also directed to make payment of balance amount of compensation, i.e. ₹ 75,017/-, within four weeks from the date of receipt of refund from Income Tax Officer, failing which petitioner company shall also be liable to pay interest @ 9% per annum on the said amount with effect from 1st February, 2018, till payment/deposit.

9. Petition is disposed of in aforesaid terms. Interim order, dated 14th May, 2018, passed in CMP No. 4311 of 2018 also stands vacated in above terms. The Commissioner is directed to proceed further accordingly. No order as to costs.

Copy **dasti.**

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

National Insurance Company Limited ...Petitioner

Versus

Neem Kumari and others ...Respondents

CMPMO No. 167 of 2018
Decided on: 01.06.2018

Employees Compensation Act, 1923- Section 4**- Income Tax Act, 1961**- Section 194A(3)(ix)- Execution of award – Insurance company depositing compensation amount with Commissioner after deducting part towards income tax as TDS- However, Commissioner directing insurer to pay amount deducted as TDS – Petition against by insurer – Held – Compensation payable for bodily injuries or death suffered in a motor accident is in nature of damages and not an income – No

amount could have been deducted by insurer towards TDS – Directions issued to Income Tax Officer to refund TDS to insurer so that same could be paid to claimants. (Paras-5, 7 and 8)

Case referred:
Court on its own motion vs. The H.P. State Cooperative Bank Ltd. and others, 2014 (Suppl.) Him.L.R. (DB) 2575

For the petitioner:	Ms. Devyani Sharma, Advocate.
For the respondents:	Mr. Vinay Kuthiala, Senior Advocate, with Mr. Diwan Singh Negi, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

Present petition has been filed against direction passed by the Commissioner under Employees' Compensation Act, Paonta Sahib, District Sirmaur, H.P. (hereinafter referred to as 'the Commissioner') in Execution Petition No. 57/2016 (23/10 of 2016), titled Neem Kumari and another versus National Insurance Company Ltd., filed by claimants/respondents No. 1 and 2 for payment of balance amount of ₹ 64,442/- alongwith interest, which were not paid by the petitioner/Insurance Company to the claimants/respondents but were deducted as TDS for income tax on interest payable to the claimants/respondents on compensation awarded in their favour under Employees' Compensation Act and deposited with respondent No. 3 through Income Tax Officer, Nahan.

2. Facts of the case, in brief, are that the respondents/claimants filed a claim petition being Claim Petition No. 10-ECA/2 of 2011/09 under Section 4 of the Workmen Compensation Act (now Employees' Compensation Act) for compensation on account of death of Shri Dhan Bahadur, who, while working as a driver, died in an accident, dated 7th January, 2009. The Commissioner allowed the petition on 13th January, 2015, by awarding a sum of ₹ 4,36,940/- alongwith 12% interest with effect from 7th February, 2009 till its deposit. The petitioner-insurance company, being the insurer, was directed to indemnify the insured.

3. In pursuance to the award, the petitioner-insurance company deposited a sum of ₹ 6,94,708/- vide cheque No. 516819, dated 3rd March, 2015 in the Court of the Commissioner after deducting an amount of ₹ 64,442/- towards TDS (20%) on the interest component payable on the compensation amount, which was deducted by the petitioner-insurance company in compliance of Section194 (A)(IX) of the Income Tax Act, 1961. The tax was deposited with respondent No. 3-Income Tax Officer (TDS), Nahan.

4. In execution petition preferred by the claimants/respondents for payment of balance amount of compensation, the Commissioner, vide impugned order, has directed to attach movable property of respondent-petitioner herein for realization of ₹ 1,02,774/- (₹ 64,442/- + interest).

5. Section 194-A of Income Tax Act, 1961, clearly provides that any person, not being an individual or a Hindu undivided family, responsible for paying to a 'resident' any income by way of interest, other than income by way of interest on securities, shall deduct income tax on such income at the time of payment thereof in cash or by issue of cheque or by any other mode. Compensation awarded under Motor Vehicles Act or Employees' Compensation Act in lieu of death of a person or bodily injury suffered in a vehicular accident, is a damage and not an income and cannot be treated as taxable income.

6. It is well settled that interest awarded by the Motor Accident Claims Tribunal on a compensation is also a part of compensation upon which income tax is not chargeable as also held by the Division Bench of this Court in **Court on its own motion vs. The H.P. State**

Cooperative Bank Ltd. and others, reported in **2014 (Suppl.) Him.L.R. (DB) 2575** and reiterated in **CWP No. 460 of 2014,** titled **Shiv Ram Sharma vs. Union of India and others,** and other connected matters vide decision dated 3rd June, 2015. The same principle will be applicable in the present case also.

7. Therefore, in view of abovesaid decision, deduction of income tax by petitioner/Insurance Company on the interest accrued/awarded on the compensation deposited by the petitioner/Insurance Company is illegal and is contrary to the law of land.

8. In view of above discussion, this petition is disposed of directing respondent No. 6-Income Tax Officer, Nahan to refund the TDS to the petitioner/Insurance Company within ten weeks from date of receiving information thereof, which shall be supplied by petitioner/Insurance Company within two weeks from today, as per Rules applicable and petitioner company is also directed to make payment of balance amount of compensation, i.e. ₹ 1,02,774/-, within four weeks from the date of receipt of refund from Income Tax Officer, failing which petitioner company shall also be liable to pay interest @ 9% per annum on the said amount with effect from 31st March, 2015, till payment/deposit.

9. Petition is disposed of in aforesaid terms. Interim order, dated 14th May, 2018, passed in CMP No. 4322 of 2018 also stands vacated in above terms. The Commissioner is directed to proceed further accordingly. No order as to costs.

Copy **dasti.**

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Prakash Chand .....Appellant.

Versus

State of H.P. .....Respondent.

Cr. Appeals No. 275 & 299 of 2016
Reserved on: 17.05.2018
Decided on: 01.06.2018

Indian Evidence Act, 1872- Section 3- Circumstantial Evidence – Held – In a case based on circumstantial evidence, prosecution must prove all necessary circumstances and same should constitute a complete chain without a snap. (Para-21)

Indian Evidence Act, 1872- Section 106- Facts within specific knowledge of accused - Proof of - Held- Accused must prove such facts, which are within his exclusive knowledge – On failure to prove such facts, adverse inference can be drawn against him. (Para-24)

Indian Penal Code, 1860- Sections 201, 302 and 120-B – Prakash Chand (A-1) convicted by Additional Sessions Judge for offence under Section 302 for murdering his wife 'N' by giving stick blows and also by strangulation – Trial Court also convicted and sentenced him alongwith Bhim Singh (A-2) for offences under Section 201 and Section 120-B for causing disappearance of evidence of commission of offence - Appeals against conviction and sentence – A-1 contending before High Court that evidence was not correctly appreciated by trial court – Plea being that on return to home, he saw his wife in an objectionable condition with stranger and during scuffle with that man, his wife fell on a corner of trunk, sustained injuries and died – On facts, it was found that accused hired taxi of complainant in order to take dead body bundled in a clothe but on complainant's questioning as what was inside the bundle, A-1 went to his shop and closed its shutters from inside whereas, A-2 fled away - A-1 was found in exclusive possession of dead body of his wife when police came and got opened shutters of a shop - All injuries on body of deceased

were not possible by strike against corner of trunk – A-1 did not take any step for medical help of his wife, which he would have otherwise done had she sustained injuries by accidental fall – A-1 also didn't lead any evidence to probablize his plea of scuffle with stranger – He also not suggesting name of stranger with whom his wife was found in objectionable condition and with whom he had a scuffle – Held – Chain of circumstances proved on record clearly established guilt of accused beyond reasonable doubts – Judgment of conviction and order of sentence of trial court upheld – Appeals dismissed. (Paras-23 to 27)

For the appellant(s): Mr. H.S. Rangra, Advocate.
For the respondent/State: Mr. Sudhir Bhatnagar, Additional Advocate General with Mr. Bhupinder Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeals are maintained by the appellants/convicts/accused (hereinafter referred to as "the accused persons"), laying challenge to judgment dated 15.06.2016, passed by learned Sessions Judge (I), Mandi, District Mandi, H.P., Camp at Karsog, in Sessions Trial No. 16 of 2014, whereby accused Prakash Chand was convicted and sentenced for the commission of the offence punishable under Section 302 and 201 read with Section 120B of Indian Penal Code, 1860 (hereinafter referred to as "IPC") and accused Bheem Singh was convicted and sentenced for the commission of the offence punishable under Sections 201 and 120B IPC.

2. The gravamen of the prosecution story, whereupon, the accused persons were sent to face Trial before the Learned Trial Court can tersely be summarized as under:

On 28.05.2014, one Shri Mahinder Singh (complainant) telephonically informed police of Police Station, Karsog, that Prakash Chand and Bheem Singh (accused persons) were loading a bale (*ghatari*) in his vehicle, outside Prakash Chicken Corner, Nayara, Karsog, and when he inquired from them that what is there in the bale, the accused persons took the bale inside the chicken corner and accused Prakash Chand closed shutter of the shop. The complainant further informed that accused Bheem Singh fled away from the spot, so he got suspicious that there may be dead body of a person inside the bale. On the basis of the above information, a police team headed by SHO Rajesh Kumar rushed to the spot and shutter of Prakash Chicken Corner was found closed from inside. Police in the intervening night of 28/29.05.2014, around 12:00 a.m. got opened the shutter of the shop from inside and the complainant identified accused Prakash Chand. There was a bale lying on the floor of the shop, which was covered with yellow and red cloth and it was tied with blanket, which was chocolate in color. On checking, a dead body of a woman, namely Narbada, wife of accused Prakash, was recovered. SHO recorded the statement of the complainant under Section 154 Cr.P.C. and the same was sent, through Constable Rajesh Kumar, to Police Station Karsog, whereupon FIR against the accused persons was registered. Thereafter, the investigation ensued and the police took into possession the dead body alongwith blanket, clothes etc. and, sealing formalities were also completed. Dupatta (*chunnri*), quilt cover and quilt were also taken into possession and the same were also sealed in a parcel and its sample seal was taken on a separate piece of cloth. Registration certificate of the shop was obtained and the spot map was prepared. Post mortem of the dead body was conducted. During the course of investigation, accused Prakash Chand made a disclosure statement under Section 27 of The Indian Evidence Act and led the police team to his chicken corner, wherefrom he got recovered a stick (*danda*) from a wooden almirah, which was taken into possession. As per the medical opinion, the injuries on the person of the deceased were possible with *danda.* Revenue record qua the shop of the accused Prakash Chand was also obtained. The accused persons were medically examined and the spot was photographed and videographed. Statements of the witnesses were recorded and scientific evidence collected from

the spot was sent to forensic analysis to RFSL, Mandi. It was unearthed in the investigation that on 28.05.2014, around 10:30 p.m., accused Prakash Chand intended to hire the taxi of complainant at village Nayara (Karsog) on fair of Rs.200/- (rupees two hundred). Subsequently, both the accused persons brought a bale from the shop of accused Prakash Chand, which was wrapped in a blanket, and when the complainant asked what is inside the bale, accused Bheem Singh fled away from the spot and accused Prakash Chand closed the shutter of the shop. Thus, it was concluded that accused Prakash Chand committed the murder of his wife and accused Bheem Singh has conspired with him to cause disappearance of the dead body of the deceased from the spot to save accused Prakash Chand. After conclusion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as seventeen witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty. However, the accused persons did not lead any defence evidence.

4. The learned Trial Court, vide impugned judgment dated 15.06.2016, convicted accused Prakash Chand and sentenced him to undergo rigorous imprisonment for life for the commission of offence punishable under Section 302 read with Section 120B IPC and to pay fine of Rs.10,000/- (rupees ten thousand) and in default of payment of fine he was ordered to further undergo rigorous imprisonment for a period of one year. Accused Prakash Chand was also convicted and sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of Rs.10,000/- (rupees ten thousand) for the commission of offence punishable under Section 201 read with Section 120B IPC and in default of payment of fine he was further ordered to undergo rigorous imprisonment for a period of three months. Accused Bheem Singh was also convicted and sentenced to undergo rigorous imprisonment for a period of two years for the commission of offence punishable under Sections 201 read with Section 120B IPC and to pay fine of Rs.5000/- (rupees five thousand) and in default of payment of fine he shall further undergo simple imprisonment for a period of three months. The sentences of accused Prakash Chand was ordered to run concurrently. The accused persons feeling aggrieved and dissatisfied have preferred the present appeals.

5. The learned counsel for the appellants has argued that the learned Trial Court has wrongly and erroneously held the appellants guilty. He has argued that there are major contradictions in the statements of PW-1, PW-2, PW-6, PW-9, PW-11, PW-12 and PW-14. He has argued that appellant No. 1, Prakash Chand, found the deceased in an objectionable condition with some stranger, so a scuffle took place between appellant Prakash Chand and that stranger. In the scuffle, the deceased fell down over the corner of the trunk and sustained fatal injuries. He has further argued that the incident took place in presence of children of accused Prakash Chand, so non-examination of key eye witnesses makes the prosecution case weak. The learned Trial Court has passed the judgment only on surmises and conjectures, so the appeals be allowed and the appellants be acquitted by setting aside the impugned judgment. Conversely, the learned Additional Advocate General has argued that the judgment of conviction, as passed by the learned Trial Court, is correct and the same does not suffer from any illegality. He has further argued that the evidence clearly proves that appellant Prakash Chand murdered the deceased and appellant Bheem Singh was aiding appellant Prakash Chand to dump the dead body occutly. He has further argued that there is no merit in the appeals, so filed by the appellants against the impugned judgment of the learned Trial Court, thus the same be dismissed.

6. In rebuttal, the learned counsel for the appellants has argued that as there major lacunae in the testimonies of the prosecution witnesses, so the appeals be allowed and by setting aside the judgment of the learned Trial Court, and the appellants be acquitted.

7. To appreciate the rival contentions of the parties we have gone through the record carefully.

8. In order to bring home the guilt, the prosecution mainly relied upon the testimony of the complainant, who claimed that the accused persons hired his vehicle and they

tried to load in his vehicle a bale. On suspicion that the bale may have human body, he inquired from the accused persons, so accused persons took the bale inside the shop. Accused Bheem Singh fled away from the spot and accused Prakash Chand closed the shutter of the shop from inside and he remained inside the shop. Subsequently, the complainant telephonically complained the matter to the police. Thus, the very narration of facts by the complainant (PW-1) is vital in the case in hand.

9. PW-1, Shri Mohinder Singh (complainant) deposed that he is a driver and on 28.05.2014, around 10:30 p.m., when he was sitting in his vehicle, which was parked outside the Prakash Chicken Corner, Nayara, accused Prakash, who is a *nepali,* and known to him asked him to hire his vehicle to drop a person at Sanarli and Rs.200/- was settled as fare. He has further deposed that both the accused persons brought a bale (*gathari*), which was wrapped in a blanket. On his inquiry accused Prakash Chand disclosed that there are torn bags of cement inside the bale and the same are to be returned at Sanarli. When he asked to show him what is inside, the accused persons took the bale to their shop and closed the shutter of the shop. As per the testimony of this witness, accused Bheem Chand fled from the spot towards the bus stand and accused Prakash Chand switched off the light of his shop and remained inside. So, he telephonically informed the police and police reached the spot after 15-20 minutes. On the direction of the police, accused Prakash Chand opened the shutter of the shop at about 12:10 a.m. The bale was checked and the dead body of deceased Narbada was found wrapped in a blanket and a flowery cloth. Blood was oozing from the nose and there was head injury on the dead body. His statement was recorded by the police, which is Ex.PW-1/A. Police prepared the spot map, clicked photographs and took into possession a *danda,* which was stained with blood, and blood stained clothes through seizure memo, Ex. PW-1/B, which were sealed in a cloth parcel. This witness, also recognized parcel, Ex. P1, *dupatta* Ex. P2, *Khind* (quilt) Ex. P3, quilt cover Ex. P4, as the same which were taken into possession on 29.05.2014 by the police from the spot. He has further deposed that he alongwith Raju signed the memo. The dead body was taken into possession through memo, Ex. PW-1/C. On 31.05.2014 police took into possession, vide memo Ex. PW-1/D, a blanket and a quilt cover, which were stained with blood. This witness also recognized in the Court parcel, Ex. P5, blanket, Ex. P6, and quilt cover, Ex. P7. He and Raju signed the memo. As per this witness, vide memo Ex. PW-1/E, police took into possession the registration certificate of the shop. This witness, in his cross-examination, has deposed that in the outer portion there is shop and the inner portion was used by accused Prakash Chand as residence. He admitted that three children used to reside in the room and on 28.05.2014 when the police came on the spot all the three children were there inside the residential area. As per this witness, there was dried blood on the floor. There is welding shop in front of the shop of the accused and there are 7-8 shops near the shop of the accused, out of which welding shop was open at that time.

10. To sustain the charge leveled against the accused persons the prosecution further relied upon the ocular evidence of PW-2, Leeladhar, who deposed that he works in a welding shop of Puneet Bhardwaj, Nayar Karsog and accused Prakash Chand used to run his shop alongwith Narbada in front of that welding shop. He has further deposed quite often accused (Prakash Chand) and deceased (Narbada) used to quarrel. On 28.05.2014 he was not in the shop and had gone to Sanarli for work and on 29.05.2014 he came to know that deceased was killed by accused Prakash Chand and the police reached the spot. This witness, was declared hostile. He, in his cross-examination, has deposed that he did not see the deceased in the shop prior to 2-3 days from the occurrence. He has deposed that accused used to work with Vishal Traders from 06:00 a.m. to 01:00 p.m. Three children of the accused used to reside in the same shop and the eldest daughter of accused is mentally alert. As per this witness, the accused never gave beatings to the deceased in his presence. Police told him that accused has killed his wife.

11. PW-3, Shri Duma Ram (brother of the deceased) deposed that the deceased was married to accused Prakash Chand. On 28.05.2014 police came to his house and informed that his sister has been killed. As per this witness, deceased and accused Prakash had strained

relations. Eldest daughter of the deceased is handicap and mentally retarded. Police entrusted the custody of the children to him and dead body was also handed over to him for cremation. In his presence, the police prepared the inquest report. He saw injury on the dead of the deceased and blood was oozing from her head. This witness, in his cross-examination, has deposed that he and his parents were not happy with the marriage and they had boycotted them.

12. PW-4, Dr. Naveen Kashyap, deposed that on 29.05.2014, through application, Ex. PW-4/A, police requested him for conducting postmortem of the deceased. He, after conducting the postmortem of the deceased issued report, Ex.Pw-4/B. As per the opinion of this witness, cause of death was Hypovolaemic shock. The deceased sustained injury on her head, contusion on left side of abdomen and two lacerated wounds on the head. He has further deposed that injury was blunt in nature and caused within less than three days. Ligature mark on the neck was also found, which was 1.5 cm in width. He has deposed that an attempt to strangulate the deceased was also made after the process of her death started. Fracture on the frontal and parietal bone of head was also noticed. There was sub-dural hemorrhage in the frontal brain. He sent the viscera of the deceased to FSL and on perusal of FSL report, Ex. PX-1, he gave his final opinion. He also sealed the clothes of the deceased in a parcel and took the blood sample of the deceased in a vial, which was sealed with seal of CH, Karsog, and gave the same to the police. He has further deposed that on 31.05.2014 police showed him a *danda* and sought his opinion through application, Ex. PW-4/C. As per his opinion, injuries on the person of the deceased could be possible with the *danda* shown to him. This witness also medically examined the accused persons and issued their medico legal certificates, which are Ex. PW-4/E and Ex. PW-4/F. This witness, in his cross-examination, has deposed that lacerated wounds were possible by blows of blunt object, by fall on hard surface or by machinery, traffic accident etc. He has further deposed that injuries could also be possible in a scuffle and by tricking against hard object, except the injury on the neck. If the dead body is in advance stage of putrefaction and tried to be transported other injuries may be caused.

13. PW-5, HHC Virender Kumar, deposed that on 28.05.2014 he recorded *Rapat* No. 63, Ex. PW-5/A, on the basis of the information given by the complainant. PW-6, HC Chhaju Ram, deposed that on 29.05.2014 SI/SHO Rajesh Kumar deposited with him two parcels of cloth, which were sealed with seal A at ten places. As per this witness, parcel contained a quilt cover, and a quilt of red color, which was stained with blood. He entered the same at Sr. No. 50 in the *malkhana* register No. 90, vide abstract, Ex. PW-6/A. Other parcel was also sealed with seal 'T' at ten places. On 29.05.2014, ASI Amar Nath deposited with him two parcels each sealed with seal CHK, Karsog at three places. One parcel said to have contained clothes of the deceased and the another parcel containing viscera, a vial, which contained blood sample and a letter sealed with seal CHK was also deposited with him, which he entered at Sr. No. 51 in *malkhana* register No. 90, abstract thereof is Ex. PW-6/B. He has further deposed that on the same day ASI Amar Nath deposited with him parcel, which was sealed with seal CHK, containing the clothes of accused Prakash Chand, two vials sealed with seal CHK, stated to have contained blood samples of accused Prakash Chand and Bheem Singh, and two letters addressed to FSL, Mandi, alongwith sample seal, which he entered at Sr. No. 52, vide abstract, Ex. PW-6/C. As per the testimony of this witness, on 02.06.2014, vide RC No. 68/2014, the case property was sent to RFSL, Mandi, through Constable Rajesh Kumar. On 31.05.2014 Constable Inder Singh deposited with him a parcel, sealed with seal CHK at three places, containing a *danda,* which was entered by him at Sr. No. 53, vide abstract Ex. PW-6/C. PW-7, Santosh Kumar, Patwari, deposed that application, Mark X, was moved to Tehsildar, Karsog, by the police and on the direction of the police, he prepared *Aks tatima,* Ex. PW-7/A, which bears his signatures at two places. He has also prepared *jamabandi,* which is Ex. PW-7/B, which also bears his signatures.

14. PW-8, Rajesh Kumar, Junior Engineer, HPPWD, Karsog, deposed that upon the direction of Assistant Engineer, HPPWD, Karsog, he prepared location plan, Ex. PW-8/A, of Prakash Chicken Corner, which was further countersigned by Assistant Engineer and his signatures on the same is in red circle 'B'. Through letter, Ex. PW-8/B, the location plan was sent to the SHO, Police Station, Karsog. PW-9, Tek Chand, Pradhan, Gram Panchayat, Karsog,

deposed that on 31.05.2014 he alongwith Up Pradhan, Narender Bhardwaj, were present in Police Station, Karsog. In their presence accused Prakash Chand disclosed about the occurrence. He has further deposed that accused Prakash Chand also led them to his room and got recovered a *danda* from an almirah. As per this witness, photography and videography was also done. The recovered *danda* was put in a parcel, which was sealed with seal impression 'H' at three places. He has identified *danda* in the Court and also his signatures on the recovery memo, Ex. PW-9/A. Witness Narender also signed the recovery memo. Disclosure statement, Ex.PW-9/B, was prepared in the Police Station, which bears his and the signatures of Narender. He has further deposed that blood stains were visible on the *danda,* when it was recovered. This witness, feigned his ignorance that seal, after its use, was handed over to him or not. He has further deposed that as considerable time has elapsed, so he does not remember many things. Seal impression, Ex. PW-9/C, of seal 'H' bears his signatures. This witness, in his cross-examination, has deposed that when the documents were readover to him, then he put his signatures on them.

15. PW-10, ASI Sohan Lal, deposed that on 29.05.2014, statement of Mahinder Singh (complainant), Ex.PW-1/A, was given to him by Constable Rajesh Kumar for registration of FIR. Ex. PW-1/A was having endorsement of SI Rajesh Kumar. On the basis of statement, Ex. PW-1/A, and endorsement thereon, FIR was registered at Police Station, Karsog, copy of which, Ex. PW-10/A, which bears his signatures. As per this witness, he also made an endorsement qua FIR, Ex. PW-10/B, which bears his signatures on reverse of Ex. PW-1/A and *missal* of the FIR was also sent to SI/SHO Rajesh Kumar, through Constable Rajesh Kumar for further investigation. PW-11, ASI Amar Singh, deposed that on 28.05.2014, at about 11:15 p.m., he alongwith SI/SHO Rajesh Kumar, ASI Amar Nath, HC Tej Singh, Constables Rajesh Kumar, Pawan Kumar and HHG Naresh Kumar, went to the spot at Nayara, in government vehicle, having registration No. HP-33-8179, which was being driven by HHC Devu Ram. He has further deposed that at that time the shutter of Prakash Chicken Corner was closed from inside and the same was got opened at about 12:10 a.m. on 29.05.2014. Accused Prakash Chand was identified by Mahinder Singh. Thereafter, SI/SHO went inside the shop and one bail (*ghathri*) was found on the floor and it was tied from outside with yellow cloth and red color. Inside the cloth there was a blanket, which was chocoloate and cream in colour. The bale was checked and dead body of a woman was found. The dead body was having cut like mark on forehead and blue color mark was on the neck. Blood was oozing out of the nose of the dead body. The dead body was identified by Mahinder Singh (PW-1, complainant) to be of Narbada wife of Prakash Chand. As per this witness, Mahinder Singh told that Prakash Chand and one *nepali,* i.e., Bheem Singh, were trying to load the said bale in his pick up. In presence of this witness, videography and photography was done by SI/SHO. He has further deposed that Mahinder Singh told that accused Prakash Chand and Bheem Singh were trying to load the said bale in his vehicle and on suspicion by him they took the bale inside the shop. Accused Bheem Singh fled away from the spot and accused Prakash Chand closed the shop from inside. As per the testimony of this witness, on 29.05.2014, at about 07:40 p.m., he deposited a parcel, which was having three seals of impression CHK containing clothes of Prakash Chand, seal CHK and a vial, which was having three seals of impression CHK, stated to have contained blood sample of Prakash Chand, another vial, which was sealed with three seals of impression CHK stated to have contained blood sample of accused Bheem Singh and two letter, which were addressed to FSL with seals of CHK, with MHC for being deposited in *malkhana.* This witness, in his cross-examination, has deposed that he did not see any blood stains on the floor. He denied that there were blood stains in the corner of the trunks. He has further deposed that during the course of investigation Deputy Superintendent of Police, Sundernagar, went to the shop of accused Prakash Chand.

16. PW-12, Constable Rajesh Kumar, deposed that on 28.05.2014, he alongwith SHO, ASI Amar Singh, ASI Amar Nath, HC Tej Singh, Constables Raj Kumar and Paran Kumar and HHG Naresh Kumar went to the spot in police vehicle, which was driven by Debu Ram. As per this witness, when they reached at Nayara, complainant, Mahinder Singh, was standing outside the closed shop of accused Prakash Chand. SHO got the shutter opened and accused Prakash Chand was found inside. Complainant Mahinder Singh also informed them that

accused Prakash Chand is inside the shop. He has further deposed that a dead body of a lady was found wrapped in a blanket, which was chocolate in color, and it was again wrapped in cloth like blanket, which was yellow and red in color. As per this witness, there were injury marks and clotted blood was found on the dead body. Accused Prakash Chand informed them that accused Bheem Singh had fled away. The spot was photographed and videographed. Statement of the complainant was recorded under Section 154 Cr.P.C, which is Ex. PW-1/A, and spot map was prepared. Statement, Ex. PW-1/A, was given to him, which he took to Police Station, Karsog, for registration of FIR and after registration of FIR, he came back on the spot. He has further deposed that on 02.06.2014 ten parcels, having the case property, were given to him by the MHC alongwith four envelops. All the parcels were sealed with different seals of impression 'A', 'T' and 'CHK'. He, on 02.06.2014, vide RC No. 68/14, deposited the case property in RFSL, Mandi, and receipt thereof was handed over by him to MHC, Karsog. The case property remained intact under his custody. This witness, in his cross-examination, has deposed that there are other shops adjacent to the shop of accused Prakash Chand. He has further deposed that SHO made investigation from the children, but they were scared and were sitting on the bed. As per this witness, in the inner portion of the shop there was a bed, kitchen material and trunks (boxes) were lying in the corner. He feigned his ignorance that there were blood stains on the corners of the trunks. SHO opened the trunk in his presence, but he could not state as to what was inside the trunk. On 28.05.2014, he again visited the spot and entrusted the custody of the children to their grandparents, but the grandparents were not called on the spot.

17. PW-13, Thakur Sen, deposed that on 28.05.2014, at about 11:30 p.m., the shutter of the shop of the accused was got opened by the police in his presence and from inside a dead body of a lady was recovered, which was wrapped in a blanket. This witness could not identify the accused in the Court, as the same person, who was inside the shop. As per this witness, there were injury marks on the dead body. This witness was declared hostile, as he has resiled from his previous statement and subjected to cross-examination. He, in his cross-examination, has deposed that after opening the shutter, inside the shop light was switched on. He feigned his ignorance that when the light was switched on, the accused Prakash Chand was present inside the shop. He has further deposed that there were children inside the shop and the police did not make any investigation from them. When the shutter of the shop was opened, there was no light outside and inside the shop. The complainant was present there at that time. As per this witness, there is welding shop in front of the shop of the accused.

18. PW-14, SI Rajesh Kumar, investigated the matter, so his statement is very vital. He has deposed that on 28.05.2014 police received a telephonic call from one Mahinder Singh (complainant), who has informed that he is standing outside the shop of accused Prakash Chand at Nayara. The information so disclosed by Mahinder Singh was reduced to writing in *rapat,* Ex. PW-5/A. Thereafter, he alongwith other police personnel went to the spot in police vehicle, having registration No. HP33-8179. As per his testimony, they reached the spot at about 11:15 p.m. and found the complainant standing outside the shop of Prakash Chand. The complainant had already informed them telephonically that accused Prakash Chand and one other person were loading a bale in his vehicle, which was wrapped in a blanket, and on suspicion when he asked them what is inside the bale they took the same inside the shop. He has further deposed that shutter of the shop of accused Prakash Chand was opened and light, which was inside the shop, was switched on. This witness has categorically deposed that accused Prakash Chand, who was sitting inside the shop, opened the shutter of the shop from inside. They found a bale, which was wrapped in a blanket and the blanket was covered with a cover of cloth. The bale was opened and a dead body of a lady was found inside. There were injury marks on her forehead and clotted as also diluted blood was found around the nose of the dead body. Strangulations marks were also on the neck of the dead body. The complainant identified the dead body as of Narbada, wife of accused Prakash Chand. As per this witness, statement of the complainant, Ex. PW-1/A, was recorded by him and the same was sent, through Constable Rajesh Kumar, to police station. During the course of investigation accused Prakash Chand disclosed the name of other accused as Bheem Singh. Three children, who were inside the shop, were handed over to their maternal

uncle. Subsequently, he went to Sarnali, as the parents of deceased are from Saranali. The dead body was taken into possession vide memo, Ex. PW-1/C, and blanket and cover of cloth were taken into possession vide memo, Ex. PW-1/D. As per this witness, blanket and cover of cloth were sealed in a parcel and seal with ten seals of impression 'T'. Sample seal was also taken separately on piece of cloth, vide memo Ex. PW-1/D. He has further deposed that blanket and cover of cloth were sealed with ten seals of impression 'T' in a parcel and facsimile seal was also taken on a piece of cloth, which is Ex. PW-14/A-1. There was a trunk on the inner side of the shop, which was stuffed with clothes. As per this witness, a *dupatta*, quilt cover and quilt, which were found inside the trunk, were put in a parcel, sealed with ten seals, having impression 'A', taken into possession vide memo Ex. PW-1/B, and the same were stained with blood. Registration certificate of the shop, Ex. PW-14/B, was also obtained and site plan, Ex. PW-14/C, was prepared. Inquest report, Ex. PW-14/D, was prepared. Through application, Ex. PW-4/A, the dead body was sent for postmortem and postmortem report is Ex. PW-4/B. The spot was photographed and videographed through a private photographer. Accused Bheem Singh was apprehended and both the accused persons were arrested. He has further deposed that through disclosure statement, Ex. PW-9/B, accused Prakash Chand, led the police party to his shop and he got recovered a *danda* from a wooden almirah. The said *danda* was sealed in a parcel and sealed with three seals having impression 'H' and facsimile seal was taken on a separate piece of cloth, which is Ex.PW-14/E. The accused persons were medically examined. Through application, Ex. PW-14/F, which was moved to Executive Engineer, PWD, Karsog, scale map, Ex. PW-8/A, of the shop was prepared. He has further deposed that site map, Ex. PW-14/G, was also prepared and application, Ex. PW-14/H, was moved to Tehsildar, Karsog, whereupon *jamabandi,* Ex. PW-7/B and *tatima*, Ex. PW-7/A, were procured. Statements of witnesses, i.e., Leeladhar, Ex.PW-14/J, Tek Chand, Ex. PW-14/K and Thakur Sen, Ex. PW-14/L, were recorded. This witness, in his cross-examination, has deposed that there are 7-8 shops adjacent to the shop of accused Prakash Chand. As per his version owner of the shop of accused Prakash Chand also resides in the same building. It was unearthed during the investigation that on 27.05.2014 the shop of accused Prakash Chand was opened and its shutter was not closed. He has admitted that during the period from 27.05.2014 to 28.05.2014 many persons entered inside the shop. He has deposed that there were two girls and a boy inside the shop and he made inquires from them, but he did not record their statements. Accused Prakash Chand could not be medically examined upto 29.05.2014, as there was other work. There were no blood stains on the corner of the trunk. As per the testimony of this witness, the disclosure statement of accused Prakash Chand was recorded in the police Station. During the course of investigation it was found that when on 27.05.2014, at about 08:30 to 09:00 a.m., accused came to his house, he found the deceased in an objectionable position with some other person.

19. PW-15, Shri Nikka Ram, deposed that on 29.05.2014 on being requested by the police, he clicked photographs, Ex. PW-15/B-1 to Ex. PW-15/B-14, of the dead body and also videographed the spot. He has further deposed that he prepared CD, Ex. PW-15/A. PW-16, HC Tej Singh, deposed that on 28.05.2014 he alongwith other police officials went on the spot and found the shop of the accused closed. The shop was closed from inside and it was opened by accused Prakash Chand. He has further deposed that when they entered inside the shop, they found something wrapped in red and yellow cloth, which was lying in the outer room. When the wrapping was opened, something was found wrapped in a chocolate blanket and on opening the blanket a dead body of female was recovered. The dead body was having injury on forehead, blood was oozing out of the nose and there were strangulation marks on the neck. The complainant identified the dead body as wife of accused Prakash Chand. This witness has further deposed that the complainant informed them that the accused persons were trying to load the dead body in his vehicle and when, on suspicion, he inquired from them what is in the bale, the accused persons took the dead body back to the shop. Thereafter, accused Prakash Chand pulled down the shutter of the shop and accused Bheem Singh fled away from the spot. As per the version of this witness, accused Bheem Singh was later apprehended by the police. SHO got clicked photographs and also videographed the spot. On 02.06.2014 he sent the case property, qua which entries were made in the *malkhana* register, vide RC No. 68/14, through constable

Rajesh Kumar, to RFSL, Mandi. This witness, in his cross-examination, has deposed that he did not notice any blood stains on the trunk lying in the room. He has further deposed that Investigating Officer made inquires from the girl, but she did not respond.

20. PW-17, SI Sunil Kumar, deposed that on 02.08.2014 he wrote the statement of Rajesh Kumar and HC Chhaju Ram. He has also procured certificate, Ex. PW-17/A, which was signed in his presence by Nikka Ram, from the photographer/videographer. He has further deposed that on 07.08.2014 he procured the final opinion of Medical Officer on post mortem report, Ex. PW-1/B, after receiving RFSL reports, Ex. PX and Ex. PX/1.

21. Now the contentions of the learned counsel for the appellants have to be analyzed on the touchstone of the testimonies of the prosecution witnesses. Admittedly, the present is not a case of direct evidence and is a case of circumstantial evidence. It is settled law that in case of circumstantial evidence the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and guilt of the accused cannot be based merely on incriminatory circumstances unless it is backed by reliable and clinching evidence. In the wake of settled legal position qua the circumstantial evidence, the chain of circumstances, as emerge, after discussing the testimonies of the prosecution witnesses, needs discussion, to arrive at some conclusive conclusion.

22. As per the prosecution story, accused Prakash Chand killed his wife (the deceased) and accused Bheem Singh was trying to help accused Prakash Chand to dump the dead body. Admittedly, upon the information given by PW-1, Mahinder Singh, the police investigation ensued. Thus, the testimony of PW-1 is vital. He has categorically deposed that on 28.05.2014, at about 10:30 p.m. when he was sitting in his vehicle accused Prakash Chand came and asked him to hire his vehicle upto Sanarali to drop a person. He has further deposed that the accused persons brought a bale and when he asked what is in the bale, they took the bale to the shop. Thereafter, accused Bheem Singh fled away from the spot and accused Prakash Chand closed the shutter of the shop from inside. He informed the police and in his presence accused Prakash Chand opened the shutter of the shop. He has further categorically deposed that from inside the shop of accused Prakash Chand a bale was recovered and upon checking the same dead body of Narbada (wife of accused Prakash Chand) was recovered. As per this witness, there are injury marks on the person of the deceased and blood was oozing from the nose. This witness identified both the accused persons in the Court. In presence of this witness, recovery of *danda,* quilt and quilt cover was made and he identified the same in the Court. The testimony of this witness remained unshattered, when he was exhaustively cross-examined. Thus, key link in the chain of the circumstances stands fully established.

23. The learned counsel for the appellants vehemently contended that three children were present inside the shop when the police allegedly recovered the dead body of the deceased. He has further contended that PW-2, Leeladhar and PW-13, Thakur Sen, did not support the prosecution case. Indisputably, PW-14, SI Rajesh Kumar, in his cross-examination has deposed that there were two girls and a boy inside the shop. The age of the eldest girl was eleven years, boy was eight years age and younger girl was two years' of age. He made inquires from these children, but he did not record their statements. Now, non-recording of the statements of these children cannot be said to be fatal to the prosecution case, as present is a case of circumstantial evidence and we have to see whether the testimonies of the prosecution evidence form a complete chain of events or not. Indeed PW-2, Leeladhar and PW-13, Thakur Sen do not fully support the prosecution case, but they are formal witnesses. However, PW-2, Leeladhar, deposed that on 29.05.2014, when he reached on the spot, he came to know that deceased Narbada was killed by her husband (accused Prakash Chand). Thus, the testimony of this witness is formal in nature and the accused cannot reap any benefit out of it. Next formal witness is PW-13, Thakur Sen. This witness in the very beginning of his examination-in-chief categorically deposed that on 28.05.2014 the shop of accused Prakash Chand was opened in his presence and a dead body of a lady was found wrapped in a blanket. So, even this witness has supported the contours of the prosecution to the effect that recovery of dead body from the shop of the accused was effected.

24. The gravamen of the prosecution case is that on 27.05.2014 accused committed the murder of the deceased and subsequently both the accused persons enwrapped the dead body in a blanket and a bale was prepared. Subsequently, on 28.05.2014, at about 10:30 p.m., at place Nayara accused persons went to the complainant for hiring his taxi and when they were loading the bale on the vehicle, PW-1, Mahinder Singh (complainant), inquired as to what is in the bale. Both the accused took the bale inside the shop. Accused Bheem Singh fled away from the spot and accused Prakash Chand closed the shutter of the shop from inside. PW-1 informed the police and till when the police came on the spot, he remained there on the spot. When police reached the spot, the shop of the shop of accused Prakash Chand was got opened and a bale was found, which had the dead body of the deceased. Thus the recovery of dead body from the exclusive possession of accused Prakash Chand stands fully proved. Now, as the recovery of dead body from the possession of the accused Prakash Chand stands conclusively proved, accused Prakash Chand is saddled with onus to establish that he neither gave beatings to the deceased with *danda,* Ex. P-9, nor strangulated her. Accused Prakash Chand pleaded that he found his wife in an objectionable condition with someone and a scuffle took place between him and that person. In the process of scuffle deceased sustained fatal injuries accidentally, but accused Prakash Chand could not prove these facts, despite the fact that independent witnesses were available on the spot, including his own children. When a particular fact is within the knowledge of a person, then as per Section 106 of The Indian Evidence Act, 1872, that person has to prove it. In the case in hand, recovery of bale having dead body of the deceased recovered from the possession of accused Prakash Chand stands fully established and now the onus is on accused Prakash Chand to prove that he did not kill the deceased, but he could not succeed in doing so. In fact the accused has miserably failed even to bring an iota of evidence that he did not kill the deceased. Thus, necessarily this Court has to draw adverse inference against the accused. The plea of accidental death by accused Prakash Chand is a simple bald assertion, having no firm feet, and the same backfires.

25. So far as the investigation part is concerned, deposition of PW-14, SI Rajesh Kumar (Investigating Officer), is vital. This witness, in his examination-in-chief fully supported the prosecution case. He, in his cross-examination, admitted that during the course of investigation it has come that when on 27.05.2014, between 08:30 to 09:00 a.m., he came to his house he found the deceased in an objectionable condition with a person, so he gave beatings to her with *danda,* Ex. P-9, and strangulated her. This witness specifically denied that scuffle took place in between accused Prakash Chand and that person and accidentally the deceased suffered injuries, as she fell on a corner of the trunk. Moreover, it is highly improbable that a person, who sustained external injury by falling on a corner of trunk, could die. The behaviour of accused Prakash Chand was also not natural, as he did not make any effort to provide medical aid to the deceased, especially when she is alleged to have sustained injuries accidentally. Accused Prakash Chand did not divulge even a word about that unknown person with whom he saw the deceased in compromising condition. Accused Prakash Chand himself deposed that their scuffle lasted for few minutes, however, surprisingly no one even from adjoining shops could hear the sound of scuffle. Thus, the story of scuffle with a stranger remains a bald assertion, hence the same is discarded.

26. After analyzing the evidence in its entirety, it stands fully established that on 27.05.2014 accused Prakash Chand gave beatings to the deceased with *danda,* Ex. P-9, on her head and he also strangulated her till death. Thus, he committed murder of the deceased and on 28.05.2014, at about 10:00 p.m., thereafter both the accused persons hatched a criminal conspiracy to destroy the evidence. They hired a taxi, having registration No. HP30-3015, to dump the dead body of the deceased thereby cause to disappear the evidence qua commission of the offence by accused Prakash Chand. It also stands established that accused Bheem Singh was instrumental in an attempt to help accused Prakash Chand to cause to disappear the evidence. The attempt to load the bale, having dead body of the deceased in the vehicle of the complainant, Mahinder Singh, by the accused persons stands established and recovery of that bale from the shop of the accused also stands established. Thus, each and every link in the

chain of events is well connected and there is no reason to doubt the same. The minor discrepancies, as pointed by the learned counsel for the accused, cannot overweigh the firmly established chain of circumstances, as these are only minor discrepancies and can easily be given go by.

27. Having tested the entire evidence, we are satisfied with the truthfulness of the story, portrayed by the prosecution, as the chain of circumstances is complete and thus the judgment of the learned Trial Court cannot be termed as erroneous and based on surmises and conjectures. Therefore, the only conclusion is that the learned Trial Court has rightly appreciated the evidence to its true and correct perspective and rightly convicted the accused persons, as the prosecution has proved the guilt of the accused persons conclusively and beyond the shadow of reasonable doubt. We find no reason to reverse the findings rendered by the learned Trial Court. The appeals are without merits, deserve dismissal and are accordingly dismissed, as the prosecution has proved the guilt of the accused persons conclusively and beyond the shadow of reasonable doubt.

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

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

Suresh Kumar .....Petitioner

Versus

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

Cr. MMO No. 216 of 2018
Reserved on: 28.05.2018
Decided on: 01.06.2018

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Sections 279 and 337- **Motor Vehicles Act, 1988-** Sections 185 and 196- Quashing of FIR – Principles summarized - Petitioner was allegedly driving his motorcycle rashly and negligently and also under influence of liquor – He hit his motorcycle against truck of complainant, resulting into registration of FIR and consequent criminal proceedings against him before CJM – Lateron, petition under Section 482 Cr.P.C filed in High Court by accused for quashing of FIR and proceedings initiated thereon pursuant to compromise with complainant – Held – In appropriate cases, FIR and consequent criminal proceedings can be quashed to meet out the ends of justice even if, offences are non-compoundable provided the settlement is amicable and without pressure- As parties had amicably compromised matter, FIR and criminal proceedings quashed.

(Paras-8 to 10)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675

Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioner: Petitioner present in person with Mr. Tara Singh Chauhan, Advocate.

For the respondents: Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals with Mr. Rajat Chauhan, Law Officer, for respondent No. 1.

Respondents No. 2 & 3 present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code") for quashing of F.I.R No. 35, dated 24.02.2016, under Sections 279 & 337 of the Indian Penal code and Sections 185 & 196 of the Motor Vehicles Act, registered at Police Station Sadar, District Bilaspur, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned Chief Judicial Magistrate 1st Class, Bilaspur, H.P.

2. Briefly stating the facts, giving rise to the present petition are that on 24.02.2016, respondent No. 2 after loading his truck, bearing registration No. HP-23A-7213 from ACC Barmana was going to Nalagarh. At about 3.30 p.m., when he reached near Sungal, a motorcycle, being driven by the petitioner, hit with the truck, due to which, the petitioner and respondent No. 3 sustained injuries. As per respondent No. 2, the petitioner was driving the motorcycle in rash and negligent driving and he was under the influence of liquor. Accordingly, FIR, under Sections 279 and 337 of the Indian Penal Code and Sections 185 & 196 of the Motor Vehicles Act was registered against the petitioner. However, now the parties have entered into a compromise **(Annexure P-2)** and they do not want to pursue the case against each other. Hence the present petition.

3. Learned counsel for the petitioner has argued that as the parties have compromised the matter, vide Compromise Deed **(Annexure P-2)**, no purpose will be served by keeping the proceedings against the petitioner, hence the FIR, alongwith consequent proceedings, arising out of the same, pending before the learned Court below may be quashed and set aside.

4. On the other hand, learned Additional Advocate General has argued that the offence of rash and negligent driving on public way is offence against the society and it cannot be compounded/quashed on the basis of settlement between the offender and victim, so the present petition may be dismissed.

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

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

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.**
>
> **[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary**

power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.

[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

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

[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

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

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

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

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

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

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties

have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

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

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

9. Thus, taking into consideration the law as discussed hereinabove, this Court finds that the interest of justice would be met, in case, the proceedings pending against the petitioner are quashed, as the parties have already compromised the matter, as per compromise deed **(Annexure P-2)**, placed on record.

10. Consequently, I find this case to be a fit case to exercise powers under Section 482 of the Code and, therefore, F.I.R No. 35, dated 24.02.2016, under Sections 279 & 337 of the Indian Penal code and Sections 185 & 196 of the Motor Vehicles Act, registered at Police Station Sadar, District Bilaspur, H.P., is ordered to be quashed. Since F.I.R No. 35, dated 24.02.2016, under Sections 279 & 337 of the Indian Penal code and Sections 185 & 196 of the Motor Vehicles Act, registered at Police Station Sadar, District Bilaspur, H.P., has been quashed, consequent proceedings/Challan pending before the learned Chief Judicial Magistrate 1st Class, Bilaspur, H.P., is thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

11. The petition is accordingly disposed of alongwith pending application(s), if any.

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

Gurpreet Singh .... Petitioner.
Versus
Kapil Expo Trade Pvt. Ltd. ....Respondent.

Cr. Revision No. 336 of 2017.
Reserved on: 30th May, 2018.
Date of Decision: 11th June, 2018.

Code of Criminal Procedure, 1973- Sections 397 and 401 - **Negotiable Instruments Act, 1881 (Act)-** Section 138- Accused convicted and sentenced by trial Court for offence under Section 138 of Act - His appeal also dismissed by Appellate Court- Revision against- Accused contending before High Court that complainant's suit for recovery of amount covered by cheque stood decreed and amount also realized by him by way of execution of decree - And recovery of money through civil proceedings amounts to implied composition of offence - Accused praying for discharge and relying upon ratio laid by Apex Court in ***M/s Meters and Instruments Private Limited vs. Kanchan Mehta, Cr. Appeal No. 1732 of 2017*** - Held – Power to discharge accused and close proceedings for offence under Section 138 of Act on proof of complainant having been duly compensated, lies with trial Magistrate only - Courts superior to trial court cannot close proceedings or order discharge of accused – However, in appropriate cases, where the complainant is proved to have been duly compensated, these courts may substitute sentence of imprisonment by directing accused to pay additional compensation to complainant - Conviction of accused upheld by High Court but sentence of imprisonment as imposed by trial court is substituted by directing payment of Rs.30,000/- as additional compensation to complainant- Principles laid down in **Priyanka Nagpal vs. State (NCT of Delhi) and another, (2018)3 SCC 249** relied upon. (Paras-8 and 9)

Cases referred:
P. Ram Das vs. State of Kerala and another, (2018)3 SCC 287
Priyanka Nagpal vs. State (NCT of Delhi) and another, (2018)3 SCC 249

For the Petitioner: Ms. Anu Tuli, Advocate.
For the Respondent: Mr. P. S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant criminal revision petition, is directed, against, the concurrently recorded findings, whereby, both the learned Courts below, convicted besides sentenced the accused/petitioner, for his committing an offence punishable under Section 138, of the Negotiable Instruments Act.

2. The facts relevant to decide the instant case are that the complainant is a private limited company and deals in sale and trade construction material. The accused/petitioner herein requested the complainant to sell the material on credit basis. The accused purchased total material of Rs.3,61,838/- from the complainant against various bills/invoices on different dates, as detailed in the complaint, bills/invoices whereof, bear his signatures. On 30.05.2010, the accounts were settled and total amount of Rs.3,61,838/- was found due against the accused. The accused in order to discharge his liability issued two cheques No.001172 of 30.05.2010 amount to Rs.50000/- of the ICICI Bank, Solan and cheque No.001173 of 1.6.2010 amounting to Rs.3,11,838/-. The accused assured the complainant that the cheque will be encashed on presentation. However, the cheque bearing No.0011072 of

30.05.2010 amounting to Rs.50000/- on presentation stood returned to the complainant along with memo of 20.11.2010 with endorsement “insufficient funds'. It is submitted that the complainant intimated this fact to the accused, who requested the complainant that he was facing financial crunches in these days and requested to present the said cheque after some time. The complainant again presented the cheque in his account and his banker forwarded the cheque for collection to ICICI Bank, Solan but the cheque was again dishonoured due to the reason of “funds insufficient. The bank of the complainant intimated, it about the non encashment of the cheque vide memo of 9.11.2010. It is submitted that the accused deliberately and intentionally issued bogus cheque in favour of the complainant, knowing that he was not having sufficient funds in his account, so as to get the payment clear. It is submitted that a legal notice of 13.12.2010 was posted on 14.12.2010 through the registered post vis-a-vis the accused, but the accused did not make the payment of the cheque amount. Hence the complaint.

3. Notice of accusation, stood put, to the accused/petitioner herein, by the learned trial Court, for his committing an offence, punishable under Section 138 of the N. I. Act. In proof of its case, the complainant examined two witnesses. On conclusion of recording, of, the complainant's evidence, the statement of the accused, under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, he claimed innocence, and, pleaded false implication.

4. On an appraisal of the evidence on record, the learned trial Court, returned findings, of, conviction upon the accused/respondent herein, for his committing, an, offence punishable under Sections 138 of the Negotiable Instruments Act. In an appeal preferred therefrom, by the accused/respondent herein, before, the learned Sessions Judge concerned, the latter, affirmed the apposite findings of conviction, and, sentence recorded in the judgment, pronounced, by the learned trial Court.

5. The accused/petitioner herein, stands aggrieved, by the findings recorded, by the learned Sessions Judge concerned, bearing concurrence vis-a-vis, the judgment, of conviction recorded against him, by the learned trial Court. The learned counsel appearing, for the petitioner/accused herein, has concertedly and vigorously contended qua the findings of conviction, recorded by the learned Sessions Judge concerned, standing not based on a proper appreciation, by him, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by him, of the material on record. Hence, he contends qua the findings of conviction rather warranting reversal, by this Court, in the exercise of its revisional jurisdiction, and, theirs being replaced by findings of acquittal.

6. On the other hand, the learned counsel appearing, for the respondent/complainant, has, with considerable force and vigour, contended qua the findings of conviction recorded by the learned Courts below, standing based, upon a mature and balanced appreciation, by them, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

7. 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.

8. The contention, reared, by the learned counsel appearing for the petitioner, is, rested upon (a) of with the complainant, vis-a-vis, the amount borne, in, the dishonoured negotiable instrument, instituting a civil suit, for its recovery, before, the learned Civil Judge (Sr. Division), Court No.1, Kasauli, suit whereof stood, registered as Civil Suit No.01/01 of 2012, and, with the learned trial Court rendering thereon, an affirmative decree, borne in Ex. Dx-1, AND, thereafter, as reflected by Ex. Dx-2, the money decree rendered in Civil Suit No. 01/01 of 2012, being satisfactorily executed, (b) hence, thereupon, with, the entire amount, borne, in the dishonoured negotiable instrument being fully satisfied, and, realized by the respondent/complainant; (c) thereupon, the concomitant sequel thereof, being an implied composition of the offence, arising, from the dishonour of negotiable instrument, rather occurring, inter se the petitioner/convict, and, the respondent/complainant, (d) thereupon, this

Court, also accepting the hence implied composition, of offence, occurring inter se the litigating parties, and, thereafter its quashing, and, setting aside, the verdicts of conviction, and, consequent sentence imposed, upon, the petitioner/accused. In making the aforesaid submission, the learned counsel appearing, for the petitioner/accused, has, placed reliance, upon, a judgment, of, the Hon'ble Apex Court, rendered, in ***M/s Meters and Instruments Private Limited vs. Kanchan Mehta, Cr. Appeal No. 1732 of 2017***, the relevant paragraph No. 18(i) to 18(iii) stand extracted hereinafter:-

> "18. From the above discussion following aspects emerge:-
>
> i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.
>
> ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.
>
> Iii) Though compounding requires consent of both parties, even in the absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused."

wherein it stands expostulated (a) of the endeavours, for, composition of offence, embodied, in Section 138, of the Negotiable Instrument Act, being encouraged, at the initial stage, and, thereafter also subject to determination, of appropriate compensation, the courts, above, the trial court, being also empowered, to make an order, for compounding, the offences, arising, from the dishonour, of, negotiable instrument; (b) of the learned trial Magistrate upon "being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused", phrase whereof, occurring, in relevant sub para (iii), of the verdcit (supra), carrying, obviously the apt signification (a) of, the courts hence encouraging, composition of offence(s), at the initial stage; (b) of courts superior, to, the trial Court, being vested with jurisdiction, to order for composition of the apt offence, subject to determination of an appropriate compensation, vis-a-vis, the complainant, and, (c) of the empowerment, for closing the proceedings, arising, from cognizance being taken, upon, the complaint, by the Magistrate concerned, and, thereafter qua discharge, of, the accused, being also empowerments rather solitarily vesting, in the trial court concerned, (d) especially, when the order(s), qua closure of proceedings, after cognizance being taken, on, the complaint, and, order qua subsequent discharge thereto, of, the accused, can only occur, before the learned Magistrate concerned, hence are renderable, only, by the latter (e) whereas, the Courts superior, to the learned trial Magistrate, though, being empowered, to, make an order for composition of offence(s), and, concomitantly, for ordering, for reversal of the verdict, of, the learned trial Court, (f) yet, Courts superior, to the learned trial Court, not holding jurisdiction, obviously hence, to close the proceedings, after, apt cognizance being taken, upon, the apposite complaint nor also theirs hence holding any jurisdiction, to, discharge the accused, rather theirs after making an order, for, composition of the offence, theirs holding, the apt jurisdiction to quash hence verdicts, of, conviction and consequent thereto imposition, of sentence, upon the convict. If so, the making, of, the aforesaid, cullings, of, the spirit carried, by the aforesaid extracted apt portion, of paragraph No.18, of, the judgment relied, upon, by the learned counsel appearing, for the appellant/accused, (i) hence, thereupon, nowat it is to be determined, whether evidence, in display of the essential element, of, consensus ad idem or the bonafides, of the petitioner, to liquidate the sum, comprised, in the dishonoured negotiable instrument, hence surging forth or rather contrary therewith, hence, evidence, surging forth. The apposite bonafide, and, consensus

ad idem, hence, ingraining, the aforesaid redemption(s), is, reiteratedly espoused, to, erupt, from, the conduct of the petitioner/convict, in his after the affirmative decree, being rendered, by the Civil Court, upon, the plaintiff's suit, for realization of sums, of, money borrowed, from it, his thereafter ensuring its satisfaction, besides from his depositing, the entire compensation amount, as, assessed, upon him. However, no conclusion, can be drawn, qua in the petitioner/convict, after, rendition of an affirmative decree, by the civil court, vis-a-vis, the plaintiff's suit, instituted against him, for recovery(ies), of the amount borne, in the dishonoured negotiable instruments, and his, thereafter ensuring satisfactory realization thereof, from his assets, his rather hence evincing bonafides, and, his apt consensus ad idem, with, the respondent/complainant. The reason being (a) the institution, of, a civil suit being an event subsequent, to the institution, of the apposite complaint, (b) and, his rearing an acid contest therein; (c) the mere factum, of his, rather rearing an acid contest, vis-a-vis, the plaintiff's suit, for recovery of money, rather erodes the substratum, of his espousal, of his holding conciliatory overtures, to the respondents/complainant, and, also overrides, all the effect of all his propagations, of, realization(s), through, coercive processes, from, his assets, the amount borne, in the dishonoured negotiable instruments, being construable or tantamounting, to be compository/conciliatory realization(s), hence occurring inter se him, and, the complainant. More so, even when without, his hotly contesting, the apposite civil suit, he could well have made an apt tenable endeavour, before, the learned trial Magistrate, for composition of the offences, (d) whereas, contrarily, his contesting, the civil suit, renders him disabled, to derive any capitalization therefrom nor in garb, of, coercive execution, of the decree of the civil court, vis-a-vis, the amounts, borne in the dishonoured negotiable instrument, he is enabled , to, contend, that per se thereupon, an apt amicable compository settlement rather occurring, hence, this Court, proceedings to quash and set aside, the concurrent verdicts recorded against him, by both, the learned Courts below.

9. Dehors the aforesaid conclusions, formed, by this Court, given, the Hon'ble Apex Court in a case titled as ***P. Ram Das vs. State of Kerala and another***, reported in ***(2018)3 SCC 287***, relevant paragraph No.8, 9 and 10 whereof, stand extracted hereinafter:-

> "8. Considering the fact that the appellant has complied with the direction given by this Court vide order dated 15.1.2018 and taking overall view of the matter, we are of the opinion that interest of justice would be subserved, if the order regarding simple imprisonment of three months is modified and in lieu thereof, additional compensation amount of Rs.1,00,000/- (Rupees one lakh only), already deposited by the appellant before the trial Court is directed to be made over to Respondent No.2. In other words, Respondent No.2 is free to withdraw the additional compensation amount of Rs.1,00,000/- (Rupees one lakh only) already deposited by the appellant before the trial Court. This amount be paid to Respondent No.2 subject to verification of his identity.
>
> 9. We are conscious of the fact that Respondent No.2 complainant has not appeared before this Court, but the order which we purpose to pass is to his advantage and, in all probability, the same would be acceptable to him. We make it clear that if Respondent No.2, original complainant is not satisfied with this order, he will be free to apply for recall of the same, which request can be considered appropriately.
>
> 10. Accordingly, we partly allow this appeal in the aforementioned terms. Resultantly, the order of sentence passed by the Judicial First Class Magistrate-II, Ottappalam, dated 30-3-2010, stands modified to the extent that the appellant shall pay an additional compensation amount of Rs.1,00,000/- (Rupees one lakh only) to respondent No.2 original complainant (which is already deposited before the trial court, in lieu of simple imprisonment for three months' period. Ordered accordingly." (p.289)

and, in a case titled as ***Priyanka Nagpal vs. State (NCT of Delhi) and another***, reported in ***(2018)3 SCC 249,*** the relevant paragraph No.4 and 5 whereof stand extracted hereinafter:-

> "4. After considering the submissions and going through the record of the case, we are of the opinion that it is not possible to interfere with the concurrent finding of fact regarding finding of guilt recorded against the appellant. Thus, no interference is warranted against the order of conviction. The only question that must receive our attention is about the sentence awarded to the appellant.
>
> 5. Having regard to the fact that the appellant has already deposited the compensation amount of Rs.6 lacs and also the fine amount of Rs.10,000/-, what remains is to undergo simple imprisonment for 2 months. We find that the Trial Court while awarding the sentence of 2 months has not considered the plea which has been urged before this Court as adverted to in the preceding paragraphs of this order. Neither the Revisional Court nor the High Court has considered the same. The appellant is the only earning member in the family and her source of income is also very nominal, barely enough to maintain herself and her family members and if she undergoes simple imprisonment for a period of two months, then she may end up losing her service, which is the only source of income for the family." (p.251-252)

wherein, in P. Ramdas's case (supra), in lieu or in substitution, of, imposition, of, sentence of simple imprisonment upon the convict therein, the Hon'ble Apex Court, had imposed additional compensation amount, upon, the convict, AND, also ordered, qua its being defrayable to the complainant, upon, evidence surging forth, of the entire amount, borne, in the negotiable instrument, being liquidated, vis-a-vis, the respondent/complainant, (i) hereat also alike therewith , the entire compensation amount assessed, upon him, by the learned courts below, being also deposited, AND, when alike therewith, with, the entire amount borne, in the dishonoured negotiable instrument, standing realized by the complainant/respondent, from, the assets, of the petitioner/convict, (ii) importantly also when, the entire realization(s) hence occur, from, the assets of the convict/petitioner, and, also when he has a family to rear, it is deemed imperative, to, apply the mandate, of the aforesaid renditions, pronounced by the Hon'ble Apex Court, (iii) thereupon, in consonance therewith, without interfering, with, the findings of guilt pronounced upon the petitioner/accused, the sentence of imprisonment imposed upon him, is, substituted, by his, within two months from today, liquidating an additional compensation, comprised, in a sum of Rs.30,000/- (Rs. Thirty thousand only), vis-a-vis, the complainant/respondent, and, upon defrayment thereof, the sentence, of imprisonment imposed upon him, shall not be put into execution. The entire compensation amount, as deposited, before the learned trial Court, be released in favour of the complainant/respondent. Appeal stands disposed off in the aforesaid manner. All pending applications also stand disposed off. No order as to the costs.

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

Kewal Singh & others .....Appellants/Plaintiffs.

Versus

Smt. Savitri & others .....Respondents/defendants.

RSA No. 90 of 2007.
Reserved on : 1st June, 2018.
Decided on : 11th June, 2018.

Himachal Pradesh Land Revenue Act, 1954- Sections 46 and 171- An aggrieved person can file suit and challenge wrong entries made in record of rights – Jurisdiction of civil courts is not ousted simply because Revenue Officer has passed an order for correction of revenue entries. (Para-10)

Specific Relief Act, 1963- Section 5- Suit for possession- Plaintiffs filing suit for vacant possession of land alleged to be encroached by defendants – Defendants claiming land as part of their own land and in alternative, also raising plea of their adverse possession- Suit dismissed by trial court and Appeal of plaintiffs was also dismissed by first appellate court – Regular Second Appeal – It was found that area of plaintiffs land was increased during settlement – These entries were subsequently corrected on application of defendants by Consolidation Officer – This order attained finality and also not shown to be wrong - Held – Plaintiffs not proved to be owners of land alleged to be encroached by defendants –Hence, plaintiffs not entitled for its possession - RSA dismissed. (Para- 9)

For the Appellants: Mr. Ajay Sharma, Advocate.
For Respondents No.1 and 2: Mr. Anup Rattan, Advocate.
Other respondents are ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for possession , qua the suit khasra number(s), was, hence dismissed.

2. Briefly stated the facts of the case are that the plaintiffs have filed the suit for possession of the land measuring 41-00 sq. meters, comprising Khewat No.238 min, Khatauni No.577, Khasra Nos. 1759 and 1760, situated in UP Mahal Basdehra Brahmna, Village Basdehra, Tehsil and District Una, H.P. It is pleaded by the plaintiffs that the suit land is owned and possessed by them and the defendants have no right, title or interest thereon. It is averred that during the settlement operation in the village, the defendants, procured wrong entries, showing them in possession over the suit land. However, such entries have been effected in the absence and without notice of the plaintiffs. Therefore, the revenue entries in favour of the defendants are wrong and illegal. It is on the basis of the said wrong revenue entries, the defendants have encroached upon the suit land near about six months back and they have raised construction in khasra No.1760 and opened the doors towards Khasra N.1759. It is averred that the defendants are again threatening to cover the whole area of the suit land. All these illegal acts are being done by the defendants despite the request being made by the plaintiffs for not doing such things. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have denied that the plaintiffs ever owned and possessed the suit land. It is claimed that the suit land was never part of pre-settlement of Khasra No.624. On the other hand, it is asserted that this was a part of old khasra No.621 and where there are old abadies of the defendants. It is admitted that the settlement authorities have recorded wrong revenue entries in the record. They are in possession of the suit land for the last more than 20 years. In the alternative, it is submitted that if the suit land is not found to be part of old khasra number 621, then they have become owners of the suit land by way of adverse possession.

4. The plaintiffs filed replication to the written statement of the defendants, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled for the relief of possession, as alleged? OPP.
2. Whether the suit land is part of khasra No.621, as alleged?OPD.

3. If issue No.2 is not proved, whether the defendants have become owners by way of adverse possession?OPD.

4. Whether the plaintiff is estopped to file the present suit?OPD.

5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the plaintiffs/appellants herein, before, the learned First Appellate Court, the latter Court dismissed, the appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 20.07.2007, admitted the appeal, instituted by the plaintiffs/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

1. Whether both the Courts below were correct in dismissing the suit of the plaintiffs and holding the defendants to be in adverse possession of the suit land, when the title of the plaintiffs had been denied?

Substantial question of Law No.1:

8. The substratum of the *res controversia*, hereat, is, embodied in the factum of the suit land, being a part of pre-settlement khasra No.624, or ,a part of old khasra No.621. Furthermore, also, in, the factum of the entries, existing in the revenue record, apposite, to the suit land, with a display therein, of the defendants being "kabaz" thereof, being meritworthy, (i) arising, from there occurrence, in the record, apposite to the suit land, being a sequel, of validly recorded orders, by the revenue authorities concerned. Even though, Ex.P-5 and Ex.P-6, both concurrently, carry reflections of the suit land, being a part of old khasra No.624, yet prima facie no validity can be imputed thereto, (ii) given the entries, occurring, in the subsequent thereto, revenue records, comprised in Ex. D-1, exhibit whereof comprises, the jamabandi appertaining, to, the year 1997-98, and, stood prepared during the course of settlement proceedings, held, in the area whereat, the suit land is located, carrying, contrary therewith reflections (a) vis-a-vis, the earlier therewith jamabandi(s), respectively, borne in Ex.P-4, and, in Ex.P-5, exhibits whereof stood prepared in consonance, with the Misal Hakiyat Bandobast, comprised in Ex.P-6, and, also in consonance, with, the Misal Hakiyat Istemal, borne in Ex.P-5, all whereof rather unravel, the trite factum qua inter se contradictions vis-a-vis therewith, Ex. D-1, especially qua hence the area of the suit land, being constituted, in an area of 0-12 marlas, (b) whereas, reiteratedly all the records hence prepared, at the time contemporaneous, to, the drawing of settlement proceedings, contrarily therewith rather revealing, its carrying dimensions, of, 317.18 sq. meters, (c) area whereof, is, rather the total area of khasra Nos. 1888, 1759 and 1760, all latter khasra numbers whereof, had evidently come to be carved, from, khasra No. 624, (d) hence, the area of the suit land, previously reflected, in aforesaid exhibits, is visibly much in excess, of, its apt area reflected in Ex.P-6, subsequently drawn at the time, of, holding, of, settlement proceedings. (e) Thereupon, the apt reflections, borne, in the latter revenue records, even, if preceding(s) therewith, valid orders were rendered by the competent revenue officer(s), also does not constrain any inference, qua the presumption of truth carried by them, being conclusive, rather the apt presumption, is rebutted, by, (f) the plaintiffs failing, to purvey any tangible explanation, for the aforesaid increases, occurring, in the area of the suit land, apt occurrence(s) whereof, emanated since the prior preparation(s), of, Ex.P-4, and, Ex.P-5, and, the subsequent thereto, hence preparation, of Ex.P-6. (g) Contrarily, with the defendants, being aggrieved, by the aforesaid untenable increases, besides apparent rife contradictions, spurring inter se, the area of the suit land, as reflected in Ex.P-4 and Ex.P-5, vis-a-vis, the subsequent thereto prepared jamabandi, suit land whereof, is borne in old khasra No.624, were hence led to file, an apt application, before, the Consolidation Officer, whereon, as divulged by Ex.D4, an affirmative order was pronounced. (h) However, the pronouncement, occurring in Ex. D4, was challenged by the plaintiffs, before

the Settlement Officer, Hamirpur, and, upon their apposite motion, the latter made an order of remand, qua the plaintiffs' grievance, to the Consolidation Officer, and, on remand, the latter proceeded, to, affirm the orders previously, borne in Ex,. D-4, by his rendering a pronouncement, borne in Ex. D-3. (i) Since, the aforesaid order, borne in Ex. D-3, acquires conclusivity, hence, reverence is to be meted thereto, and, also meteings of deference thereto, by both the learned Courts below, is both appropriate, and, apt, it being anchored, on well grooved tangible reasons, (j) thereupon also the affirmative findings, as, recorded qua the defendants, qua theirs being kabaz, vis-a-vis, the suit land, rather being a sequel of a valid and efficacious order, made, on 11.9.1991 by the Settlement Officer, are merit worthy, and, also rather hence displace the presumption of truth enjoyed, by the entries, as relied upon by the plaintiff, (k) rather hence the entries in the revenue record, displaying the defendants, as "kabaz", upon the suit land, acquire conclusivity. Since, the order directing, the recording of the defendants, as "kabaz", vis-a-vis, the suit land, is, preceded by a valid order, recorded by the Revenue Officer concerned, (l) more so, when no evidence, is, adduced, by the plaintiffs, of it being stained with vices of infractions, of, principles of natural justice, or, the revenue officer concerned, in rendering, the apposite order, his rendering it, without bearing in mind, the apposite record, maintained, with respect to the suit land,(m) besides when the plaintiffs omitted, to, render any tangible explanation qua untenable increases, occurring, in the area, of the suit land, (n) besides their canvassings, qua the suit land, being purportedly, a part, of old khasra No.624, area whereof, is uncontestedly recorded in Ex.P-5, and, in Ex.P-6, exhibits whereof respectively comprising the copies of Misal Hakiyat Istemal or Misal Hakiyat Bandobast, to be borne, in, an area of 0-12 marlas, are all hence unmeritworthy, (o) thereupon, the untenable increases,meted qua the apt area, as reflected in Ex.P-6, warranted its correction, as tenably, done under Ex. D-3.

9. However, at this stage, the learned counsel appearing for the respondents, has submitted, with much vigour, before this Court qua with the provisions, borne in subsection 2(vi) of Section 171 of the H.P. Land Revenue Act, provisions whereof stand extracted hereinafter;-

> **171. Exclusion of jurisdiction of Civil Courts in matters within the jurisdiction of Revenue Officers.** - Except as otherwise provided by this Act-
>
> (1) A Civil Court shall not have jurisdiction in any matter which the State Government or a Revenue Officer is empowered by this Act, to dispose of or take cognizance of the manner in which the State Government or any Revenue Officer exercises any powers vested in it or him by or under this Act; and in particular-
>
> (2) A Civil Court shall not exercise jurisdiction over any of the following matters, namely-
>
> (i) any question as to the limits of any land which has been defined by a Revenue Officer as land to which this Act does or does not apply;
>
> (ii) any claim to compel the performance of any duties imposed by this Act or any other enactment for the time being in force on any Revenue Officer, as such;
>
> (iii) any claim to the office of kanungo, or village officer, or in respect of any injury caused by exclusion from such office, or to compel the performance of the duties or a division of the emoluments thereof;
>
> (iv) any notification directing the making or revision of a record-of-rights;
>
> (v) the framing of a record-of-rights or [periodical] record or the preparation, signing or attestation of any of the documents included in such a record;
>
> (vi) the correction of any entry in a record-of-rights, [periodical] record or register of mutations;
>
> (vii) any notification of the undertaking of the general re-assessment of a district or tehsil having been sanctioned by the State Government;
>
> (viii) the claim of any person to be liable for an assessment of land-revenue or of any other revenue assessed under this Act;

(ix).....”

(i) making a graphic display, of,Civil Court(s) concerned, being barred to exercise jurisdiction, in all matters appertaining, to, correction of entries, existing in, the records of rights, (ii) thereupon, the instant suit maintained, by the plaintiffs, being not maintainable, given it being statutorily barred, to, exercise jurisdiction thereon.

10. However, the aforesaid submission, addressed before this Court, by the learned counsel, appearing for the respondent, is unworthy of any merit, as, he has not borne in mind, the provisions occurring in Section 38, and, in Section 46 of the H.P. Land Revenue Act, provisions whereof stand extracted hereinafter:-

> **38. Restrictions on variations of entries in records.** - Entries in records-of-rights or in [periodical] records, except entries made in [periodical] records by patwaris under clause (a) of section 36 with respect to undisputed acquisitions of interest referred to in that section, shall not be varied in subsequent records otherwise than by -
>
> (a) making entries in accordance with facts proved or admitted to have occurred;
>
> (b) making such entries as are agreed to by all the parties interested therein or are supported by a decree or order binding on those parties; and
>
> (c) making new maps where it is necessary to make them.
>
> **46. Suit for declaratory decree by persons aggrieved by an entry in a record.** - If any person considers himself aggrieved as to any right of which he is in possession by an entry in a record of rights or in [a periodical] record, he may institute a suit for a declaration of his right under [chapter VI of the Specific Relief Act, 1963],

(a) wherewithin, rather jurisdiction, is, vested in Civil Courts, to even, after the Revenue Officer, makes an order, for correction, of the revenue entries, or, he refuses to make any apposite affirmative order thereon, hence, test validity thereof, (b) AND emphatically, within the domain, of, the apt mandate(s) occurring therewithin, through, exercise, of, jurisdiction, under Section 46 of the H.P. Land Revenue Act, hence render a decree, upon, the apposite civil suit, preferred, therebefore, by the litigant concerned, wherein, he casts a challenge, vis-a-vis, the apposite orders, made by the Revenue Officer, hence directing or omitting to direct the making, of, correction(s), of, entries hence occurring, in the revenue records. (c) corollary whereof, qua the aforesaid statutory betowments upon civil court(s), is, hence the verdicts recorded, by civil court(s), rather holding paramount predominance, vis-a-vis, any purported untenable assumption, of jurisdiction, by any revenue officer(s), vis-a-vis, alike therewith matters, or, in respect(s) whereof, the Civil Court, previously render their verdict. In other words, the decrees, pronounced by the Civil courts concerned, (d) hold predominance, and, paramountancy, vis-a-vis, any order(s) made even, by any officer in the highest echelon(s), of, the hierarchy, of, revenue officers, and, are always enjoined, to be meted fullest deference thereto, by all courts, inclusive, the revenue courts, (e) and, any motion cast before, the revenue officers concerned, subsequent, to the rendition, of decree(s) by civil Court(s), vis-a-vis, any matter, holding alikeness therewith, rather enjoins all revenue officers concerned, to mete deference, vis-a-vis, verdicts of civil courts, (f) also, in case the decree/verdict, pronounced, by the court of first instance, is, challenged before superior thereto civil court concerned, thereupon, the revenue officers, being enjoined, to stay the proceedings, upon apposite motions, being made before them, till a decision, is pronounced, by the courts superior, to, the court of first instance.

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

12. In view of the above discussion, there is no merit in instant Regular Second Appeal and it is dismissed. In sequel, the judgments and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Copy of this judgment be forthwith forwarded to the learned Financial Commissioner (Revenue), and, he is directed to ensure that no decrees/verdicts, of, the civil courts are flouted or attempted to be flouted, by any Revenue Officer concerned.

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

New India Assurance co. Ltd. .....Appellant

Versus

Sarla Devi & others .....Respondents

FAO (MVA) No. 38 of 2018
Reserved on 31.5.2018
Decided on : 11.6.2018

Motor Vehicles Act, 1988- Section 166- Claim for compensation on account of death in a motor accident - Claims Tribunal holding that accident was result of rash driving of driver and then fastening liability on insurer – Claims Tribunal determining monthly income of deceased at Rs. 17,150/- by taking Rs.5,000/- p.m. as his additional income from employment with a tent house - Appeal against by Insurer – Insurer contending wrong assessment of monthly income of deceased and excessive payments under conventional heads – High Court found that no documentary evidence regarding additional income of Rs.5,000/- P.M. of deceased was led before Claims Tribunal – Held – Additional income of deceased not proved notwithstanding that witnesses were not cross-examined by insurer on that point - Monthly income of deceased proved to be Rs.12,150/- only- Compensation under conventional heads also scaled down in consonance with ***Pranay Sethi's*** case – Appeal partly allowed - Award modified. (Paras-4 and 7)

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

For the appellant: Mr. Praneet Gupta, Advocate.
For the respondents: Mr. Naresh Kaul, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal is directed, against, the award recorded by the learned Motor Accident Claims Tribunal (I) Kangra at Dharmshala, upon, RBT (MACP No. 94-K/13 of 2011, whereby, it proceeded to assess compensation qua the dependents of deceased Ranjeet Singh, compensation whereof, is, comprised in a sum of Rs. 36,97,740/- only, and, the apposite indemnificatory liability, is, fastened upon the insurer/appellant herein.

2. The learned counsel appearing, for the appellant/insurer, does not, contest the validity of the findings recorded, by the learned Tribunal, vis-à-vis, issue No.1, issue whereof appertains, to, the occurrence, of, demise of Ranjeet Singh being a sequel, of, rash and negligent manner, of, driving of the offending vehicle, by respondent No.1. Furthermore, he also does not contest, the, validity, of, the fastening, upon it, of, the apposite indemnificatory liability.

3. However, the contest which, is, reared by the insurer rather is concentrated, upon the learned Tribunal hence fallaciously proceeding, to compute the per mensem salary, of the deceased, in, a sum of Rs. 17,150/-, fallacy whereof, is, espoused, to arise (a) from the learned Tribunal, while not moving astray, from, cogent evidence qua the deceased, drawing, a sum of Rs. 12,150/-, per mensem, from his rendering employment with M/s Infratech Pvt. Ltd., factum whereof also stands conjointly deposed, by PW-3, and, by PW-4, (b) whereas, its, rather untenably also meteing deference, to the conjoint depositions, rendered by PW-3, and, by PW-4 qua the deceased, also in addition thereto, drawing, a further sum, of Rs. 5000/- per mensem, from, his rendering employment, with, M/s Shiva Tent House, Shahpur. The un- tenability(s) of placing reliance thereon, is, canvassed by the learned counsel, for, the insurer, to, stem from, the learned Tribunal hence inaptly inferring, that with both, PW-2 and PW-4, remaining uncross-examined, by the learned counsel for the insurer, qua, the aforesaid factum, thereupon, the, gravest solemnity, being visited, vis-à-vis, their respective apt conjoint testifications.

4. The vigor of the aforesaid address, made before this Court, by the learned counsel for the appellant, is to be gauged, from (a) though with both PW2 and PW-4, remaining evidently uncross-examined, by the counsel for the insurer, vis-à-vis, the aforesaid trite factum, nonetheless, in the learned Tribunal, meteing profound solemnity thereto, rather moving astray, from the trite factum, qua, the apt onus for adducing best evidence thereon, hence being cast upon the claimants, (b) and unless, the claimants', had adduced the best documentary evidence, in discharge of the apt onus, as, cast upon them, vis-à-vis, the issue(s) apposite therewith, (c) thereupon, the mere factum, of, any want of cross-examination, of, both PW-2 and, of, PW-4, by the counsel for the insurer, imperatively, vis-à-vis, the aforesaid trite factum, was not enjoined, to spur any inference, qua the claimants hence satisfactorily discharging, the apposite onus, qua the apt issue(s), germane thereto. Contrarily, it, was unwarranted, for, the learned Tribunal, to not insist, qua adduction of best documentary evidence, by the claimants, vis-à-vis, the issue, whereon the onus, qua discharge whereof, was, cast upon them nor also obviously, to, omit to insist, for, hence the best documentary evidence being adduced, by them in display of the deceased, apart from, his deriving Rs. 12,150/- per mensem, from his employment, with, M/s Infratech, is also, drawing Rs. 5000/- per mensem, from his rendering employment, with M/s Shiva Tent House. (d) moreso, when the counsel, for the respondents relies upon PW-2/A, to contend of its comprising, the, apposite best documentary evidence, whereas, its, carrying reflections in respect, of, the prior employment, of the deceased, with M/s Sun Security Services. Consequently, the effects of the aforesaid omissions', is qua, an, apt inference being generated, qua, the per mensem salary, of the deceased, being computable, at, Rs. 12,150/-, AND, its comprising, the apposite per mensem salary derived by him, from, his rendering employment only with M/s Infratech Pvt. Ltd.

5. Be that as it may, the deceased, as divulged by his matriculation certificate, was, at the relevant time, aged 38 years. Since the deceased was rendering employment, in, private sector or was self-employed, thereupon, with the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.59 extracted hereinafter:

> "59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be

> inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years, an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."
>
> (p.2721-2722)

expostulating (i) that where the deceased concerned, is rendering employment, in non government organization(s), as is hereat, the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil, of future incremental prospects, vis-à-vis, the salary drawn, by him, at the time contemporaneous to the ill fated mishap, from his employer, being also meteable thereto. However, before applying the mandate, of the, aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report, reflects, the trite factum of the deceased at the relevant time, being aged 38 years, thereupon, with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects, vis-à-vis, the salary las drawn, by the deceased, being hence pegged, upto 40% thereof, besides being tenably meteable vis-à-vis, the, apposite last drawn salary. Consequently, in consonance therewith, after meteing 40% increase(s), vis-à-vis, the apposite deceaseds' last drawn salary, thereupon, the relevant last drawn salary, of, the deceased is reckonable, at Rs. 17,010/-, [Rs.12,150/-(last drawn salary of the deceased)+ Rs. 4,860/- (40% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, four, hence, 1/4th deduction is to be visited, upon, a sum of Rs. 17,010/-, deducted, amount whereof, is calculated at Rs. 4,252/- per mensem. Consequently, the annual dependency, including the future hikes towards future prospects, is, worked out, now at Rs.17,010–Rs.4,252 = Rs.12,758/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.12,758x12 = Rs.1,53,096/-. After applying, upon, the aforesaid figure, of, annual dependency, the apposite multiplier of 15, the total compensation amount, is assessed, in a sum of Rs.1,53,096 x15 = Rs. 22,96,440/-.

6. However, the quantification, of compensation/ damages, by the learned Tribunal in a sum of Rs.1 lacs, vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii) and quantification, of compensation in a sum of Rs. 22,96,440/- vis-a-vis the mother and off springs of the deceased, under the head, loss of love and affection, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.25,000/- respectively, (iii) and, with no expostulation, occurring therein, vis-a-vis the compensation amount(s), being awardable, to the mother, and, to the off springs of the deceased, especially under the head, loss of love and affection, hence reliefs in respect thereto, being impermissibly granted. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its inaptly determining compensation, under, the aforesaid heads, vis-à-vis, the widow of the deceased, as also, vis-à-vis, the off springs, and, mother of the deceased. Accordingly, in addition to the aforesaid amount of Rs. 22,96,440/-, the petitioners, are, nowatentitled under conventional heads, namely, loss to estate, loss of consortium, (only to the widow of the deceased), and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.25,000/- respectively, as such, the total compensation whereto the petitioners are entitled, comes to Rs. 22,96,440/- + 15,000/- + 40,000/- + 25,000/-= Rs. 23,76,440/- (Rs. Twenty three lacs, seventy six thousand, four hundred forty only).

7. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation, of, Rs. 23,76,440/-, along with pending and future interest @ 7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants, and be disbursed, in, the manner, ordered by the learned Tribunal. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit, of the, minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

Shri R.K. Garg .....Petitioner.

Versus

Labour Enforcement Officer and another ....Respondents.

Cr.MMO No. 133 of 2015.
Reserved on : 30th May, 2018.
Decided on : 11th June, 2018.

Code of Criminal Procedure, 1973- Section 197- **Contract Labour (Regulation and Abolition) Act, 1970 (Act)-** Sections 23 and 24- Sanction to prosecute – If mandatory - Trial Court summoning petitioner/accused for offences punishable under Act – Petition against summoning order – Held – Alleged offences, if any, were committed in purported discharge of public duties by petitioner/accused – Cognizance could not have been taken against him for want of sanction under Section 197 of Code – Provisions of Section 197 of Code are mandatory – Summoning Order of trial court set aside. (Paras- 7 and 8)

For the Petitioner: Mr. N. K. Sood, Senior Advocate with Mr. Aman Sood, Advocate.
For the Respondents: Mr. Vir Bahadur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition is directed, against, the orders, borne in Annexure PG, rendered by the learned Judicial Magistrate 1st Class, Court No.4, Mandi, wherein, he directed the issuance of summons, upon, the petitioner herein, for alleged violations, by him, of the apposite provisions, borne in, the Contract Labour (R&A) Act 1970, and, Contract Labour (R&A) Central Rules, 1971.

2. The learned counsel appearing, for the petitioner herein, has with much fervor, and, vehemence contended that, the summoning orders are legally infirm, given, the learned Magistrate, within, the statutory contemplation(s), borne in, the provisions of Section 204 of the Cr.P.C., provisions whereof stand extracted hereinafter:-

> "**204. Issue of process**.-(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-
>
> (a) a summons- case, he shall issue his summons for the attendance of the accused, or
>
> (b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.
>
> (2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.
>
> (3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint.
>
> (4) When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.
>
> (5) Nothing in this section shall be deemed to affect the provisions of section 87."

hence issuing summons, for, ensuring the presence, of the accused before him, whereupon, has also obviously, within, the domain of sub-section (1) thereof, hence taken cognizance, upon the offences, borne in the apposite complaint, (i) legal consequence whereof, being rather qua hence evidently, at the apt stage contemporaneous, to his hence taking cognizance, and, thereafter issuing summons, there being no peremptory meteing, of, any valid prosecution sanction, by the sanctioning authority, especially in adherence, of the statutory fiat, encapsulated in Section 197 of the Cr.P.C., (iii) and, with courts concerned, being barred, to take cognizance, upon, the apposite offences, constituted, in the complaint, unless prior thereto, the apposite mandatory sanction, for, hence prosecuting the accused, rather is meted, by the designated authority. (iv) He further submits, that with, the offence embodied in the complaint, being purportedly committed, by the petitioner, while his discharging, his official or public duties, thereupon, the meteing, of, the mandatory sanction, within, the ambit of Section 197 of the Cr.P.C., by the designated authority, for hence, any, valid cognizance being taken, upon, the complaint, by the learned magistrate concerned, was an utmost ordained legal necessity, (v) whereas non meteing thereof, or non existence thereof, at, the relevant stage, renders both, the taking of cognizance upon the complaint, by the learned Magistrate concerned, AND, also his order, directing, the issuance of summons upon the petitioner, to be legally stained.

3. The learned counsel appearing for the respondents, does not, contest, that the allegations embodied, against the petitioner herein, in the apposite complaint, appertaining to the petitioner's hence discharging his official duties or public duties, thereupon, prima facie, it was a peremptory obligation hence cast, upon, the complainant, to alongwith the complaint,

rather append the apt sanction, for prosecuting the petitioner, (i) as thereupon, the mandate, of, Section 197 of the Cr.P.C., would stood accomplished, and, also the learned Magistrate concerned, upon being seized, of the private complaint, would be concluded to not wander astray, in his exercising jurisdiction, under Section 204 of the Cr.P.C., comprised in his making the impugned order, (ii) whereas, purported infraction thereof, arises hereat, from his issuing summons, for eliciting the presence of the accused/petitioner before him, directions whereof, issued under sub section (1) of Section 204, of the Cr.P.C., are, a sequel of his obviously, within, the domain of sub-section (1) of Section 204 of the Cr.P.C., rather taking cognizance upon the complaint, even when, reiteratedly thereat, the peremptory prosecution sanction, hence was amiss.

4. The learned counsel appearing, for the petitioner, has also placed reliance, upon, a judgment of this Court, rendered in ***Cr.MMO No. 42 of 2002, titled as Rakesh Nath & another vs. H.P. State Environment Protection & Pollution Control Board, decided on 31.12.2004***, wherein, vis-a-vis, alike the petitioner herein, the petitioners therein, who, were rendering employment, as Chairman, BBMB, and, Chief Engineer of the Beas Sutlej Link of the BBMB , (i) this Court, had in the apt portion thereof, which stands extracted hereinafter, had concluded, that the BBMB being neither a Body corporate nor a Public Under taking nor a government company, rather it being a statutory body created under the Punjab Re-organization Act. (ii) AND thereupon had recorded a conclusion, qua , the prosecution of the co-petitioners therein being unamenable, to be launched qua them, given prior thereto, the apposite prosecution sanction, hence, being unmeted by the designated authority. Reemphasisingly, this Court, in the afore referred judgment, had, for evident want, of, sanction, for, hence prosecuting the petitioners therein, being meted by the designated authority, had, proceeded to recall, and, quash the impugned orders, issued vis-a-vis them, by the judicial magistrate concerned, upon a complaint instituted against them, for theirs allegedly violating, the provisions borne in Sections 41, 43, 44, 47 and 49 of the Water (Prevention and Control of Pollution) Act, 1974. (iii) whereunder alike hereat, the petitioners therein were yet summoned. The apt portion of the judgement supra reads as under:-

> "The ratio of Mohd. Hadi Raja is of no assistance to the respondent in the present case. I have already said that BBMB is neither a Body corporate nor Public Undertaking nor a Government company. BBMB is a statutory Body created under the Punjab Re-organization Act to discharge the functions relating to Bhakra Beas Project, which are under the Statute dischargeable by the Central Government."

5. The afore-referred verdict rendered by this Court, in Cr.MMO No.42 of 2002 ,would beget its square attraction hereat, (i) given eruption, of evident alikeness, inter se, the capacities of the petitioners therein, vis-a-vis, the petitioner herein, besides, given the assumption therein, of, jurisdiction by the learned Magistrate concerned, arising, from a complaint instituted before him, whereafter, he alike herewith hence proceeded, to, within the ambit of Section 204 of the Cr.P.C., rather after taking cognizance, ordered for issuance, of summons, qua accused therein, (ii) even when, as akin hereat, at the aforesaid stage, no sanction, within the ambit of Section 197, of the Cr.P.C., was rendered by the designated authority. Consequently, with all the aforestated absolute concurrence(s), and, similarities, inter se, the factual matrix therein, and, the factual scenario prevailing hereat, rather making their evidence emergence hereat, (iii) thereupon, this Court, in consonance therewith, is, constrained to accept, the instant petition, and, to direct for the quashing and recalling, of, the summoning orders. However, it is made clear that it is open, for, the learned Magistrate concerned, to, after the apposite orders, for prosecuting, the accused are rendered, by the designated authority, he shall, in accordance with law, take cognizance upon the complaint, and, issue orders, for summoning, the accused/petitioner. Obviously, the learned Magistrate concerned, shall thereafter, on the apposite sanction, for prosecuting the petitioner herein, being meted, by the designated authority, hence also bear in mind, all the espousals reared, by the petitioner, qua the factum, vis-a-vis, with his name being ordered to be deleted, by the respondents, and, thereafter the respondents

ensuring the addition, in his place, of one Shri S.K. Sharma, qua hence yet the petitioner's arraying, as an accused, being or not being legally infirm.

6. However, at this stage, the learned counsel appearing for the respondents, places reliance, upon a verdict, of the Hon'ble Apex Court, rendered, in ***Cr. Appeal No. 4576 of 2018, titled as Manju Surana vs. Sunil Arora and others, decided on 27th March, 2018***, wherein, the Hon'ble Apex Court, has made a reference, for, an adjudication being meted by a larger Bench of the Hon'ble Apex Court, vis-a-vis, the conundrum appertaining qua the scope of inquiry, under Section 156(3) of the CR.P.C., (i) AND, whether at the stage, of exercising, of, jurisdiction by the learned Magistrate, under, Section 156(3), of, the Cr.P.C., and, wth the application, cast, within the parameters, of the aforesaid provisions, occurring in the Cr.P.C., also embodying, therein, rather offences constituted, under, the provisions, of, the Prevention of Corruption Act, (ii) or under any other statutory provisions, whereunder, prior meteing, of, statutory sanction, for hence validly launching the prosecution, of, the accused, hence is, peremptory, (iii) thereupon, pointedly, at the stage of institution, of the complaint, under provisions aforesaid, it being rather peremptorily enjoined, upon, the complainant, qua, thereat its evidently, holding the apposite peremptory sanction, for hence validly launching, prosecution against, a public servant. (iv) Therefrom, he contends that since the controversy engaging, this Court, is, alike the one, qua wherewith, a, reference is made by the Hon'ble Apex Court, to a larger Bench, of, the Hon'ble Apex Court, hence awaiting the pronouncement, of a verdict, upon, the apposite matter referred, for, meteing, of, an adjudication thereon, by the larger bench, of, the Hon'ble Apex Court, this Court not proceeding, to apply hereat, the mandate of the decision, rendered, by a co-ordinate bench of this Court, in Cr.MMO No. 42 of 2002.

7. However, the aforesaid submission, as addressed before this Court, by the learned counsel appearing for the respondents, is, amenable to rather founder, (i) as it arises, from, a gross misreading, of the apposite paragraph No.34 of the verdict, pronounced, by the Hon'ble Apex Court, in Cr. Appeal No. 457 of 2018, (ii) besides it, arises, from his remaining, oblivious to the factum, of evident contradistinctivity existing, inter se, the provisions, occurring, in Section 156(3) of the Cr.P.C., vis-a-vis, the ones borne, in Section 204 of the Cr.P.C., (iii) apparently, also his being unmindful qua attractability hereat, of, the latter provisions. Contrarily, the verdict, of the Hon'ble Apex Court, rendered in Cr. Appeal No.457 of 2018, is, confined, to, the mandate, occurring, in Section 156(3) of the Cr.P.C., provisions whereof stand extracted hereinafter:-

> "**156. Police officer's power to investigate cognizable case.**— (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

The aforesaid provisions, appertain, (i) to the apt jurisdiction bestowed thereunder, upon the Magistrate concerned, to upon, the latter being seized, of, a motion made before him, under Section 156(3) of the Cr.P.C., to, in compliance therewith hence order for investigations being carried, by a police officer, vis-a-vis, cognizable offences, as, borne in the apposite application, hence cast within its domain. Any aforesaid rendition, by the learned Magistrate concerned, for the Police Officer hence holding investigation also entails upon him, a, statutory obligation to also order, the police officer, to prior thereto lodge an FIR, with respect to the offences, carried, in the apposite application. The imperative significance thereof, is of, (ii) upon conclusion, of, investigations, the learned Magistrate concerned, being empowered, to, on being seized, with, the report submitted before him, under Section 173 of the Cr.P.C., take cognizance thereon, (iii)

whereas, in gross contradistinctivity thereto, any empowerment bestowed upon the learned Magistrate to take cognizance, upon, a private complaint, constituted under Section 204 of the Cr.P.C., only arises,or is invokable in the manner statutorily ordained therein, inasmuch as, upon directions being rendered, by the Magistrate concerned, for issuance of summons, upon, the accused. However, even though, despite the aforesaid contradistinctivities, hence occurring, inter se, the statutorily ordained manner, of, the Magistrate, taking cognizance, upon, a private complaint, vis-a-vis, an FIR, ordered to be registered, upon a motion being made before him, under Section 156(3) of the Cr.P.C., or vis-a-vis upon conclusion, of, investigations, upon an FIR ordered to be registered, by the Magistrate concerned, upon his pronouncing, affirmative directions, upon, his being seized, with an, application cast under the provisions of Section 156(3) of the Cr.PC.., (iv) yet an imperative alikeness, inter se, both the aforesaid statutorily ordained modes, appertaining qua taking, of, apt cognizance(s), is rather manifest, (v) similarity whereof, is comprised, in the Magistrate concerned, upon taking cognizance, upon, a police report or upon a complaint, especially, when both the police report or the complaint, embody therein offences, warranting peremptory meteing, of, the apposite sanction, by the designated authority, (vi) his refraining, to take cognizance, upon both, unless prior thereto, the apposite sanction, within the ambit of Section 197 of the Cr.P.C., is purveyed, by the designated authority, for hence prosecuting the accused. However, even if the aforesaid alikeness qua the facet aforesaid, is, rather manifestly surging forth, (vii) nonetheless, the factum, of, any making, of, a reference to a larger Bench, of the Hon'ble Apex Court, for, hence resolving the aforestated conundrum, embodied in paragraph No.34, of the judgment, relied upon the learned counsel, for the respondents, would not yet restrain, this Court, to apply hereat the mandate of the verdict rendered by this Court, in Cr.MMO No. 42 of 2002, (viii) especially when the controversy referred, for, the meteing of an apt adjudication thereon, to a larger Bench of the Hon'ble Apex Court, only appertains, to the peremptoriness or the absolute necessity, of meteing, of, statutory sanction, for prosecuting a public servant, for his committing, the apt penal misdemeanors, during, the discharge of his official duties, pointedly only, at a stage contemporaneous, to the institution of a complaint, cast under the provisions of Section 156(3) of the Cr.P.C., (ix) hence, with the aforestated stage, appertaining to the stage, of launching, of, investigations, and, its not appertaining, to the stage, of conclusion of investigations, nor its appertaining, to the stage, of, the court, upon, being seized, of a report submitted before it, under, Section 173 of the Cr.P.C., it without, the peremptory sanction, being, within the domain of Section 197 of the Cr.P.C., hence meted thereon rather, is, forbidden to take cognizance, upon, the report submitted, under, the provisions of Section 173 of the Cr.P.C., by the Investigating Officer. Consequently, the investigative stage, whereat, the provisions, of, Section 156(3), of the Cr.PC, may hereat warrant attraction, of the aforesaid unresolved conundrum, appertaining, to, legal necessity, of, existence thereat, of, the mandatory apt statutory apposite sanction, rather evidently, is, not existing hereat, (x) contrarily, therefrom, rather hereat the visible contradistinct, thereupon, provisions, of Section 204 of the Cr.P.C., comprise, the apt hereat attractable provisions, and, within domain whereof, the extant complaint is filed, against, the accused/petitioner, (xi) and, with the learned Magistrate concerned, hence, taking cognizance, whereas, thereat the peremptory necessity, of, prior thereto, meteing of apt sanction, within, the ambit of Section 197 of the Cr.P.C., was wanting, for hence imputing validity, to the apt taking of cognizance, (xii) thereupon, the apt paragraph of the verdict of the Hon'ble Apex Court, obviously, does not detract, the efficacy of the verdict rendered (supra), by a coordinate bench of this Court, nor this Court would be coaxed to not apply its mandate hereat.

8. For the foregoing reasons, the instant petition is allowed and the summoning order impugned before this Court is quashed and set aside. However, it is made clear that it is open, for the learned Magistrate concerned, to, after the apposite orders, for prosecuting, the accused/petitioner herein, are rendered, by the designated authority, he shall in accordance with law, take cognizance upon the complaint, and, issue orders for summoning, the accused/petitioner. Obviously, the learned Magistrate shall thereafter, on the apposite sanction, for prosecuting the petitioner herein, being meted, by the designated authority, hence also bear in mind, all espousals reared, by the petitioner, qua the factum, qua with his name being ordered to

be deleted, by the respondents, and, thereafter the respondents hence ensuring addition, in his place, of one Shri S.K. Sharma, qua hence yet the petitioner's arraying, as an accused, being or not being legally infirm. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith.

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

Rajbir Singh .....Appellant.
Versus
Geeta Devi .....Respondent.

Cr. Appeal No. 206 of 2018.
Reserved on: 30th May, 2018.
Date of Decision: 11th June, 2018.

Negotiable Instruments Act, 1881- Section 138- **Himachal Pradesh Registration of Money Lenders Act, 1976-** Section 3- Trial Court acquitting accused on ground that complainant was engaged in money lending without licence/registration as required under Act of 1976 – Findings recorded by trial court, on basis of complainant having filed complaints under Section 138 of Act of 1881 against 'R' and 'B' also – Appeal against – Held – Bar under Section 3 of Act of 1976 is attracted qua filing of money suit or seeking recovery of money by way of execution application only- Complaint under Section 138 of Act of 1881 is not barred by virtue of Section 3 of Act of 1976. (Para-11)

For the Appellant: Mr. S. D. Sharma, Advocate.
For the Respondent: Mr. Ashwani Kaundal, Advocate vice Mr. Bhupinderjit Kashyap, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The complainant/victim, is aggrieved, by the pronouncement, of, an order, of acquittal by the learned trial Court, vis-a-vis the accused, upon, Cr. Case No. 1412/3 of 2014/2013.

2. The facts relevant to decide the instant case, are that the complainant lent a sum of Rs.1 lac to the accused in the month of September, 2012. This amount was to be repaid within one year. He further lent a sum of Rs.72,000/- to the accused in the month of March, 2013, amount whereof was to be repaid within six months. The aforesaid amounts was advanced in presence of Smt. Pushpa Devi w/o Shri Chet Ram, r/o Sant Niwas, Ambedkar Colony, Dhalli, District Shimla. The accused gave an undertaking for a sum of Rs.1 lac out of the total amount. The complainant also submits that he also arranged a sum of Rs.3 lacs for accused on her request, made, through Smt. Pushpa Devi. He further submits that when he demanded the aforesaid amount, the accused issued a cheque No.072825 of 15.09.2013, in his favour, drawn at Allahabad Bank, Shimla, amount to Rs.1,72,500/-. The said cheque was returned unpaid on 9.10.2013 with remarks "funds insufficient". The complainant served a legal notice upon the accused through registered post and it was replied by the accused, however, she failed to defray the cheque amount. Hence the complaint.

3. A notice of accusation, was, put to the accused by the learned trial Court, for hers, committing an offence punishable under Section 138 of the Negotiable Instruments Act. In

proof of his case, the complainant examined 2 witnesses. On conclusion of recording, of, the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication, besides she examined two witnesses in her defence.

4. On an appraisal, of, the evidence on record, the learned trial Court, returned findings of acquittal qua the accused/respondent herein.

5. The complainant, stands, aggrieved by the judgment of acquittal recorded qua the accused/respondent. He, has concertedly, and, vigorously contended qua the findings of acquittal recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of acquittal, warranting reversal, by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

6. On the other hand, the learned counsel appearing for the accused/respondent herein, has with considerable force and vigour, also contended qua the findings of acquittal recorded by the learned trial Court rather standing based on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

7. 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.

8. The accused issued cheque, borne, in Ex.CW1/A vis-a-vis the accused, and, upon its presentation, before, the banker(s) concerned, it, as reflected in memo Ex.CW1/C, and, in Ex.CW1/C, was hence dishonoured, for want of sufficient funds, in the account(s), of, the accused. Subsequent thereto, the complainant sent a notice, borne, in Ex. CW1/D, for, hence beseeching the accused to liquidate the amount, borne, in the dishonoured negotiable instrument. The accused/respondent, has not, denied the existence of her signature(s), on, Ex.CW1/A. The complainant in support of the averments, embodied, in the complaint, of, his on 9.9.2012, and, in March, 2013, in the presence of, one, Pushpa Devi, respectively handing over to the respondent/accused, a sum of Rs. 1 lac, and, a further sum of Rs.72,000/-, has, rendered testification(s), bearing consonance therewith. The testification rendered by the complainant, is, meted corroboration by CW-2 Puspa Devi. The defence as ventilated by the accused/respondent, of hers, in the presence of, one, Krishan Kumar, who testified, as DW-1, hence liquidating vis-a-vis the complainant a sum of Rs. One lacs-, from amongst, a sum of Rs.1,72,000/-, borne in Ex.CW1/A, obviously depended upon the testification, of Krishan Kumar. However, the latter omitted, to, purvey his appropriate corroboration thereto. The effect of the aforesaid defence reared, by the accused/respondent, being hence falsified, (i) also carries the further effect, of, the further defence, reared by the accused/respondent, of the amounts scribed, in words and figures, in, the dishonoured negotiable instrument, borne in Ex.CW1/A, being not authored, by her rather being authored by the complainant, (ii) arising, from qua at the time contemporaneous to hers, purportedly liquidating the sum of Rs.one lac, his not returning to her, three blanks cheques, being also negatived, (iii) conspicuously with the respondent/ accused, not lending efficacious proof in respect thereof, comprised in hers either making, any apposite testification in respect thereof nor hers thereafter, instituting an application cast, under, the provisions of Section 45 of the Indian Evidence Act, for, sending the disputed scribings occurring, in, Ex.CW1/A, to the Handwriting Expert concerned, for the latter being hence enabled, to compare them, with, her admitted signatures or scribings, (iv) contrarily, with the aforesaid befitting therewith endeavours, rather remaining uncanvassed, by the respondent/accused, hence, constrains this Court, to conclude, of, the scribings both in words and figures, of the amount, borne, in Ex.CW1/A, being authored by the respondent/accused, (v) and hence hers prevaricating, the factum, of the complainant/appellant, authoring, the relevant scribings, and, also her propagation, of hers despite issuing three blank cheques to the complainant, yet theirs remaining unreturned to her, by him, even when she liquidated a sum of Rs.one lac, to the complainant also hence being ingrained, with, a pervasive vice of falsity.

9. The penal provisions, occurring, in Section 138 of the Negotiable Instruments Act, for theirs begetting attraction, enjoin, adduction of cogent proof, (i) qua, the amount, borne in the dishonoured negotiable instrument, comprising, a legally recoverable debt or legally enforceable debt, (ii) contrarily, upon evidence surging forth, in display of the amount, carried in the dishonoured negotiable instrument, being not, a legally recoverable debt or a legally enforceable debt or other liability, (iii) thereupon, the mandate of the apposite penal provisions, would remain unattracted nor courts of law, would render any order of conviction, upon, the drawer of the cheque concerned.

10. The learned trial Magistrate, had, recorded a conclusion, that, the complainant was engaged in the business of money lending, hence, in the face, of the provisions, borne, in Section 3 of the H.P. Registration of Money Lenders Act, 1976, provisions whereof stand extracted hereinafter:-

> **"3. Suits and applications by money-lenders barred, unless money**-Notwithstanding anything contained in any other enactment for the time being in force a suit by a money-lender for the recovery of loan, or an application by money-lender for the execution of a decree relating to a loan, shall, after the commencement of this Act, be dismissed, unless the money lender, at the time of institution of the suit or presentation of the application for execution, or at the time of decreeing the suit or deciding the application for execution,-
>
> (a) is registered; and
>
> (i) holds a valid licence, in such, form and in such manner as may be prescribed; or
>
> (ii) holds a certificate from a Commissioner granted under section 10, specifying the loan in respect of which the suit is instituted, or the decree in respect of which the application for execution is presented; or
>
> (iii) if he is not already a registered and licensed money-lender, satisfies the court that he has applied to the Collector to be registered and licensed and that such application is pending;
>
> Provided that in such a case, the suit or application shall not be finally disposed of until the application of the money-lender for registration and grant of licence pending before the Collector is finally disposed of."

(i)whereunder an unregistered money lender, is, barred, to enforce his claim, against, his borrower by instituting a civil suit or upon rendition of an affirmative decree, he is forbidden, to realize the decretal amount, through his casting an execution petition, before, the executing court concerned, (ii) hence concluded that the amount, borne, in Ex. CW1/A, being, not a legally recoverable debt or a legally enforceable debt, thereupon, pronounced an order, of acquittal, upon, the respondent/accused. The factual besides evidentiary matrix, for, the learned trial Court, hence, errecting the aforesaid inference, (iii) is, comprised, in inability, of, the complainant, to, explain the nature of his relationship, with, the accused, (iv) AND also stems, from, his also acquiescing qua his instituting complaint(s), under, Section 138 of the Negotiable Instruments Act, against, one Ranjna Devi, and, one Basant Singh, wherewithwhom, he has also not explained, his relationship. However, the aforesaid conclusions, are mis-founded, and, are apparently surmisally drawn, (v) given the aforesaid Ranjna Devi, and, Basant Singh, not, being cited, as witnesses, by the respondent/accused, for, theirs hence rendering testifications, qua their borrowing(s), of, money from the complainant, and, his lending vis-a-vis them, also being accompanied by his charging or levying interest, upon, the principal sum(s). (vi) Also hence, for, theirs rendering testifications, of, in theirs making borrowing(s) from the complainant, theirs holding, no acquaintance with him, and, that in their relevant borrowing(s), from, the complainant, theirs being solitarily guided by the factum of his being an unlicensed professional money lender. However, evidence, in regard aforesaid, is grossly amiss hereat, (vii) thereupon, it was insagacious, for, the learned trial court, to conclude qua the accused, being an unlicensed

professional money lender, and, his charging interest vis-a-vis the money lent by him vis-a-vis the accused, despite, his being wholly unacquainted, with her, or other borrowers. (viii) More so, when PW-2, espouses, of hers, being well known, to the respondent/accused, also, when the relevant transaction, occurred, in the presence of the wife of the complainant, besides with the respondent/accused, not making, any testification, qua the relevant borrowings, made by her, from the complainant, being, a sequel of hers, knowing, the complainant to be engaged in the profession, of, money lending. Furthermore, also when, the borrowings, rather made, from, professional money lenders, by the latter's customers, enjoin also eruption of clinching proof, qua, charging of interest thereon, by the money lender, (ix) whereas with no evidence surging forth hereat, in display of the amount, carried in the dishonoured negotiable instrument, also carrying therein, the apt interest levied or charged thereon. Contrarily, with existence, of, evidence qua the initial borrowings, made by the respondent/accused, from, the complainant, rather bearing consonance, with, the amount carried, in the dishonoured negotiable instrument, (x) whereupon, it is apt, to, conclude, of no, interest being charged or levied by the complainant, from, the respondent/accused, in the latter making, hence, borrowings from him. Corollary thereof, is, it being unbefitting to conclude, of, the complainant, charging or levying, any interest, on the money lent by him to the apposite borrowers AND hence his being not construable to be a money lender.

11. Be that as it may, even if assumingly, the complainant, is construable to be an unregistered or an unlicensed professional money lender, and, even if assumingly, the bar constituted under Section 3 of the H.P. Registration of Money Lenders Act, 1976, is attracted vis-a-vis the purported business of money lending, carried by the complainant, (i) nonetheless, the bar, is, attracted only, against, institution of a civil suit, and, for realization, through, coercive processes, of, decrees rendered thereon, (ii) the bar obviously, is, not attracted vis-a-vis, the institution of a complaint, under Section 138 of the Negotiable Instruments Act, (iii) given non existence of any specific explicit mandate therein qua the bar encapsulated therein, vis-a-vis, institution of a civil suit, by any unlicensed money lender, for hence his seeking recovery, of, amounts lent by him, to, his borrowers, also being extendable qua the institution of a complaint under Section 138 of the Negotiable Instruments Act, by a money lender against his borrower. Consequently, omission of existence, of, an explicit apposite exclusionary mandate, in Section 3 of the H.P. Registration of Money Lenders Act, 1976, against institution, of, a statutory complaint, by a professional money lender against his borrower, also hence, constrains a conclusion, that, mandate thereof, is, unattractable vis-a-vis institution, of a statutory complaint, by a money lender, against his borrowers, (a) unless evidence surges forth, of the apposite lending being provenly, ingrained, with entrenched prohibitive vices, (b) whereupon, alone the lending, would be construable to be, not, a legally recoverable debt nor a legally enforceable debt, (c) whereas, with no evidence hereat, rather surging forth, qua the sums embodied, within, the cheque, hereat carrying, any, entrenched prohibitive vices, thereupon, even if assumingly, the complainant, is, a professional unlicensed money lender, yet the lending made by him vis-a-vis the accused, are, to be construable to be both, a legally recoverable debt besides a legally enforceable debt. (d) More so, when evidently no proof is forthcoming qua the respective borrowings, being made, subject to levying or charging, of, interest thereon.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court, suffers, from, a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, the instant appeal is allowed and the judgment impugned before this Court is quashed and set aside Consequently, the accused/respondent herein, is, convicted for the offence punishable under Section 138 of the Negotiable Instruments Act. She be produced before this Court on 19/06/2018 for hers being heard on the quantum of sentence.

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

State of H.P. .....Appellant.
Versus
Kali Prashad & others .....Respondents.

Cr. Appeal No. 419 of 2010.
Reserved on: 1st June, 2018.
Date of Decision: 11th June, 2018.

Punjab Excise Act, 1914 (as applicable to State of H.P.)- Section 61(1)(a)- Recovery of cartons containing Indian made foreign liquor from vehicle occupied by accused – Accused were charged and tried for possessing liquor without permit - Accused however were acquitted by trial Court- Appeal against- Held – Cartons allegedly containing bottles of liquor not produced before trial Court for identification by witnesses – Link evidence is also missing – Charges not proved – Acquittal upheld – Appeal dismissed. (Paras- 11 and 12)

For the appellant: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs., for the appellant.
For the respondents: Mr. M.L. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed, against, the verdict, pronounced on 7.5.2010, by the learned Judicial Magistrate, 1st Class, Nadaun, District Hamirpur, H.P. in Excise Case No. 24-III-2006, whereby, he acquitted, all the accused for theirs' allegedly committing, an offence punishable under Sections 61(i)(a) of the Punjab Excise Act, as applicable, to the State of Himachal Pradesh.

2. The facts relevant to decide the instant case are that on 9.3.2006, SI Rajinder Pal, the Investigator of the case along with other police personnel and officers of the Excise Department was on patrol duty and nakabandi at place Gaggal near the Mandial Petrol Pump where he received a secret information that one jeep tralla bearing Non. HP-22-1709 loaded with liquor was coming from Kangra side to Naduan. On receipt of aforesaid secret information, the Investigator along with other police personnel and officers of the Excise Department laid naka at place Gaggal and around 6.30 a.m. the aforesaid vehicle came from the side of the Bus Stand Naduan and on seeking the police party, the accused persons tried to escape from the scene of crime by turning their vehicle back but the investigator along with aforesaid officials succeeded in apprehending the accused persons along with said vehicle. The accused Kali Dass was driving the offending vehicle whereas the other accused persons namely Vikram Singh and Ravi Parkarsh were occupying the same and they revealed their identity as such to the investigator. On search aforesaid vehicle, 80 cartons of Country Liquor Lal Kila Brand cartons of Indian Made Foreign Liquor Bag Piper brand, 10 cartons, Indian Made foreign Liquor Kingpaul brand, 10 cartons of Thunderbolt Beer were recovered from the exclusive and conscious possession of the accused persons without there being any valid permit. Each carton was containing 12 bottles of liquor/bear. The investigator took out one bottle of each brand of liquor, that is, five bottles as sample from one carton of each brand of liquor and thereafter sealed them with seal impression 'H' and were taken into possession along with the remaining bottles of country liquor contained in the respective cartons vide memo Ext. PW-5/B in presence of S/Sh. Prakarn Singh, Chet Ram and Raj Kumar. The investigator furnished a copy of recovery memo Ext. PW-5/B to the accused persons and also obtained their signatures thereon in token of receipt. The investigator also obtained specimen of seal impression 'H' on a piece of cloth which is Ext. PW-5/A and the seal

after use was handed over to Sh. Prakaran Singh. Thereafter the investigator prepared rukka Ext. PW-5/A and send the same to Police Station, Nadaun through HC Amar Nath for registration of the case on the basis of which, FIR Ext. PW-9/A was lodged at Police Station, Naduan against the accused. The investigator also took into possession the jeep tralla along with its documents vide memo Ext. PW-1/A. The site plan Ext. PW-5/D was also prepared. During investigation, the sample bottles were sent to CTL, Kandaghat for chemical analysis and the same were found to be containing alcoholic strength as detailed in report of Chemical Examiner Ext. PX. After completion of investigation and on being satisfied that the accused persons have committed the offence complained against the officer-in-charge of the Police Station, Nadaun presented the charge-sheet for the commission of offence punishable under Section 61 (i) of Punjab Excise Act, as applicable to the State of H.P. against the accused persons.

3. On conclusion of investigations, into the offence, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared, and, filed before the learned trial Court.

4. The accused, stood charged, by the learned trial Court, for theirs', committing offences punishable, under Sections 61(i)(a) of the Act. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording of prosecution evidence, the statement, of all the accused, under Section 313, of, the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, all the accused claimed innocence, and, pleaded false implication.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal qua, the, accused/respondents herein.

6. The State of H.P., stands aggrieved, by the judgment of acquittal, recorded, qua the accused/respondents. The learned Addl. Advocate General appearing for the State, has concertedly, and, vigorously contended qua the findings of acquittal recorded by the learned trial Court, standing not based, on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise, of its appellate jurisdiction, and, theirs standing replaced, by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondents herein, has, with considerable force and vigour, contended qua the findings of acquittal recorded, by, the learned trial Court rather standing based on a mature, and, balanced appreciation, by it, of the evidence on record, and, theirs' not necessitating any interference, rather theirs meriting vindication.

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

9. The relevant recovery, of, the cache of liquor, was made through memo, comprised in Ext. PW-5/B. All the official witnesses, deposed, in tandem and with utmost consistence, besides bereft of any intra-se contradictions, occurring, in their respective examinations-in-chief, and, in their cross-examinations, besides rendered testifications, all bereft, of, any inter-se contradictions, the qua trite factum, of the recovery of the cache of liquor, occurring through, memo borne in Ext. PW-5/B. Their respective testifications hence acquire, the, gravest solemnity, and, probative vigor. Even though, an independent witness, to Ext. PW-5/B, has reneged, from, hsi previous statement recorded in writing. However, with his rather admitting the occurrence, of, his genuine signatures, as exist, on Ext. PW-5/B, thereupon the factum of his admitting his signatures, on the aforesaid memo, cannot be overlooked, (i) whereupon, he, as mandated by the provisions of Section 91 and 92 of the Indian Evidence Act, stood, interdicted, besides forbidden, to depose in variance therefrom, rather with his being interdicted, by the statutory mandate engrafted, in the afore-referred apposite provisions, of, the Indian Evidence Act, (ii) thereupon, reiteratedly, he, by admitting his signatures existing thereon, hence also imputes conclusive proof, qua all the recitals, occurring therein, (iii) significantly on

occurrence, of unflinching evidence qua his signatures existing thereon, irrefragable evidence whereof stands evinced, by his admitting, the prime factum of the apposite memo, rather holding his signatures, hence, his apposite admission, sequelly statutorily belittles, the effect of his deposing orally in variance or in detraction thereto.

10. Even though, he has testified, of, the Investigating Officer rather obtaining his signatures, upon, a, blank paper, yet, the aforesaid testification, cannot, render unproven, all the recital(s) hence occurring in Ext. PW5/B, nor obviously the aforesaid statutory embargo, permits him, to renege, from his previous statement recorded in writing, or, from, the recitals occurring in PW-5/B, whereon, his uncontested signatures hence occur, the reason being, (a) his not making any clear echoing, in his testification, qua the Investigating Officer concerned, exerting any coercion or duress, upon him, for his subscribing his signatures thereon, (b) nor his making, any echoing, in his testification qua his thereafter, making a complaint, vis-à-vis, police officers superior, to, the Investigating Officer.

11. The apposite report of the CTL, is, comprised in Ext. PX, and, is rendered qua (i) one bottle country liquor Lal Kila, (ii) one bottle Bag Piper, (iii) one bottle English wine Kiny Paul, (iv) English wine Black Jack xxx Rum, (v) thunder Bold 180ML Beer, all bottles whereof were extracted, from, the cache of liquor, recovered through memo, borne, in Ext. PW-5/B, (a) all the prosecution witnesses concerned, in their respectively rendered testifications, echoed, with utmost unanimity, and, concurrence, vis-à-vis, the recovery of the apposite cache, of, liquor being made under Ext. PW-5/B. (b) along therewith, each of, the prosecution witnesses, in their respectively rendered tesitifcations, make apparent underscorings vis-a-vis the recovery of cache, of liquor, as, made under Ext. PW-5/B, also bearing congruity therewith, (e) AND, the CTL in its report comprised, in, Ext.PX also makes, clear unrebutted echoings, vis-à-vis, the sample bottles, sent to it, for analysis, containing therewithin liquor, (f) preponderantly, hence the factum of the sample bottles retrieved, from, the entire cache, of, liquor recovered, at the site, comprised in site plan, embodied in Ext.PW-5/B, does prima facie bear apt analogity therewith. In aftermath, the prosecution, does prima facie, succeed, in proving the charge against the accused, vis-à-vis, the bottles, of, liquor qua wherewith, report comprised, in, Ext. PX, was hence rendered.

12. Be that as it may, even when the prosecution, has hence, proven the charge, to the extent aforesaid, against, the accused, yet, (a) the further important link, for hence emphatically establishing, the, charge qua them rather was comprised in the prosecution, also producing, the case property, in court, importantly for enabling the learned trial Court to hence sight it, AND, also to facilitate, its, sighting by the prosecution witnesses' concerned, and, by the learned defence counsel, (b) whereupon apt sightings thereof, hence forthright apt discernments would rather emanate, from, the court, and, from the learned defence counsel, vis-à-vis, the seal impression(s) embossed thereon, carrying analogity vis-a-vis, the ones', reflected in Ext. PW-5/B. However, the aforesaid vital link, for hence firmly, and, formidably establishing the charge, against the accused, is grossly amiss hereat, (c) given the case property being put to auction, and, being thereat sold, on 3.5.2006, rendering hence, precluded, its, production before the learned trial Court. The aforesaid sale of the case property, hence, in a public auction, is deprecated, given its obviously begetting, the ill sequel, qua thereupon the genesis, of the prosecution case, rather being smothered, significantly, even qua, the, bottles in respect whereof, the report borne in Ext. PX, stood rendered. The Commissioner of Excise, is directed to after issuance of show cause notice, to all concerned, initiate in accordance with law, appropriate proceedings against them. A copy of this order, be sent forthwith, to the learned Commissioner (Excise), for his initiating, <u>further necessary action</u>.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material on record by the learned trial Court, does not suffer, from a gross perversity or absurdity of mis-appreciation, and, non appreciation of evidence on record.

14. Consequently, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgment, is, affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Subhash Sharma @ Chand .....Petitioner

Versus

State of H.P. .....Respondent.

Cr.MP(M) No. 670 of 2018
Decided on: 11th June, 2018

Code of Criminal Procedure, 1973- Section 439- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989-** Section 3(1)– Bail – Accused surrendered before High Court and separately filed application for bail – Investigation was found complete – Custody of accused was not required for further investigation by police - Accused was having roots in society and there was no chance of his fleeing away from justice – Conditional bail granted.

(Paras-4 and 5)

For the petitioner : Mr. Naresh Kaul, Advocate

For the respondent: Mr. Narinder Guleria, Addl. A.G with Mr. Kunal Thakur, Dy. A.G. Mr. Navdeep Singh, Dy.S.P. Nurpur is present in person along-with the record.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Petitioner herein is an accused in FIR No. 144/18 registered under Section 504 and 506 of the Indian Penal Code and Section 3(1) of the SC & ST (Prevention of Atrocities)Act, 1989 in Police Station, Nurpur, District Kangra, H.P. at the instance of Jagdish Raj with the allegations that on 11th April, 2018 around 12.15 p.m. when he met the accused-petitioner in connection with matrimonial dispute of his daughter with his son-in-law Suram Singh, he not only called him by his caste but also hurled filthy abuses. The accused-petitioner has surrendered in this Court and also filed the present application with a prayer to admit him on bail.

2. The I.O. Deputy Superintendent of Police, Nurpur Sh. Naveep Singh is present in person and has produced the record.

3. Status report has also been filed.

4. The investigation is almost complete, therefore, further custodial interrogation of the accused-petitioner is not required. Otherwise also, he belongs to village and Post Office Dainkwan, Tehsil Nurpur, District Kangra, H.P. He had been Pradhan of Gram Panchayat, Dainkwan also. Presently, it is his son Satish, who is Up-pradhan of the said Gram Panchayat. Being so, he has roots in the society. The controversy as to whether he has committed the offence in the manner as claimed in the FIR has to be set at rest at an appropriate stage after holding full trial. However, at this stage, keeping in view that there is no possibility of the accused-petitioner fleeing away from justice and there being no past criminal history in his credit, he deserves to be admitted on bail.

5. Consequently, this application is allowed and the accused-petitioner is ordered to be released on bail in connection with the case registered against him vide FIR No. 144/18 in

Police Station, Nurpur, District Kangra, on his furnishing personal bond in the sum of Rs. 25,000/- with one surety in the like amount to the satisfaction of learned Sessions Judge (Special Judge), Kangra at Dharamshala. He shall further abide by the following conditions:-

(a) make himself available for interrogation as and when called upon to do so;

(b) not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.

(c) not 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 the Police Officer.

(d) not leave the territory of India without the prior permission of the Court.

6. It is clarified that if the petitioner misuses his liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

7. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and rather remain confined to the disposal of this petition alone. Petition stands disposed of accordingly.

Dasti ***copy***.

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

Shri Tara Dutt Sharma .....Petitioner/J.D. No.2.

Versus

Mahindra & Mahindra Financial Services Ltd. & another .....Respondents.

CMPMO No. 38 of 2018.
Reserved on : 30th May, 2018.
Date of Decision: 11th June, 2018.

Code of Civil Procedure, 1908- Section 47- Order 1 Rule 10- Necessary party – Joining of - Decree holder (DH) filing execution application against principal debtor as well as guarantor – Despite Court order's, DH not giving correct address of principal debtor for effecting his service – DH then moving application under Order 1 Rule 10 for deletion of principal debtor from array of parties in execution proceedings - Executing Court allowing application and ordering deletion of principal debtor from execution application – Challenge thereto by guarantor – Held – Notwithstanding that liability of principal borrower and guarantor is joint and several yet equity requires that Executing Court should first ensure service of principal borrower in accordance with law - Decretal amount should first be recovered from assets of principal debtor – Order of Executing Court set aside – Matter remanded. (Para-4)

For the Petitioner: Mr. Sudhir Thakur, Advocate.
For Respondent No.1: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For Respondent No.2: Mr. Bhupender Pathania, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition, is, directed against the affirmative orders rendered by the learned executing Court, on 31.07.2017, upon, the decree holder's application, cast, under the

provisions of Order 1, Rule, 10 CPC, claiming therein, a relief for deletion, of, the name of JD No.1/respondent No.2 herein, from the array, of, judgment debtors.

2. One Smt. Sumeet Dhilon, is, the principal borrower, and, she suffered a money decree, decree whereof, was, put to execution, before, the learned executing court. The petitioner herein, is, the guarantor of the loan, borrowed by the principal loanee, from, the decree holder. A perusal, of, the apt record, reveals, that the principal borrower, JD No.1, despite, repeated attempts, to personally serve her, yet remained unserved. However, the petitioner herein was personally served, and, through his counsel, had recorded his appearance, on 21.1.2017, before, the learned executing Court. An incisive perusal, of, the zimni orders, made, subsequent to 21.1.2017, upto, 21.07.2017, make, vivid disclosure(s), of though, the learned executing court, rather making orders, for, effectuation of service, upon, the unserved JD No.1, though affixation, yet for want of the decree holder hence purveying her correct address, hence, service, through affixation upon JD No.1, remaining unefectuated. Despite the counsel for the decree holder, not, purveying to the learned executing Court, the correct address of JD No.1, for, hence hers, being served through affixation, yet on 31.07.2017, an affirmative order, was pronounced, upon, the decree holder's application cast, under the provisions of Order 1, Rule 10, of the CPC, for, hence, the name of JD No.1, the principal borrower, being deleted, from, the array of co-respondents/JDs. The orders made, on, the apposite application, were, rendered on the very day, when it was filed therebefore.

3. The learned counsel appearing, for the respondent/decree holder, submits, with much vigour, that the orders rendered subsequent thereto, for the apt coercive processes, being initiated, for hence realizing from the assets, of the petitioner herein/JD No.2, the decretal amount, rather not warranting interference, given, the provisions embodied, in Section 47 of the CPC, provisions whereof stand extracted hereinafter, omitting, to, on their circumspect reading, carry any explicit mandate therein, of any bestowment being made, upon, the JD to rear objections, before, the learned executing Court. Provisions of Section 47 of the CPC read as under:-

> **"47. Questions to be determined by the Court executing decree.-** (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
>
> (2) omitted by Act 104 of 1976. effective from 1-2-1977
>
> (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court
>
> Explanation I: For the purposes of this section, a plaintiff whose Suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.
>
> Explanation ll: (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the degree is passed; and
>
> (b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

However, the aforesaid submission, is, misplaced, AND, arises, from, a misreading, of, the provisions borne in Section 47 of the CPC, (i) especially, of, the words "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit" hence occurring therein, rather imperatively

carrying, no connotation, other than the one , (ii) qua the JDs, being empowered, to resist the satisfactory discharge, of the decree, from their respective assets, by canvassing grounds, qua the decree, being unexecutable vis-a-vis them/him, or their respective assets, (iii) the apt unexecutability(ies) thereof, arising, from the decree being void or nonest, hence, reiteratedly unenforceable against their assets.

4. Nowat, the learned counsel appearing, for the decree holder submits, that assumingly, the aforesaid connotation is tenably ascribable, by this Court, to the provisions, borne in Section 47 of the CPC, (i) thereupon with JD No.2, one Tara Dutt Sharma, not since, his being validly served, and, upto the apt coercive processes being issued, for hence the decretal amount being satisfied from his assets, hence, raising objections, against, apt executability, and, enforceability, vis-a-vis, his assets, (ii) thereupon, his acquiescing, to the realization of the decretal sum, from, his assets. Again the aforesaid submission is amenable to founder, (iii) given the trite factum, of the learned counsel, for the decree holder, remaining grossly unaware besides oblivious, to the trite factum, of the unserved JD/principal borrower, one Smt. Sumeet Dhillon, being unserved also his remaining unaware, of, the factum of one Tara Dutt |Sharma, JD No.2/petitioner herein, being merely, the guarantor to the apposite borrowings made by her, from, the decree holder. The further effect, of his misawakenings besides unawakenings qua the further therefrom ensuing trite tenet, of, co-extensibility of liability of the guarantor, along with, the principal borrower or the principal JD, qua, the borrowings made, by the latter from the lender concerned, rather also thereupon being squarely attracted vis-a-vis the apt co-JD, and, the apt guarantor, impleaded hereat, as co-JD No.2. (iv) whereas, for ensuring all apt attraction(s) thereof, vis-a-vis him, besides for ensuring qua the principle of equity or justice, and, of fair play, rather, hence begetting their apt fullest compliance , it being also imperative, for, the executing courts (v) to initially ensure, that the decretal sums, being initially realizable, from, the assets of the principal judgement debtor or the principal borrower, and, on evident failure thereof, it being open for the executing court, to, make orders, for apt coercive realization(s), from, the assets, of the guarantor or co-JD. However, the aforesaid principles of equity or justice and fair play, (vi) ingraining the trite canon(s) of co-extensibility, of liability, of, the guarantor, along with, the principal borrower or principal JD, appears to be given a complete go-bye, (vii) and, the learned executing Court, rather, has made short shrift, of, the afore trite principles, by its, after ordering for deletion, of the principal JD, on 31.07.2017, upon an application, in the apt regard, being made, by the decree holder, on the same day, its thereafter rather proceeding, to realize the decretal sums, from, the assets, of, JD No.2. Contrarily, prior, to, the rendering, of, the impugned order, it was incumbent, upon, the learned executing court, to, insist upon the DH, qua the latter making a clear display of it, making efforts, to ensure qua its orders directing, effectuation, of, service through affixation upon JD No.1, being complied with, and, upon its apt efforts failing, for, any dereliction on the part of the DH, to purvey the correct address of the principal JD, thereupon, it was enjoined to pronounce a direction, upon, DH, to, make a scribed motion, for the unserved principal JD, being served through publication of a notice in a daily newspaper. Consequently, reiteratedly before pronouncing, the impugned order, it was incumbent upon the learned executing Court, to insist upon the decree holder, to ensure qua service being effectuated, upon, principal JD, through, ordinary mode or through affixation , and, on failure thereof, it was enjoined, to, ensure that service stood effectuated, upon, the principal JD through publication, of, a notice in a newspaper, holding circulation, in the area, whereat the principal JD, was, last residing. The aforesaid concerted efforts, would also made a display, of the executing court, ensuring, the presence of the principal JD, and, also its thereupon ascertaining, qua the latter JD, holding any assets, for hence the decretal amount, being realized therefrom, and, in its thereafter proceeding, to make coercive realization, of the decreetal amount, from, the assets held by the guarantor/JD No.2, would thereupon, rather hold an aura of validity. Even the aforesaid endeavours, rather remained omitted, to be exercised by the learned executing court, rather it, in a slip shod or in a hurried manner, without application of mind, and, without adhering, to, the tenets of justices and equity, inhering, the principle of coextensibility of liability, of guarantor, vis-a-vis, the principal JD, (i) canons whereof, are comprised in the executing court being assured, of assets of the principal JD, being insufficient or not in existence, or wanting in

adequacy, for, hence meteing the fullest satisfaction of the decree, put to execution, (ii) rather the assets of co-JD being available, for realization of the decretal amount. Contrarily, visible infraction(s) of the aforesaid principles, constrains this Court, to conclude, that the order impugned before this Court, hence suffering from, grave vices of illegality, and, warrants its being set aside. More so when the counsel, for, the decree holder, states at the bar, of his holding no objection in case the principal JD, is ordered to be impleaded as co-JD, along with the petitioner herein, as also, when obviously JD No.1 one Smt. Sumeet Dhillon stands served, before this Court, and, she represented by her counsel, hence has tacitly, made a submission, of may be hers, holding assets, qua hence the decretal sum being realised therefrom.

5. For the foregoing reasons, the instant petition is allowed, and, the impugned order rendered, on 31.07.2017 by the learned executing Court, upon an application cast, before it, under the provisions of Order 1, Rule 10 CPC, is set aside. The parties are directed to appear, before, the learned trial Court on 22nd June, 2018. No order as to costs. All pending applications also stand disposed of . Records be sent back forthwith.

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

The Executive Engineer, HPSEB, Electrical Division, Mandi .....Petitioner.

Versus

Sh. Mohinder Singh ....Respondent.

CWP No. 1664 of 2017.
Reserved on : 30.05.2018.
Decided on : 11th June, 2018.

Industrial Disputes Act, 1947- Section 25G- Principle of last come first to go – Applicability - In absence of contract to the contrary employer is required to retrench workman who was employed last in that category – Respondent was retrenched though his juniors 'U', 'J' and 'K' all were retained- Plea of petitioner that respondent had abandoned his work not probablized – Held – Retrenchment of respondent was illegal – Award of Labour court holding retrenchment of respondent illegal, is upheld. (Paras-4 and 5)

For the Petitioners: Mr. T.S. Chauhan, Advocate.
For the Respondent: Mr. Rajesh Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Labour Commissioner forwarded, vis-a-vis, the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (hereinafter referred to as the Tribunal), the hereinafter extracted, reference, for an adjudication being rendered thereon:-

> " Whether the industrial dispute raised by the wroker Shri Mohinder Singh son of Shri Dharam Singh, r/o Village Badog, P.O. Dudar, Tehsil Sadar, District Mandi, H.P., before the Executive Engineer, H.P.S.E.B. Electrical Division Mandi, District Mandi, H.P., vide demand notice dated 7.09.2009, regarding his alleged, illegal termination of service w.e.f. 25.10.2001, suffers from delay and latches? If not, whether termination of services of Shri Mohinder Singh son of Shri Dharam Singh, r/o Village Badog, P.O. Dudar, Tehsil Sadar, District Mandi, H.P., by the Executive Engineer, H.P.S.E.B. Electrical Division, Mandi, District Mandi, H.P. w.e.f. 25.10.2011 without complying the provisions of the Industrial Disputes Act, 1947, is

legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above aggrieved workman is entitled to from the above employer?"

2. Upon the afore extracted reference, the learned Tribunal, rendered an affirmative adjudication, vis-a-vis, the workman, and, against his employer. The employer is aggrieved therefrom, hence, has instituted the instant civil writ petition before this Court.

3. In the petition, the workman had espoused, qua infraction being visited, vis-a-vis, the provisions of Section 25G, of, the Industrial Disputes Act, provisions whereof, stand extracted hereinafter, (a) wherein a statutory prohibition, is, embodied, against, retention of workmen, by the employer, even when prior thereto, the services of senior therewith apposite workman, are, retrenched, also wherein the principle of last come, first go, is contemplated, (ii) infringment whereof, is canvassed, to, comprise in 2 workmen, junior to the respondent herein, being retained by the employer, even when prior thereto the services of the respondent herein, were retrenched. The provisions, of, Section 25G, of, the Industrial Disputes Act, read as under:-

"**25G. Procedure for retrenchment.**- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

4. The espousal reared, by the workman/respondent herein, in his claim petition, is, meted corroboration, by the testification hence occurring, in the cross-examination of RW-1, (i) wherein, he makes a candid communication, of, one Uma Devi, Jagdish and Kashmir, all juniors, to the respondent herein, being retained, even when prior thereto, the services of the respondent herein were disengaged. Since, hence visible infraction, of, the principle of last come, first go, embodied in Section 25G, of the Industrial Disputes Act, is thereupon, hence forth coming, (ii) also when RW-1, in his testification, embodied, in his cross-examination, makes, echoings, of sufficient funds, being available, with, the employer, for maintaining the works, and, also for engaging workmen, (iii) besides, for, liquidating their wages, thereupon, it was untenable, for the employer, to, disengage the respondent herein.

5. Be that as it may, the petitioner, has, also ventilated grounds, in, the instant writ petition, (i) that since the workman, had abandoned his work, hence, ipso facto, his being not inferable to be retrenched, by the department nor hence there arising, any, occasion for any breach being made, vis-a-vis, the principle of last come, first go, comprised in Section 25G, of, the Industrial Disputes Act, nor hence, the retention of juniors, vis-a-vis, the respondent herein, significantly subsequent to his abandoning, the works, purveying any leverage to the workman, to on anvil thereof, rather contend, qua his being entitled, to the relief, of reinstatement in service. However, the aforesaid espousal, though, is embodied, in, the testification occurring, in the examination-in-chief, of, RW-1, (ii) yet the effect thereof, is eroded, by the factum of the petitioner while making a testification, his making a candid voicing therein, of his being, on his visiting the apposite establishment, of the petitioner, his being apprised, by the J.E., concerned, of his services being dispensed with or his being retrenched. The aforesaid testification, occurring, in the examination-in-chief of PW-1, was not concerted, to be belied, by the respondent, by subjecting him to cross-examination, omission whereof, begets an inference, of the department, rather conceding qua truth thereof, (iii) besides obviously subsequent thereto testification, rendered by RW-1, qua, hence thereupon, the aforesaid inferential effect, being eroded, arising from, the factum, of, the workman purportedly abandoning his job, is hence unworthy of credence, rather, is, construable to be a sheer invention, (iv) more so, with the workman hereat, being engaged as a Beldar, on a daily rated, besides, thereupon, given the minimal wages meted to him, whereon he was dependent, for, his sustaining his family, also renders capsized the aforesaid contention of the employer (v) besides when no evidence surges forth, of, his after, his

purportedly abandoning his job, his being engaged, in sum other avocation, (vi)whereas, evidence in the aforesaid respect, if adduced, may have constrained a conclusion, of, his abandoning the apt job. Contrarily, with the aforesaid evidence being amiss hereat, rather hence reiteratedly fosters, an inference of the department concerned, contriving and inventing, the factum of his abandoning, his job, merely, for camouflaging, its untenable act, of, its evidently infracting the principle, of last come and first go, evidently embodied in Section 25G, of, the Industrial Disputes Act. The effect of the aforesaid discussion, is, that the impugned order, directing the re-engagement, of, the workman, being both apt as well as tenable.

6. The learned counsel appearing, for the petitioner, has contended with vigour, that, the pronouncement, recorded by the learned Tribunal, upon, issue No.1, appertaining to the claim petition, suffering from, the vice(s) of delay and laches, warranting interference therewith, (i) and, the reliance placed by the learned tribunal, for hence, rendering disaffirmative findings thereupon, upon the verdicts alluded, in, the impugned verdict, being rather misplaced. However, the aforesaid submission is blunted, by, the factum of a revelation, occurring, in Annexure P-4, qua the Labour Commissioner hence declining, to refer, the dispute raised by the workman, to the Labour Court-cum-Industrial Tribunal. However, the workman had challenged the order, made, by the Labour Commissioner, and, as comprised in Annexure P-4, by his instituting a civil writ petition before this Court. The apposite civil writ petition, bearing CWP No. 7429 of 2011, was disposed off, by this Court on 4.5.2015, and, the operative part thereof, contains, the hereinafter extracted directions, being meted by this Court, upon, the Labour Commissioner concerned:-

> "5. Moreover, the issue of delay can always be considered by the Labour Court-cum-Industrial Tribunal at the time of answering the reference by moulding relief.
>
> 6. Accordingly, the writ petition is allowed. Annexure P-4 dated 24.3.2011 is quashed and set aside. The Labour Commissioner is directed to make a reference to the Labour Court-cum-Industrial Tribunal within a period of four weeks from today and Labour Court-cum-Industrial Tribunal shall decide the same within a period of six months after the receipt of reference."

The aforesaid, directions, rendered by this Court, in CWP No. 7429 of 2011, acquire an aura, of, conclusivity, and, and estop, the writ petitioner, to contend, that, the apt disaffirmative findings recorded, upon, apposite therewith issue, by the Industrial Tribunal concerned, rather suffering from any legal infirmity, (i) especially when this Court, had, also made directions, upon, the Industrial Tribunal, to, consider the issue qua delay and laches, by moulding relief, (ii) obviously hence impliedly, it had, rendered a pronouncement, upon, the Labour Court, qua upon its receiving the apposite reference, to rather over look, the factum, of the demand raised by the workman, being purportedly afflicted, by the factum of delay and laches, by its hence moulding relief. The aforesaid apt directions, meted, by this court, vis-a-vis, the Labour Court-cum-Industrial Tribunal, vis-a-vis, the issue, appertaining to delay and laches, wherewith, it stands seized at the appropriate stage, carries, the effects, and, implications of the tribunal concerned, being empowered to mould the relief, vis-a-vis, the workman, upon, its pronouncing affirmative findings qua him, upon, adduction, of, firm proof, evidently surfacing qua infraction, of, the apposite provisions of Section 25G, rather than, it, merely, on evidence, surging forth, in display of delay and laches, it outrightly rejecting, the workman's claim, for reinstatement, in service. (iii) Emphatically with moulding of relief,emanating, from, the tribunal concerned, given its, declining relief of back wages, to, the workman.

7. Even otherwise, the apt onus, upon, the aforestated issue, though, was cast upon the petitioner/workman, yet, with his retrenchment, being gripped, with gross statutory violations, (i) and, with the contention of the employer, qua the workman, abandoning his services, being, falsified, (ii) also hence renders the casting of the aforesaid, onus, upon the workman, being construabl to be grossly inappropriate, given his employer, rather raising, the contention, of the demand notice, being grossly time barred, also, (iii) hence the onus, for adducing apt evidence, in respect thereto, was enjoined to be cast, upon the employer, (iv)

consequently, for the apposite onus qua the aforesaid issue, being inappropriately fastened, upon the workman, thereupon, it appears, that, he has not made, any endeavour to adduce evidence, in consonance therewith, hence, any non adducing, of, any evidence by the workman, for discharging the apt onus qua the aforesaid issue, does not work against him, (v) rather with the employer being aware, of its, raising the apposite contention, it was obliged, to adduce the apt best evidence in respect thereof, dehors, the inapposite, casting of the apt onus qua the aforesaid issue, upon, the respondent herein, (vi) whereas, its omitting, to adduce the apposite evidence in respect of the respondent, being hence literate, thereupon, despite his within time making legal consultations, for his canvassing, his appropriate remedy, his yet omitting to within time make the relevant endeavours, (vii) whereupon, alone, dehors, the verdict supra, pronounced by this Court , findings adversarial, to, the workman, were pronounceable thereon, (vii) whereas, the aforesaid evidence being amiss rather when the employer, rears, a false plea, of, the workman abandoning his job, thereupon, the strength, if any, of the apposite contention, is wholly emasculated.

8. For the foregoing reasons, there is no merit in the instant petition and it is dismissed accordingly. Consequently, the order impugned before this Court, is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

M/s Sai Engineering Foundation .....Decree Holder
Versus
HPSEB .....Judgment Debtor

Execution Petition No. 16 of 2016
Reserved on 22.5.2018
Date of Decision:13.6.2018

Arbitration and Conciliation Act, 1996- Section 31(7)(b)- (As stood before amendment)- Grant of post award interest – Entitlement –Arbitrator in his award did not grant post award interest to claimant – Claimant/D.H. also not filing any objection under Section 34 to award regarding non grant of post award interest to him - Award attained finality – DH however relying upon Section 31(7)(b) (As stood before amendment) and praying for post award interest from date of award till realization in execution proceedings – Held – When award for money is silent as to grant of post-award interest, claimant is statutorily entitled to interest @ 18% per annum from date of award till realization even before Executing Court, since provisions of Section 31(7)(b) (as existed before amendment), are mandatory. (Para-25)

Cases referred:
Bharat Heavy Electricals Limited v. Tata Projects Limited, 2015 (5) SCC 682
Kataria Builders Vs. State of HP, 2004 (3) Arb. L.R. 137
Himachal Pradesh Housing and Urban Development Authority and Anr. v. Ranjit Singh Rana, 2012 (4) SCC 505.
State of Haryana Vs. S.L. Arora and Co. 2010 (3) SCC 690
Nityananda Samantray v. State of Orrisa, AIR 1987 Ori 132
Hyder Consulting (UK) Limited v. Governor, State of Orissa, 2015 (2) SCC 189,
Union of India and Anr. V. M/s P.C. Sharma and Com., AIR 2007 Delhi 51
Mithilesh Kumari & Anr. V. Prem Behari Khare, (1989) 2 SCC 95

For the petitioner: Mr. Vikas Chauhan, Advocate.

For the respondent: Mr. J.S. Bhogal, Senior Advocate, with Mr. Satish Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. ***(Oral)***

HP Electricity Regulatory Commission, Shimla, appointed Shri D.N. Bansal (retired Engineer)/ Ex-Member of the HPSEB as the sole Arbitrator vide its order dated 25.2.2008, passed in petition No. 139/2007 titled M/s Sai Engineering Foundation v. HPSEB, for adjudication of dispute arose inter-se parties concerning the evacuation of power from the Titang Mini Hydel Project, Kinnaur. Aforesaid Arbitrator came to be appointed in terms of terms and conditions contained in Power Purchase Agreement dated 3.10.2000, signed between both the parties. Learned Arbitrator allowed the total sum of Rs. 53,26,732/- without interest as compensation in favour of decree holder. None of the parties to aforesaid arbitration proceedings filed objections, if any, under Section 34 of the Arbitration and Conciliation Act, 1996 (*in short "the Act"),* laying therein challenge to award dated 30.5.2009, passed by the sole arbitrator and as such, same has attained finality.

2. On 8.7.2016, decree holder, filed an execution petition under Order 21 Rule 11 of CPC read with Section 36 of the Act, for the execution of award dated 30.5.2009, passed by the sole Arbitrator, however, subsequently, an application bearing OMP No. 375 of 2016, came to be filed on behalf of the decree holder, seeking therein following amendment:-

> ***"3. That the applicant/decree holder wants to amend by way of substitution in the existing Para 7 of the Execution petition as under:***
>
> > ***Learned Arbitrator has allowed a total sum of Rs.53,26,732/- (Rupees Fifty Three Lakh Twenty Six thousand seven hundred and thirty two only) without interest as compensation in favour of the decree holder till the date of the arbitral award that is 30.5.2009. The decree holder is also entitled to the future interest @ 18% per annum on the sum directed to be paid by an arbitral award as per Section 31(7)(b) of the Arbitration and conciliation Act, 1996 w.e.f. 31.5.2009 till the date of actual payment. Thus, the decree holder is entitled for a sum of Rs.1,21,41,958/- (Rupees one crores twenty one lakh forty one thousand nine hundred and fifty eight only)as calculated upto 8.7.2016 that is the date of filing of the Execution Petition before this Hon'ble Court. The following amount is payable by way of judgment debtor to the decree holder:***
> >
> > ***(i)Principal amount Rs.53,26,732/-***
> >
> > ***(ii) Interest on principal amount till the date of arbitral award (30.5.2009) -NIL-***
> >
> > ***(iii)Interest at 18% per annum on Principal amount from 31.05.2009 to 08.07.2016 (date of filing of the execution Petition) Rs.68,15,226/-***
> >
> > ***Total Rs. 1,21,41,958/-***
> >
> > ***(Future interest is also receivable @ 18% per annum till the date of full and final payment to the decree holder)"***

3. Though aforesaid prayer made on behalf of the decree holder was opposed by the Judgment Debtor, but this Court while returning finding that the entitlement of the decree holder to claim the post award interest and denial thereto by the Arbitral Tribunal is an arguable point, allowed the application and permitted Judgment Debtor to amend the execution petition.

Aforesaid order was never laid challenge by the Judgment Debtor and as such, it attained finality qua both the parties.

4. Judgment Debtor filed the objections under Section 47 CPC bearing OMP No. 381 of 2016, to the execution petition, praying therein for dismissal of the execution proceedings, however fact remains that same was dismissed by this Court vide order dated 16.5.2017. It is also not in dispute that no challenge, if any, was laid to order dated 16.5.2017, passed by this Court. Subsequent to passing of aforesaid order, an application bearing OMP No. 269 of 2017, came to be filed on behalf of the decree holder for release of principal amount i.e. Rs.53, 26,732/- , deposited by the judgment debtor in the Registry of this Court. This Court taking note of the fact that it had already dismissed the objections filed under Section 47 of CPC vide its order dated 16.5.2017, ordered for release of amount lying deposited in the Registry of this Court in favour of the decree holder. However, issue with regard to the entitlement of post award interest in terms of Section 31 (7) (b) of the Act, was ordered to be decided later on. After dismissal of objections filed under Section 47 of CPC i.e. OMP No. 381 of 2016, petitioner filed application bearing No. 270 of 2017 under Order 21 Rule 13 of CPC, praying therein for attachment of immovable property of the judgment debtor.

5. As has been noticed herein above, none of the parties have laid challenge to the award passed by the learned Arbitrator and as such, same has attained finality. Objection to the execution of award stands already dismissed and the amount deposited by the judgment debtor in this Court in terms of award passed by the learned Arbitrator stands already disbursed to the decree holder. Question which remains to be decided by this Court in the present proceedings is that *whether decree holder is entitled to post award interest @ 18% p.a., from the date of the award till date of actual payment, as has been prayed in the instant petition on behalf of the decree holder or not?*

6. There is no dispute that the learned Arbitrator has not held the decree holder entitled to post award interest while awarding it compensation qua various claims raised by it by way of settlement of claims. Learned Arbitrator while returning finding qua issue No. 3, has categorically held that no interest is payable as IPP has not contributed for its interconnection to the distribution licensee.

7. Mr. Vikas Chauhan, learned counsel representing the decree holder fairly admitted that decree holder being aggrieved and dis-satisfied with the non-grant of interest, as claimed in the statement of claims, ought to have filed objections under Section 34 of the Act, however, he while inviting attention of this Court to Section 31 (7) (b) strenuously argued that the learned Arbitrator was under obligation to award post award interest and as such, decree holder is entitled to interest @18% p.a. from the date of the award till the date of actual payment. While referring to the award passed by the learned Arbitrator, Mr. Chauhan, made an endeavour to persuade this Court to agree with his contention that there is no specific finding, if any, recorded by the Arbitrator qua the post award interest. He further stated that since award passed by the learned Arbitrator is silent qua aforesaid aspect of the matter, decree holder is entitled to post award interest in terms of Section 31 7 (b).

8. Mr. J. S. Bhogal, learned Senior Counsel, duly assisted by Mr. Satish Sharma, Advocate, while opposing the aforesaid submissions having been made by the learned counsel representing the decree holder, contended that since Arbitrator has categorically denied the future interest, as prayed for, by the decree holder in its statement of claims, no post award interest can be claimed under Section 31 (7) (b). While referring to the provisions contained in Section 31 (7) (b), Mr. Bhogal argued that decree holder is not entitled to any post award interest, because arbitrator has held it not entitled to any kind of interest. While laying stress upon words *"unless the award otherwise directs"*, Mr. Bhogal, contended that learned Arbitrator has returned specific finding qua the interest claimed by the decree holder in its statement of claims and as such, decree holder cannot claim post award interest in terms of Section 31 (7) (b). He further argued that being aggrieved and dis-satisfied with non-awarding of interest by the learned Arbitrator, decree holder ought to have filed objections under Section 34 of the Act and post

award interest, as prayed for, cannot be granted in the instant proceedings. Lastly, Mr. Bhogal, contended that in execution proceedings, court cannot go beyond the decree/award passed by the court/arbitrator and as such, prayer for post award interest, cannot be considered and decided by this Court in the instant proceedings, especially when learned Arbitrator has not held the decree holder entitled for future interest. In this regard, he placed reliance upon judgment rendered by the Hon'ble Apex Court in ***Bharat Heavy Electricals Limited v. Tata Projects Limited, 2015 (5) SCC 682***.

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

10. Before ascertaining the correctness of the rival contentions raised on behalf of both the parties, it would be profitable to take note of following provisions of Act:

> ***"35. Finality of arbitral awards.***
>
> ***Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.***
>
> ***36. Enforcement.***
>
> ***Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.***
>
> ***31 (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."***
>
> ***(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment." (Emphasis supplied)***

11. Needless to say, award passed in terms of Sections 35 and 36 of the Act, is an executable decree passed by the Court. Further careful perusal of Section 31 (7) (b), entitles the petitioner for an interest on the awarded amount till the date of payment of interest @18% p.a. Aforesaid provisions are evidently clear and claimant is entitled to be awarded interest, as prayed for, in the statute. Since expression used is "shall", language of the statute is mandatory. No doubt, discretion to award interest is based upon the equitable consideration, but certainly court cannot go behind the decree. This Court in case titled ***Kataria Builders Vs. State of HP***, 2004 (3) Arb. L.R. 137**,** while dealing with an execution petition, held the decree holder entitled to future interest @ 18% p.a. from the date of the award till the date of payment in terms of clause (b) of Sub Section (7) of Section 31 of the Act.

12. Subsequently, this Court while dealing with similar situation in case titled ***Ranjit Singh Rana v. H.P. Housing and Urban Development,*** bearing OMP No. 678 of 2008 in Execution Petition No. 6 of 2008 decided on 5.3.2009, held the decree holder entitled for the post award interest in terms of Section 31 (7) (b) of the Act. It would be profitable to take note of the following paras of the aforesaid judgment:-

> ***"A bare perusal of Section 31 (7) (b) entitles the petitioner for interest on the awarded amount till the date of payment at the rate of 18% per annum.***
>
> ***This Court in Kataria Builders Vs. State of H.P. 2004(3) Arb.L.R. 137 while dealing with an execution petition, arising out of similar circumstances***

has held the decree holder to be entitled to future interest at the rate of 18% per annum from the date of the award till the date of the payment in terms of Clause (b) of sub-section (7) of Section 31 of the Act.

A Similar view has also been taken by the Division Bench of the High Court of Delhi in Union of India and another Vs. M/s P.C. Sharma, and Company, AIR 2007 Delhi 51 and the High Court of Punjab and Haryana in State of Haryana and others vs. Goel projects Pvt. Ltd., 2007(1) Arb.L.R. 444 (P&H).

No doubt discretion to award interest is based on equitable consideration but, however, this court cannot go behind the decree.

The fact of the matter is that the provisions of the statute are evidently clear and the claimant has to be awarded interest as awarded for in the statute. The language of the statute is mandatory and the expression used is 'shall'. The nature of the transaction between the parties were commercial in nature. They were conscious of the commercial terms and the laws of the land. Therefore, I have no hesitation in holding that the decree holder shall be entitled to interest at the rate of 18% from the date of the award till the date of actual payment.

It may be noticed that while dealing with the proceedings under the Act, as well as Arbitration Act, 1940, the Apex Court in Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and another, 2007 (2) SCC 720, Mcdermoti International Inc. Vs. Burn Standard Co. Ltd. and others 2006 (11) SCC 181, Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd. 2006 (7) SCC 700 and Pure Helium India (P) Ltd. Vs. Oil & Natural Gas Commission 2003 (8) SCC 593, have reduced the rate of interest from the rate so awarded by the arbitrator. The Court was not dealing with the execution proceedings. But, however, the same has been done in the facts and circumstances of the cases being dealt with by the Court and that too in exercise of its constitutional powers and, therefore they are not binding precedents. The question as to whether interest lower than 18% as provided for in Section 31 (7) of the Act can be awarded by the executing Court was directly and substantially not in issue before the Apex Court.

No doubt, the constitution Bench in Central Bank of India Vs. Ravindra and others (2002) 1 SCC 367 has held as under:-

> ***"(7) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree inter-est at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.***

But, however, the court was not dealing with the relevant provisions of the Act. Therefore, the decision is not applicable.

In this view of the matter, it is held that the decree holder shall be entitled to interest at the rate of 18% per annum from the date of the award till the date of the payment."

13. At this stage, it may be noticed that aforesaid judgment passed by this Court was subsequently laid challenge in the Hon'ble Apex Court i.e. ***Himachal Pradesh Housing***

and Urban Development Authority and Anr. *v.* ***Ranjit Singh Rana, 2012 (4) SCC 505***. Hon'ble Apex Court though upheld the finding returned by the co-ordinate Bench of this Court qua the entitlement of the decree holder for post award interest in terms of Section 31 (7) (b), but modified the judgment of this court to the extent that appellant department would be liable to pay interest @ 18%p.a. for the post award period from the date of award until 24.5.2001, i.e. on which date, department had deposited the entire amount due under the award before the High Court. It would be profitable to take note of the following paras of the aforesaid judgment because Hon'ble Apex Court has specifically dealt with provision contained under Section 31 (7) (a) and (b) and while drawing strength from its earlier judgment rendered in **State of Haryana Vs. S.L. Arora and Co. 2010 (3) SCC 690**, upheld the finding returned by this Court. Hon'ble Apex court has categorically held that since arbitrator has not exercised any discretion in the matter pertaining to interest for the post award period, decree holder shall be entitled to interest @ 18% p.a. from the date of award till the date of payment in terms of Section 31 (7) (b) of the Act. Relevant Paras are reproduced herein below:-

> ***"6.The High Court considered the diverse provisions of the Act including Section 31(7)(a) and (b) of the Act and few decisions of this Court and ultimately held that the respondent was entitled to post-award interest @ 18% p.a. from the date of the award till the date of the actual payment. It is this order which is in appeal before us.***
>
> ***7. There is no dispute that the entire amount due under the Award dated February 14, 2001 was deposited by the appellants before the High Court on May 24, 2001. The question that arises for determination before us is, whether deposit of the entire award amount by the appellants on May 24, 2001 into the High Court amounts to payment to the respondent and the appellants liability to pay interest @ 18% p.a. from the date of the award ceased from that date.***
>
> ***8. Section 31(7)(a) and (b) of the Act reads as under:***
>
> > ***"31(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.***
> >
> > ***(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."***
>
> ***9. The above provision has been recently considered 9. The above provision has been recently considered by this Court in State of Haryana and others vs. S.L. Arora and Company (2010)3 SCC 690. This Court held as under:***
>
> > ***"23.....In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract, as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum."***
>
> ***This Court further observed in para 24.6 as under:- (2010 (3) SCC690, 2010 (1) (Civ) 823:***

"24.6.....but if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post-award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to post-award interest, the claimant will be entitled to post- award interest at the higher rate of 18% per annum.

10. The learned counsel for the parties are ad idem that the Arbitrator has not exercised any discretion in the matter pertaining to the interest for the post-award period. Obviously, in absence thereof, by virtue of Section 31(7) (b) of the Act, the award would carry interest @ 18% p.a. from the date of the award till the date of payment."

14. Relevant paras of judgment passed by the Hon'ble Apex Court in **State of Haryana Vs. S.L. Arora and Co. 2010 (3) SCC 690,** are also reproduced herein below:-

"23. The difference between clauses (a) and (b) of section 31(7) of the Act may conveniently be noted at this stage. They are :

(i) Clause (a) relates to pre-award period and clause (b) relates to post- award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no application in regard to interest during the post-award period.

(ii) Clause (a) gives discretion to the Arbitral Tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the Arbitral Tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral Tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post-award period.

(iii) While clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the post-award period.

In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.

24. As there is some confusion as to what section 31(7) authorizes and what it does not authorize, we will attempt to set out the legal position regarding award of interest by the arbitral tribunals, as emerging from section 31(7) of the Act.

(24.1) The provision for interest in the Act is contained in section 31 dealing with the form and contents of arbitral award. It employs two significant expressions "where the arbitral award is for payment of money" and "the arbitral tribunal may include in the sum for which the award is made, interest..... on the whole or any part of the money". The legislature

has thus made it clear that award of interest under sub-section (7) of section 31 (and award of costs under sub-section (8) of Section 31 of the Act) are ancillary matters to be provided for by the award, when the arbitral tribunal decides the substantive disputes between the parties. The words 'sum for which the award is made' and `a sum directed to be paid by an arbitral award' contextually refer to award on the substantive claims and not ancillary or consequential directions relating to interest and costs.

(24.2.) The authority of the arbitral tribunals to award interest under section 31(7)(a) is subject to the contract between the parties and the contract will prevail over the provisions of section 31(7)(a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the arbitral tribunal will have to grant or refuse interest, strictly in accordance with the contract. The arbitral tribunals cannot ignore the contract between the parties, while dealing with or awarding pre-award interest. Where the contract does not prohibit award of interest, and where the arbitral award is for payment of money, the arbitral tribunal can award interest in accordance with Section 31(7) (a) of the Act, subject to any term regarding interest in the contract.

(24.3) If the contract provides for compounding of interest, or provides for payment of interest upon interest, or provides for interest payable on the principal upto any specified stage/s being treated as part of principal for the purpose of charging of interest during any subsequent period, the arbitral tribunal will have to give effect to it. But when the award is challenged under Section 34 of the Act, if the court finds that the interest awarded is in conflict with, or violating the public policy of India, it may set aside that part of the award.

(24.4) Where an arbitral tribunal awards interest under section 31(7)(a) of the Act, it is given discretion in three areas to do justice between the parties. First is in regard to rate of interest. The Tribunal can award interest at such rate as it deems reasonable. The second is with reference to the amount on which the interest is to be awarded. Interest may be awarded on the whole or any part of the amount awarded. The third is with reference to the period for which the interest is to be awarded. Interest may be awarded for the whole or any part of the period between the date on which cause of action arose and the date on which the award is made.

(24.5) The Act does away with the distinction and differentiation among the four interest bearing periods, that is, pre-reference period, pendente lite period, post-award period and post-decree period. Though a dividing line has been maintained between pre-award and post-award periods, the interest bearing period can now be a single continuous period the outer limits being the date on which the cause of action arose and the date of payment, subject however to the discretion of the arbitral tribunal to restrict the interest to such period as it deems fit.

(24.6) Clause (b) of Section 31(7) is intended to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award to the date of payment if the award does not provide otherwise in regard to the interest from the

date of the award. This makes it clear that if the award grants interest at a specified rate up to the date of payment, or specifies the rate of interest payable from the date of award till date of payment, or if the award specifically refused interest, clause (b) of Section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to post- award interest, the claimant will be entitled to post- award interest at the higher rate of 18% per annum. The higher rate of interest is provided in clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award.

34. Conclusion

Thus it is clear that section 31(7) merely authorizes the arbitral tribunal to award interest in accordance with the contract and in the absence of any prohibition in the contract and in the absence of specific provision relating to interest in the contract, to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the award is silent about interest from the date of award till date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till date of payment. The calculation that was made in the execution petition as originally filed was correct and the modification by the respondent increasing the amount due under the award was contrary to the Award."

15. Plain reading of Section 31 (7) (b) of the Act (un-amended) prescribes the maximum rate of interest that can be allowed by an arbitrator. Aforesaid provision clearly lays down that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of 18%, from the date of award till the date of payment. At this stage, it may be noticed that since award sought to be executed by way of present proceedings was passed in the year, 2009 i.e. 30.5.2009, and as such, un-amended provision of Section 31 (7) (b) shall be applicable, not the amended Section 31(7) (b), whereby it has been provided that an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. Aforesaid provision of law came to be amended by Act 3 of 2016. It would be profitable to take note of amendment made in Section 31 of the principal Act of the Arbitration and Conciliation (Amendment) Act, 2015:-

"16.Amendment of section 31.- In section 31 of the principal Act,-

(i) in sub-section (7), for clause (b), the following clause shall be substituted, namely:-

> ***(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.***

Explanation. The expression current rate of interest shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).' ;

(ii) for sub-section (8), the following sub-section shall be substituted, namely:-

(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A."

Aforesaid amendment came into force w.e.f. 23.10.2015. At this stage, it would be apt to take note of Section 26 of the Amended Act, 2015, which is reproduced herein below:-

"26.Act not to apply to pending arbitral proceedings.-Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

Aforesaid provision of law clearly provides that nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree and this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act i.e. Arbitration and Conciliation (Amendment) Act, 2015. Careful perusal of aforesaid provision of law leaves no manner of doubt that amendment made in Section 31 (7) (b) is prospective and cannot be made applicable to the arbitral proceedings commenced before the commencement of Arbitration and Conciliation (Amendment) Act, 2015.

16. Careful reading of aforesaid provision of law clearly provides for future interest to be paid on the principal amount awarded by the Arbitrator. Though discretion lies with the arbitral tribunal to grant interest at a rate lower than the set out from the date of award to the date of payment, but in the absence of any determination on the claim of interest by the arbitral tribunal, the award "shall" carry interest at the rate of 18% from the date of award till the date of payment and as such, it can be safely concluded that act provides for an in-built machinery for payment of future interest on the amount of award unless the award otherwise directs. Very object of the clause seems to compel the unscrupulous disputants from adopting delaying tactics in the matter of payment of the award alongwith interest. Hon'ble Apex Court in ***Nityananda Samantray v. State of Orrisa, AIR 1987 Ori 132***, has held that award of future interest from the date of decree puts a lead and tension on the other party to pay off the sum promptly since otherwise payment of the sum may be delayed indefinitely. It has been further held that very purpose of resorting to arbitration is a prompt disposal of the claim and unless future interest is granted, the whole purpose of arbitration may be frustrated.

17. Bare reading of aforesaid exposition of law, clearly suggests that even when there is prohibition on the part of the arbitrator in granting interest on the awarded amount, the court is not precluded from granting post award interest for early recovery of the amount so awarded and to protect interest of the party in whose favour, award is passed. No doubt, from the date of passing of the decree, future interest can be awarded by an arbitrator, but in this regard, he or she is under obligation to return specific finding qua the entitlement of decree holder for post award interest. If the award is silent with regard to rate of interest in the award, then the party in whose favour, the award for money has been made, shall be entitled to the interest at the rate specified from the date of the judgment. Higher rate of interest is provided in clause (b,) purposely with an intent of discouraging the judgment debtors from adopting delaying tactics and persuade them to comply with award as is held in State of Haryana v. **S*.L. Arora's case*** (surpa). Grant of future interest is mandatory since expression used in sub section 7(b) is "shall". Where the nature of transaction between the parties is commercial in nature and they were conscious of the commercial terms and law of the land, the decree holder would be entitled to interest at the rate specified from the date of award till the date of payment as has been held by the Hon'ble Apex Court in ***Ranjit Rana's*** case supra.

18. Reliance is also placed upon judgment rendered by the Hon'ble Apex Court in case ***Hyder Consulting (UK) Limited v. Governor, State of Orissa, 2015 (2) SCC 189***, wherein it has been held that vide Section 31 (7) (a) of the Act, Parliament intended that an award for

payment of money may be inclusive of interest and the "sum" of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such "sum" for the post-award period vide clause (b) of sub- section (7) of Section 31 of the Act. In the aforesaid judgment, it has been held that pre-award interest is at the discretion of Arbitral Tribunal, whereas the post-award interest on the awarded sum is mandate of statute and the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. Relevant paras of the aforesaid judgment are reproduced herein below:-

> ***"9. The purpose of enacting this provision is clear, namely, viz. to encourage early payment of the awarded sum and to discourage the usual delay, which accompanies the execution of the Award in the same manner as if it were a decree of the court vide Section 36 of the Act.***
>
> ***26.Section 31(7)(a) of the Act deals with grant of pre-award interest while sub-clause (b) of Section 31(7) of the Act deals with grant of post- award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance of the award. Pre-award interest is at the discretion of Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of statute - the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act, i.e., 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.***
>
> ***80. Therefore, it may be concluded that the term "interest", appears to be distinct from the principal amount on which it is imposed. Furthermore, the imposition of an interest is stated to be for the purpose of providing compensation for withholding the said principal amount or, as in the case of clause (a) of sub- section (7) of Section 31 of the Act, 1996, for withholding the money awarded as per the claim, as determined by the arbitral tribunal, from the date the cause of action arose till the date when such award was made. In other words, interest is imposed to compensate for the denial to one party, by the other party, of the money which rightfully belongs to the said former party under the relevant agreement governing the arbitration proceedings.***
>
> ***81. Having clarified sub-section (a) of sub- section (7) of section 31 of the Act, 1996, I would now consider clause (b) of the said provision. As noticed above, clause (b) is applicable for the period from the date of award to the date of payment. The applicability of clause (b) has also been qualified by the legislature. The said clause uses the phrase "unless the award otherwise directs", which would mean that in the event the arbitral tribunal, in its award, makes a provision for interest to be imposed in this second stage as envisaged by sub- section (7) of section 31 of the Act, 1996, clause (b) would become inapplicable. By the said award, the arbitral tribunal has the power to impose an interest for the post-award period which may be higher or lower than the rate as prescribed under clause (b). Even if the award states that no interest shall be imposed in the post-award period, clause (b) cannot be invoked.***
>
> ***82. If the arbitral award is silent on the question of whether there would be any post- award interest, only in that situation could clause (b) be made***

applicable. In the said situation, it would be mandatory as per law that the award would carry interest at the rate of 18% per annum from the date of the award to the date of payment. The term used in the given clause is "shall", therefore, if applicable, the imposition of interest as per clause (b) would be mandatory.

83. It would be relevant also to take note of the case of H.P. Housing & Urban Development Authority v. Ranjit Singh Rana, (2012) 4 SCC 505. In the Ranjit Singh Rana case (supra), this Court dealt with the meaning of the word "payment" as under clause (b) of sub- section (7) of section 31 of the Act, 1996 to ascertain when the liability to pay post- award interest would come to an end. After making a reference to the S.L. Arora case (supra), this Court went into the dictionary meaning of the word "payment". The Court explained as follows. The Court explained as follows: (Ranjit Singh Rana Case, SCC p.508, para 15)

> ***"15. The word "payment" may have different meaning in different context but in the context of Section 37(1)(b); it means extinguishment of the liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the court is nothing but a payment to the credit of the decree-holder. In this view, once the award amount was deposited by the appellants before the High Court on 24-5-2001, the liability of post-award interest from 24-5-2001 ceased. The High Court, thus, was not right in directing the appellants to pay the interest @ 18% p.a. beyond 24-5-2001."***

84. Clause (b) of sub- section (7) of section 31 of the Act, 1996 further states that the interest as envisaged under the said provision would be on the sum directed to be paid by an arbitral award. As noticed in the discussion hereinabove, the term "sum", as in clause (a), refers simply to the money directed to be paid as per the award, that is, the money as adjudicated by the arbitral tribunal.

19. It is apparently clear from the aforesaid enunciation of law laid down by the Hon'ble Apex Court as well as this Court that Arbitral Tribunal can exercise discretion to grant pre award period interest only in the absence of agreement between the parties and it has absolute discretion to grant post award interest, but the contract has no application to the post award interest. It also emerges from the reading of the aforesaid judgments rendered by the Hon'ble Apex Court that if the award is silent as to the interest from the date of award, or does not specify the rate of interest from the date of award, interest at a mandatory statutory rate of 18% per annum is payable from the date of award in terms of Section 31 (7) (b).

20. High Court of Delhi in ***Union of India and Anr. V. M/s P.C. Sharma and Com., AIR 2007 Delhi 51***, has held that mandate of law is that award shall automatically carry interest at the rate of 18% per annum from the date of the award till the date of payment unless the award otherwise directs. It has been further held that even if it was not so spelled out in the award, it has to be read into the award. While rendering the aforesaid judgment, High Court of Delhi, has further held that executing court cannot be faulted in awarding post award interest in terms of Section 31 (7) (b) and such action of executing court cannot be termed as modification of the award. Relevant paras of the judgment are reproduced herein below:-

> ***"10. It is, therefore, explicit from a perusal of the said provision that any sum which is directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of 18% per annum from the date of the award to the date of payment. This being the mandate of the provision of the Act, even if it was not so spelled out in the award, it has to be read into the award and the executing Court cannot be faulted in***

doing so in the present case. This cannot be termed as a modification of the award. The submission of the learned Counsel for the appellants that the award already stood satisfied on payment of Rs. 4,68,753/- and that the provisions of Section 33 could only be invoked by the arbitral tribunal and not by the Court for carrying out any correction and/or interpreting an award or passing an additional award, is devoid of merits inasmuch as the executing Court has not exercised its powers under the said provision at all. Nor has it corrected the original award or passed any additional award. The learned single Judge has only amplified the relevant provisions of the Act and given effect to them by holding that the respondent/decree holder is entitled to receive interest on the awarded amount at the rate of 18% per annum from 25th November, 2000 to 25th September, 2003.

11. Even otherwise, it is a well settled rule of justice, equity and fair play that the Court has inherent jurisdiction to award interest even in the absence of any legislation, agreement or custom to that effect, though subject to contrary agreement. As held by the Supreme Court in the case of South Eastern Coalfields Ltd. v. State of M.P. reported as , "applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many...."

21. At one point of time, Government of India, desired that the Law Commission may review the functioning of the Act in view of the various shortcomings observed in its provisions and certain representations received by the Government. Vide communication dated 12.9.2001, Law Commission of India submitted its 176th report on the Arbitration and Conciliation (Amendment) Bill, 2001, wherein Section 31 (7) (b), also came to be considered, relevant extract whereof is being reproduced herein below:-

"2.23 Interest under sec. 31(7)(b): 18% to be the upper limit - proposal rejected

Under sec. 31(7)(b) of the Act, it is stated that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per cent per annum after the date of the award till date of payment.

It has been pointed out that this provision is creating great hardships in cases where the award is silent as to the rate of interest in as much as, in all such cases, 18% interest becomes payable. It has been suggested that sec. 31(7)(b) be amended as to prescribe 18% as the upper limit.

The provision in section 31(7)(b) reads as follows:

> ***"Section 31(7)(b): A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at such rate as may be fixed by the Court but not exceeding 18%"***

Therefore, unless the award fixes a lesser rate, where the award is silent, 18% would apply. This is a special provision and is the reverse of section 34(2) of the Code of Civil Procedure, which says that if a decree is silent, interest from the date of decree is to be deemed as refused.

The provision in section 31(7)(b) is salutary and if this provision is not there, in the case of an award which is silent in regard to interest from the date of award till payment, the party who is to pay under the award can merrily use dilatory tactics and escape paying of interest.

Having regard to the very nature of the provision, deeming a rate of interest, it is not possible to say that 18% is to be the maximum. After due

consideration, the Commission has felt that there is no justification for reducing the rate below 18%. Hence no amendment is necessary in section 31(7)(b).

Though Law Commission did not recommend any amendment in the provision of law, but having carefully examined aforesaid section came to the conclusion that unless the award directs, arbitral award shall carry interest at such a rate as may be fixed by the court but not exceeding 18 %, meaning thereby, if no interest is awarded and award is totally silent with regard to the post award interest, claimant shall be entitled to interest 18% on the amount awarded by the learned Arbitrator.

22. In case titled ***Mithilesh Kumari & Anr. V. Prem Behari Khare, (1989) 2 SCC 95***, it has been held that "*It is permissible to refer to the Law Commission's Report to ascertain the legislative intent behind the provision? We are of the view that where a particular enactment or amendment is the result of recommendation of the Law Commission of India, it may be permissible to refer to the relevant report as in this case. What importance can be given to it will depend on the facts and circumstances of each case.*"

23. Now in the aforesaid background, this Court shall proceed to examine the correctness of submission having been made by the learned counsel representing the judgment debtor that since arbitrator while dealing with the claims having been filed by the decree holder has held the decree holder not entitled to the interest, it is estopped from claiming post award interest in terms of Section 31 (7) (b). Undisputedly, in clause (vi) of statement of claims filed by the decree holder, claimant has stated that the claim of the petitioner may be allowed and respondent be directed to pay to the claimant a sum of Rs. 8,21,11,675/- and interest @ 18 % p.a., thereon from 1.4.2002, till the date of actual payment. Learned Arbitrator while awarding amount qua various claims raised in the statement of claims, held the decree holder entitled to a certain amount, but specifically returned the finding that no interest is payable as IPP has not contributed for its interconnection to the distribution licensee.

24. There is no manner of doubt that learned Arbitrator has not held the decree holder entitled to interest qua the amounts claimed in the statement of claims. Though this Court is in agreement with Mr. Bhogal, learned Senior Counsel, that decree holder being aggrieved with non- awarding of interest qua the amount claimed in the statement of claims, ought to have filed objections under Section 34 of the Act, but is not persuaded to agree with his another contention that since specific finding has been returned by the learned arbitrator qua the future interest as prayed for by the decree holder in the statement of claims, it is precluded from claiming the post award interest in terms of Section 31 (7) (b) of the Act. At the cost of the repetition, it may be stated that there cannot be any quarrel with the proposition of law as settled by the Hon'ble Apex Court that in case there is specific finding, if any, with regard to the entitlement of decree holder qua the post award interest, no interest in terms of Section 31 (7) (b) can be claimed by the person in whose favour award has been passed, but at the same time, it has been repeatedly held by the Hon'ble Apex Court in judgments referred herein above, that if award is silent qua the entitlement of the claimant to the post award interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, shall be entitled to interest @18 % p.a. from the date of award. In the case at hand, decree holder in his statement of claims had prayed for awarding of interest @18 % p.a. from 1.4.2002 till the date of actual payment, which plea of its was not accepted by the learned Arbitrator, but mere claiming of interest claimed by the claimant in the statement of claims filed before the learned Arbitrator and finding, if any, returned thereupon, cannot be said to be finding returned qua the entitlement of the decree holder or person in whose favour award is passed, for post award interest. Finding returned by the learned Arbitrator with regard to interest in impugned award definitely relates to pre award period not the post award period as envisaged under Section 31 (7) (b) of the Act. Arbitrator has denied interest to the claimant/decree holder qua the claims raised by it, but that is pre award interest (i.e. interest on the amount awarded on the claim made by the claimant/decree holder.) Section 31 (7) (b) has

been introduced to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award till the date of payment, meaning thereby, post award interest is awarded on the amount awarded by the Arbitrator in its award, which may or may not include interest, if any, claimed by the claimant in the statement of claims. If the award grants interest at a specified rate up to the date of payment or specifies the rate of interest payable from the date of award till date of payment, or if the award specifically refuses interest, clause (7) (b) of Section 31 shall not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, shall be entitled to interest at 18% per annum from the date of award.

25. In the case at hand, there is no specific finding, if any, recorded by the Arbitrator with regard to the post award interest payable to the decree holder. Arbitrator has not found decree holder/claimant entitled to interest over the amount claimed by it in the statement of claims, but definitely, there is no finding qua the entitlement of claimant/decree holder, for the post award interest i.e. interest over awarded amount and as such, this Court finds considerable force in the argument advanced by Shri Vikas Chauhan, Advocate, that award passed by the arbitrator is totally silent with regard to the entitlement of the claimant/decree holder for the post award interest and as such, it is entitled to be awarded rate of interest @ 18% p.a. from the date of the award till date of its payment. Since there is no determination or specification of post award interest in the award, passed by the learned Arbitrator and no particular reason has been assigned in the award for refusing the post award interest, Section 31 (7) (b), comes into operation, entitling the claimant-decree holder to interest @18% p.a., from the date of award. Hon'ble Apex Court in ***Ranjit Singh Rana's*** *case (supra)*, while modifying the judgment rendered by this Court has held that judgment debtor shall be liable to pay interest @ 18% p.a. for the post award period from the date of award till its depositing the amount in the High Court. In the case at hand, Arbitrator has not exercised any discretion in the matter pertaining to the interest for the post award period and as such, by virtue of Section 31 (7) (b) of the Act, award would definitely carry interest @ 18% p.a. from the date of award till its deposit made by the judgment debtor in the High Court. Reliance placed by the learned Senior Counsel on the judgment passed by the Hon'ble Apex Court in ***Bharat Heavy Electricals Limited v. Tata Projects Limited*** *(supra),* is wholly mis-placed because Hon'ble Apex Court in the aforesaid judgment has reiterated that where no award is made for interest, statutory rate of interest @18% p.a. is payable from the date of award till date of payment (power award interest). In the aforesaid case, prayer was made to enhance the post-award interest granted by the Arbitral Tribunal @ 10.5% to 18% p.a. in the light of provisions in Section 31(7)(b) of the Act. Hon'ble Apex Court rejected the aforesaid prayer taking note of the fact that Arbitral Tribunal had already granted post award interest @ 10.5%. Hon'ble Apex Court further held the statutory rate of interest @18% p.a., would have been payable from the date of award to the date of payment, if the arbitral Tribunal had not granted any post award interest. Relevent para of the aforesaid judgment is reproduced herein below:-

> ***"4. On the issue of award of interest, learned senior counsel for the respondent tried to persuade us to enhance the post-Award interest granted by the Arbitral Tribunal @ 10.5% to 18% p.a. in the light of provisions in Section 31(7)(b) of the Act. We are unable to accept this contention because the Arbitral Tribunal has already granted post-Award interest @ 10.5%. Only if the Award had not made such a direction, the statutory rate of interest @ 18% p.a. would have been payable from the date of the Award to the date of payment as per statutory provision noted above."***

26. Consequently, in view of the detailed discussion made herein above, as well as law relied upon, this court is inclined to hold the decree holder entitled to post award interest @ 18% p.a. on the principal amount awarded by the learned Arbitrator i.e. Rs. 53,26,732/-, from

the date of award till its deposit made in the Registry of this Court. Accordingly, judgment debtor is directed to deposit/pay 18% p.a. post award interest on the awarded amount from the date of passing of the award till its deposit made in the Registry within a period of six weeks, failing which prayer made by the decree holder in its original miscellaneous application bearing No. 270 of 2017, filed under Order 21 Rule 13 of CPC, for attachment of immovable property belonging to the judgment debtor shall be considered.

List on **3rd August, 2018**.

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

Abdul Rehman ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

CrMP(M) No. 655 of 2018
Reserved on: 13.06.2018
Decided on:15.06.2018

Code of Criminal Procedure, 1973- Section 439- Regular bail- Allegations against accused/petitioner Abdul Rehman being that his vehicle was used by 'SR', co-accused for taking victim and then murdering her by pushing her down from a cliff – Further, petitioner obstructed investigation by threatening police and forensic experts indicating that he was a party to conspiracy to kill deceased – Held – Only material collected during investigation against accused/petitioner shows that his vehicle was used by principal accused 'SR' for carrying victim – Call details record does not show any call between petitioner and principal accused at material point of time - Whether petitioner had knowledge of purpose of principal accused in taking his vehicle, is something to be seen during trial- Petitioner granted bail with conditions. (Paras- 22 and 23)

Code of Criminal Procedure, 1973- Section 439- Regular bail- Principles - Held- Grant or denial of bail is entirely the discretion of the judge – Nature and gravity of circumstances in which offence is committed, position and status of accused with reference to victim and witnesses; possibility of tampering with witnesses, likelihood of accused fleeing from justice are relevant considerations - Gurcharan Singh versus State (Delhi Administration), (1978) 1 Supreme Court Cases 118 relied upon. (Para- 12)

Cases referred:

Gurcharan Singh versus State (Delhi Administration), (1978) 1 Supreme Court Cases 118

Prasanta Kumar Sarkar versus Ashis Chatterjee and another, (2010) 14 Supreme Court Cases 496

Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 Supreme Court Cases 694

Gurbaksh Singh Sibbia versus State of Punjab, (1980) 2 Supreme Court Cases 565

Sanjay Chandra versus Central Bureau of Investigation, (2012) 1 Supreme Court Cases 40

Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 Supreme Court Cases 22

For the petitioner: Mr. N.S. Chandel and Mr. Sunil Mohan Goel, Advocates.

For the respondent: Mr. Shiv Pal Manhans and Ms. Rameeta Kumari, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General.

ASI Hardev Singh, Police Station Majra, District Sirmaur, present in person.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Petitioner has filed instant petition under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC') for grant of regular bail in case FIR No. 10 of 2017, dated 14th November, 2017, registered at Police Station Majra, District Sirmaur, H.P., under Sections 364, 302, 120-B, 201 read with Section 34 of Indian Penal Code (hereinafter referred to as 'IPC').

2. I have heard learned counsel for the petitioner as well as learned Deputy Advocate General for the respondent-State and have also gone through the status reports filed on behalf of the respondent-State.

3. Prosecution case, in brief, as emerges from the material on record, is that 20 years old Mumtaz (daughter of complainant-Wajid Ali) did not return back on 11th November, 2017 after leaving the house about 10.00 a.m. for visiting Paonta Sahib to collect her mark-sheet from College whereupon she was searched everywhere in relation, but, on finding no clue, her missing report was lodged by the complainant in Police Station Majra on 13th November, 2017. During search of Mumtaz, police found a clue that she was last seen together with one Sharik Rehman on 11th November, 2017 at Paonta Sahib whereafter said Sharik Rehman was interrogated, who informed the police that Mumtaz had asked him on his mobile phone from an unknown number to come to Paonta Sahib whereupon he had visited Paonta Sahib to meet her, but, at that time Mumtaz was very angry and had told him that she was going to adopt her own way and he should also mind his own business. Thereafter, when the police visited house of Sharik Rehman on 15th November, 2017 for further investigation, he had tried to commit suicide by inflicting an injury in his stomach with some sharp edged weapon, which led to registration of FIR No. 11 of 2017, dated 15th November, 2017, against him under Sections 342, 186, 506 and 309 IPC in Police Station Majra. Sharik Rehman was admitted in Aggarwal Hospital Jagadhari/Yamunanagar.

4. On 17th November, 2017, petitioner-Abdul Rehman, who is real uncle of Sharik Rehman, had interfered in and obstructed the investigation being carried out by the police and forensic team by abusing and threatening them when they visited the house of Sharik Rehman on 17th November, 2017, whereupon ASI Subhash Chand lodged a report in DDR under Section 186 and 189 IPC.

5. After obtaining the call details and tower location of mobile number of Sharik Rehman, his location on 11th November, 2017 was found at Puruwala, Moginand, Badripur, Gondpur in the morning and at Badwas, Baldwa (Kamrau) during day time and after 1.30 p.m., again at Badripur and Puruwala area. After receiving this information, search for Mumtaz was started in these areas. On 25th November, 2017, a foul smell was sensed by the police party at a big curve between Sataun and Hevna Temple whereupon search was made below the road and at a distance of 20 feet below the road, a red coloured lady plastic shoe was found and on further search 30 feet below the road, putrificated dead body of a woman was found. The said dead body, on the basis of wearings of the deceased, was identified by her cousin Riyasat Ali and Uncle Shamim Ali as at the time of leaving her house on 11th November, 2017, Mumtaz was wearing these apparels and her red plastic shoe was also identified by her Aunt Mehazbeen.

6. Thereafter, statements of witnesses were recorded, who stated that Sharik Rehman in conspiracy with Abdul Rehman (petitioner), by using vehicle of petitioner, bearing registration No. HP-17B-5944, had thrown Mumtaz from the cliff with intention to kill her as on 11th November, 2017, when Sharik Rehman came back to Puruwala in the said car, he had washed the said vehicle near house of his aunt (bua) whereupon petitioner-Abdul Rehman was

arrested on 26th November, 2017. During police remand, he produced his car bearing registration No. HP-17B-5944, alongwith key and documents and informed that his nephew (Sharik Rehman) had borrowed his car on 11th November, 2017. After checking the footage of 11th November, 2017, of CCTV cameras installed in the area, the said vehicle was found at 10.24 a.m. at Taruwala going towards Sataun and at Batapul, it was found coming towards Puruwala at 2.03 p.m. The call details of Sharik Rehman and one Sahil Khan (co-accused) disclosed their *inter se* talks and their presence in the one and the same area, whereupon Sahil Khan was interrogated, who disclosed that on 11th November, 2017, he had visited towards Kamrau in the said car with Sharik and Mumtaz was also with them and during return from Kamrau, Sharik had stopped the car near a curve and asked him to leave the vehicle to facilitate him to have personal talk with Mumtaz whereupon he had deboarded the vehicle and gone towards back side and started talking with his girlfriend. On his return, he saw Sharik dragging Mumtaz outside the car and throwing from the cliff. Thereafter, Section 302 read with Section 34 IPC was added in the case and on 28th November, 2017, Sahil Khan was arrested.

7. On 29th November, 2017, Director, SFSL, visited the spot alongwith his team, inspected the vehicle involved in the incident and had taken in possession hair and sand from the vehicle. Seat cover and foot mat of rear seats were also taken in possession. On 1st December, 2017, Sahil Khan made a statement under Section 27 of the Evidence Act following the identification of the spot where Mumtaz was killed by Sharik Rehman by throttling and throwing from the cliff. Sharik Rehman was arrested by the police after his discharge from the hospital on 4th December, 2017, who had also made a statement under Section 27 of Evidence Act followed by the identification of the spot. He also identified the spot from where he had thrown the purse and one shoe of deceased below the road, but, the said purse and shoe could not be recovered despite searching the same on the said spot, which resulted into addition of Section 201 IPC in the case.

8. During investigation, viscera and clothes of Mumtaz, CCTV footage, mobiles of Sharik Rehman and Sahil Khan and the material recovered from the vehicle and exhibits of accused-Sharik Rehman were sent for chemical analysis to SFSL Junga, report whereof has been received now and as per status report, supplementary challan in this regard is yet to be produced in the Court whereas challan presented in the Court is under consideration of learned Additional Sessions Judge, Sirmaur District at Nahan.

9. Petitioner had filed an application under Section 439 CrPC before Additional Sessions Judge, Sirmaur District at Nahan, which was dismissed on 3rd January, 2018 whereafter the petitioner had approached this Court by filing CrMP (M) No. 41 of 2018, but, the same was withdrawn on the ground that application filed by the petitioner before learned Additional Sessions Judge was dismissed primarily on the ground that investigation was still going on at that time and as challan had been filed by the time petition (CrMP (M) No. 41 of 2018) was preferred in this Court, the said petition was permitted to be withdrawn with liberty to file fresh application before the learned trial Court. Thereafter, petitioner preferred a bail application before learned Additional Sessions Judge, which was dismissed on 3rd April, 2018 constraining the petitioner to file present petition in this Court.

10. It is contended on behalf of the State that Sharik Rehman is residing with the petitioner-Abdul Rehman and is under his influence as there is no other person to guide him in his family and petitioner-Abdul Rehman has permitted his vehicle for commission of offence, which was washed twice by Sharik Rehman after the incident, but petitioner-Abdul Rehman did not inform the police about this abnormal suspicious activity nor made any inquiry about the fact from Sharik Rehman. Also, petitioner-Abdul Rehman had obstructed the police investigation and tried to mislead the course of investigation and had the petitioner been not involved in conspiracy with Sharik Rehman, he would have never obstructed the police investigation and definitely, would have informed the police about the conduct of Sharik Rehman, particularly, about the attempts made by Sharik Rehman to destroy the physical evidence. It has therefore been contended that there is evidence against the petitioner so as to establish his conspiracy with

main accused and for his active efforts to derail the investigation, he is not entitled for bail, as being an influential person, he can hamper the investigation and tamper with the evidence.

11. Learned counsel for the petitioner submits that even in the report of SFSL, involvement of the vehicle of petitioner is not established, the petitioner has been arrested on the basis of suspicion only and there is no remote evidence on involvement of the petitioner in the commission of alleged offence, much less, the concrete evidence and even if the statements of witnesses recorded by the police are taken as it is, there is no iota of evidence of involvement of petitioner-Abdul Rehman in commission of alleged offence. It has further been submitted that there was no occasion or motive for petitioner-Abdul Rehman to hatch the conspiracy to murder Mumtaz.

12. Principles with regard to grant of bail are well settled, which have been reiterated by the apex Court in numerous pronouncements. The apex Court in case titled as **Gurcharan Singh versus State (Delhi Administration),** reported in **(1978) 1 Supreme Court Cases 118,** has laid the following criteria for grant of bail:

> *"22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437 (1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.*
>
> *23. .....*
>
> *24. Section 439 (1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437 (1) there is no ban imposed under Section 439 (1) CrPC against granting of bail by the High Court or the Court of session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so the High Court or the Court of session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439 (1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437 (1) and Section 439 (1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence, of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out."*

13. The apex Court in case titled as **Prasanta Kumar Sarkar versus Ashis Chatterjee and another,** reported in **(2010) 14 Supreme Court Cases 496,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

14. Thereafter, the apex Court in a detailed judgment in **Siddharam Satlingappa Mhetre versus State of Maharashtra and others,** reported in **(2011) 1 Supreme Court Cases 694,** relying upon pronouncement of the Constitution Bench in **Gurbaksh Singh Sibbia versus State of Punjab,** reported in **(1980) 2 Supreme Court Cases 565,** laid down the following parameters for grant of bail:-

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

15. Following observations made by the apex Court in **Sanjay Chandra versus Central Bureau of Investigation,** reported in **(2012) 1 Supreme Court Cases 40,** may also be relevant to be reproduced herein:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative.

Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

40. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required."

16. In a recent pronouncement in case titled as **Dataram Singh versus State of Uttar Pradesh and another,** reported in **(2018) 3 Supreme Court Cases 22,** the apex Court, after considering its previous pronouncements, has held as under:

"2. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

3. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status

of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436-A in the Code of Criminal Procedure, 1973.

4. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in Inhuman Conditions in 1382 Prison, In re (2017) 10 SCC 658 : (2018) 1 SCC (Cri) 90.

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1 : (2017) 13 Scale 609, going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465, in which it is observed that it was held way back in Nagendra Nath Chakravarti, In re 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476, that bail is not to be withheld as a punishment. Reference was also made to Emperor v. H.L. Hutchinso, 1931 SCC OnLine All 14 : AIR 1931 All 356, wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.

6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory."

17. In view of aforesaid, grant of bail to the petitioner is to be considered within the parameters laid down by the apex Court, as referred hereinabove.

18. In present case, as per submission of learned Deputy Advocate General, accusation against the petitioner is based upon the statements of witnesses-Wazid Ali (complainant), Imran, Shamim Ali and Riyasat Ali and also on the basis of the fact that petitioner had permitted the main accused to use his vehicle, which has been found involved in commission of offence and further that petitioner had not informed the police about the suspicious activity of the main accused, rather, tried to hamper the investigation.

19. Perusal of statement of aforesaid witnesses recorded under Section 161 CrPC discloses that only on the basis of user of vehicle of petitioner by main accused and washing thereof twice after the incident, these witnesses, in their statements, have suspected the conspiracy of petitioner in commission of offence by further stating that Sharik Rehman used to tease Mumtaz and he had caused to break the engagement of Mumtaz and thus, Sharik Rehman had killed Mumtaz with the help of his uncle Abdul Rehman (petitioner).

20. During investigation, police has also obtained call details as well as location of mobile phones of accused. From the call details referred before this Court, the fact that deceased Mumtaz, through phone of her friend Nisha, had conversation with Sharik Rehman on 11th November, 2017, during 9.43 a.m. to 9.46 a.m. As per statement of Kumari Nisha, recorded by the police, on 11th November, 2017, at about 9.30/9.45 a.m., when she was waiting for bus for Paonta at Puruwala Bus Stop, Mumtaz, who was also there, had informed her that it was her holiday and she was visiting Paonta and at that time, Mumtaz had made one or two calls from her

mobile and at that time, Sharik Rehman had come from Paonta Sahib in a tempo and made an eye signal to Mumtaz. In the meantime, bus came and she and Mumtaz went to Paonta in the said bus. She had deboarded the Bus at Bangan Chowk whereas Mumtaz had proceeded ahead in the bus.

21. Combined reading of call details and the statement of Kumari Nisha depicts that there was conversation between Mumtaz and Sharik Rehman and Sahil Khan, but, during these calls, any talk between Sharik Rehman with the petitioner has not been pointed out.

22. Further, it is also prosecution case that Mumtaz was taken in the vehicle by Sharik Rehman and Sahil Khan. So far as the conspiracy on the part of petitioner to facilitate or instigate Sharik Rehman and Sahil Khan to commit offence is concerned, the same is yet to be established during the trial and is a matter of consideration of the trial Court. One of the basis, as of now, to implicate the petitioner is to permit Sharik Rehman and Sahil Khan to take his car. Knowledge of the purpose for which his vehicle was taken by Sharik Rehman is also a fact yet to be established in trial. *Prima facie,* it appears from the record that Sharik Rehman is the main culprit in committing the murder and Sahil Khan is his accomplice. Mumtaz and Sharik Rehman appears to have intimacy with each other and Sahil Khan was also their common friend and knowledge of the petitioner in this regard is yet to be established, but, even if it is considered that he was having knowledge of such intimacy, on the basis of material placed before this Court, only such knowledge cannot be made basis for rejection of bail petition of petitioner. What happened between Mumtaz and Sharik Rehman is in knowledge of either Sharik Rehman or Sahil Khan. There cannot be presumption of knowledge of everything to the petitioner. Such knowledge and conspiracy, if any, is yet to be established on record.

23. It is noticeable that DDR has been recorded against the petitioner for interfering and obstructing the investigation, for which the respondent-State/Investigating Agency is free to take appropriate action, including registration of case, if made out. Such act on the part of petitioner definitely warrants an action against him and may be a reason to suspect that he has connived with Sharik Rehman to save him, but, the omission on the part of petitioner to make an endeavour to help Sharik Rehman after commission of offence does not mean that he had conspired for commission of offence with main accused. Such an act can always be taken care of by the police by registering a case against him.

24. From the material placed before this Court, it is apparent that omission and commission on the part of petitioner cannot be equated with the act of main accused Sharik Rehman and Sahil Khan causing murder of Mumtaz. Material on record may be a pointer suspecting the involvement of petitioner, but, at this stage, such suspicion, which is yet to be established, cannot be a reason to deny the bail.

25. As of now, investigation is complete and challan has been presented in the Court. Therefore, there will be no question of hampering or obstructing the investigation in case petitioner is released on bail. Further, FSL report has also been received and has been proposed to be filed in the Court with supplementary challan in the near future in which also, the petitioner has no role to play.

26. It is also noticeable that Mumtaz had disappeared on 11th November, 2017 whereas petitioner was arrested on 26th November, 2017 and the witnesses, whose statements have been made basis for accusation against petitioner, had deposed before the police before his arrest. Therefore, probability of terrorizing or dissuading the witnesses from telling the truth is also not there. Moreover, in any case, if the petitioner involves himself in any such act, then, the Court can be approached under Section 439 (2) CrPC for cancellation of his bail.

27. The petitioner is a Doctor by profession and having roots in the society and has not fled during investigation of the case before his arrest and, therefore, there is no possibility of his fleeing, if enlarged on bail.

28. According to prosecution, a hair was recovered from the car used for commission of offence, but, as per SFL Report, the same has not matched with the hair of Sharik Rehman. For the reasons best known to the Investigating Agency/Officer, the hair of other persons, i.e. Sahil Khan, Abdul Rehman (petitioner) or deceased-Mumtaz have not been sent for comparison with the said hair. It is also not known as to whether hair of deceased Mumtaz have been preserved for such comparison or not and as to whether it is possible now to extract her hair from the graveyard. Be that as it may, it is for the Investigating Agency/Officer to decide the course of investigation.

29. Considering the entire material placed before this Court and the principles propounded by the apex Court referred (supra), petitioner is ordered to be released on bail in case FIR No. 10 of 2017, dated 14th November, 2017, registered at Police Station Majra, District Sirmaur, H.P., if not required in any other case, subject to following conditions:

(i) The petitioner shall furnish bail bonds in the sum of ₹ one lac with one surety in the like amount to the satisfaction of Chief Judicial Magistrate, Sirmaur at Nahan, District Sirmaur;

(ii) The petitioner shall make himself available to the police or any other investigating agency or Court in the present case as and when required;

(iii) He shall not hamper the investigation nor tamper with the prosecution evidence of the case in any manner whatsoever;

(iv) He shall not 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 the Police Officer;

(v) He shall not leave the country without prior permission of the Court;

(vi) He shall not misuse the liberty in any manner; and

(vi) Any breach in the conditions imposed upon him would entail cancellation of his bail.

30. Observations made in this petition hereinbefore shall not have any bearing on the merits of the case and the trial Court shall consider the material placed before it, in accordance with law, on its own merit without being influenced by any observation of this Court.

31. Petition stands disposed of in aforesaid terms.

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

Om Parkash & ors. .....Petitioners.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Revision No.40 of 2011.
Reserved on : 29.5.2018.
Date of Decision :18.6.2018.

Code of Criminal Procedure, 1973- Section 397/401- Revision- Accused were convicted and sentenced for offences under Sections 323, 451, 504 and 506/34 IPC by trial Court – Accused were found to have trespassed in house of complainant and gave beatings to him and his mother on ground that victim had taken away wood cut and kept by accused in jungle without their consent- Appeal of accused dismissed by Additional Sessions Judge- Revision against – On facts, statement of complainant on oath was found at variance with his version given to police on many

counts – His statement not worth credence – Alleged eye-witnesses also did not support prosecution case during trial – Held – Evidence on record does not prove guilt of accused for said offences beyond reasonable doubts- Revision allowed- Judgments of lower courts set aside- Accused acquitted. (Paras- 6 to 8)

For the petitioners : Ms. Leena Guleria, Advocate.
For the respondent : Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Criminal Revision Petition maintained under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment, dated 15.2.2011, passed by learned Additional Sessions Judge, Mandi, H.P. in Criminal Appeal No. 36, 34 and 35 of 2008, affirming the judgment dated 13.6.2008, passed by the learned Judicial Magistrate 1st Class, Baijnath camp at Tehsil Jogindernagar, District Mandi, H.P. in RBT No.49-II of 2007, whereby the present petitioners (in short 'accused') were convicted under Sections 451, 323, 504, 506 read section 34 of the Indian Penal Code and sentenced as under:-

Offence	**Sentence**
Under Section 451 IPC	Simple imprisonment for three months each and to pay fine of Rs.500/- each and in case of default to undergo simple imprisonment for one month each;
Undre Section 323 IPC	Simple imprisonment for three months each and to pay a fine of Rs.500/- each and in case of default further to undergo simple imprisonment for one month each;
Under Section 504 IPC	Simple imprisonment for one month each and to pay a fine of Rs.100/- each and in case of default further to undergo simple imprisonment for 15 days each;
Under Section 506 IPC	Simple imprisonment for three months each and to pay a fine of Rs.500/- each and in case of default to further undergo simple imprisonment for one month each. All the sentences shall run concurrently.

2. Briefly stating facts giving rise to the present appeal are that complainant-Subhash Kumar (PW-1) was present in his home on 16.2.2007, at about 9:30 PM, accused persons, namely, Om Prakash, Panna Lal and Ghanshyam, came to his house. They shouted and asked the complainant-Subhash Kumar to get out, when he came out of the room, all accused persons started beatings him with kick and fist blows. They also inquired, as to why, he had brought the wood cut by them. Complainant replied that the wood was lying in the jungle for 10-15 days and in case, the wood belonged to the accused, they should take it away. The accused abused him, when the complainant shouted for help, his mother came at the spot. The accused also gave beatings to her. The matter was reported to the police, on the basis of which, FIR Ex.PW1/A was registered. Statements of witnesses were recorded and site plan was prepared. Thereafter, codal formalities were completed and *challan* was put up in the Court.

3. The prosecution, in order to prove its case, examined as many as six witnesses. Statement of accused persons were recorded, under Section 313 of the Code of Criminal

Procedure, wherein they have denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Ms. Leena Guleria, learned counsel appearing on behalf of the petitioners has vehemently argued that the statement of complainant is not inspiring confidence, as he has improved while appearing in the witness box as PW-1 that there are material improvements from his statement, under Section 154 of the Code of Criminal Procedure, so recorded before the police and in these circumstances, his statement cannot be relied upon to record the conviction against the petitioners. She has further argued that even PW-2 and PW-3, who are independent witnesses, have not supported the prosecution story. On the other hand, Mr. Rajat Chauhan, learned Law Officer has strenuously argued that PW-2 and PW-3 have stated that they had seen the accused persons in the house of complainant and it has come on record that the reason for giving beatings to the complainant that the complainant has taken away the wood cut by the accused persons in the jungle. He has further argued that the prosecution has proved the guilt of the accused conclusively and, therefore, appeal deserves to be dismissed.

5. To appreciate the arguments of learned counsel appearing on behalf of the parties, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

6. In order to prove its case, the prosecution has examined complainant-Subhash Kumar (PW-1), he has deposed that on 16.2.2007, at about 9:30 PM, he was present at his house. In the meantime, all the accused persons came there and started abusing him and further asked him to get out of the room. Accused Om Prakash, inquired from him as to why he took away their wood, which had been kept by them on cutting in the forest. He replied that he had not brought any wood on which, the accused started beating him. His mother shouted for help. Balwant reached at the spot. He was rescued by Balwant and Sunita etc. He was beaten inside the house. He received injuries on his mouth and teeth part of the body. In his cross-examination, he has denied that he had picked up the wood of the accused from the jungle. He has denied that he had stated that he would return the wood. PW-2, Balwant Singh, deposed that the house of the complainant is located at a distance of 150 meter from his house. On 16.2.2007, at about 9:30 PM, he heard some noise from outside. He came out and found that a quarrel was taking place in the house of the complainant. He could not identify the person. He was declared hostile and admitted that when he shouted for help, Sonu, Arun and Sunita came at the spot. He has admitted that Om Prakash, Panna Lal and Ghanshyam were present at the spot. He has admitted that they had given beatings to the complainant in the courtyard. He has admitted that accused had threatened to kill the complainant. In his cross-examination, he has stated that there are 10-12 houses there. Panna Lal, Om Prakash, Ghanshyam and mother of the complainant etc. were present at the spot. He had not visited the veranda of PW-1, Subhash Chand. He was not aware that the criminal case was maintained against him by the mother of the accused. He has also admitted that it was 16.2.2007, at about 9:30 PM, when the accused persons were present on the spot and were seen by him giving beatings to the complainant. There is nothing in the statement, which could have shown that he is making a false statement to that effect. He has denied that PW-1 received injuries, while bringing wood from the forest, which clearly shows that the accused persons are admitting the presence of injury on the person of the complainant during the relevant time. He has categorically denied that he neither went to the house of the complainant nor witnessed the incidence. PW-3, Sunita Devi, stated that nothing has happened in her presence. In her cross-examination, she has categorically admitted that she alongwith Sonu and Arun, on hearing noise went to the spot. She has also admitted that at the relevant time, accused persons were present on the spot. She has also admitted the presence of accused persons as well as complainant party on the spot, at the relevant day and time and that she rushed to the same on hearing a noise, but failed to explain, as to what was happening at the spot. She has failed to explain as to what noise was being made by the parties which forced her to rush to the spot alongwith other persons. PW-4, SI, Kapoor Chand, has registered the FIR, Ex.PW1/A, came to be registered on 17.2.2007, at about 10:30 PM. The incidence took

place on 16.2.2007, at about 9:30 PM. PW-5, HC Gulab Singh, has investigated the case. He has categorically denied that a false case has been made in connivance with the complainant. PW-6, Dr. Partap Chand, has examined the complainant on 17.2.2007 and issued MLC Ex.PW6/A and found that the complainant had suffered simple injuries, which could have been caused by means of kick and fist blows. He has admitted in his cross-examination that the injuries could have been caused by way of fall in the jungle.

7. Statement of PW-1, Subhash Chand, in the present case is not confidence inspiring, as he has stated before the police, under Section 154 of the Code of Criminal Procedure, he asked the accused that in case, the wood is there, he will return the wood to them, but while appearing in the witness box in the learned Court below, he has not stated so and has improved upon his case, so his statement becomes suspicious. Further, while appearing before the police, he has stated that his mother was also beaten up, but while appearing in the witness box, he has not stated so. Though, Balwant Singh and Sunita Devi were examined, but they had not supported the prosecution case. Statement of PW-1, Subhash Chand, if read in totality doesn't make out a case against the accused persons. Further, his statement is not trustworthy and remained uncorroborated by independent witnesses. Further, the improvement made by PW-1, in his statement while appearing in the witness box before the learned Court below also makes its statement untrustworthy. The non-examination of other independent witnesses also creates a doubt in the prosecution story.

8. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused persons conclusively and beyond the shadow of reasonable doubt. So, this Court finds that the findings recorded by the learned Court below convicting and sentencing the accused persons are liable to be set aside.

9. Accordingly, the present Criminal Revision is allowed and the judgment, dated 15.2.2011 passed by the learned Additional Sessions Judge, Mandi, District Mandi, affirming the judgment dated 13.6.2008, passed by the learned Judicial Magistrate 1st Class, Baijnath camp at Jogindernagar, District Mandi, is set aside.

10. In view of the above, the present Criminal Revision is disposed of, so also the pending application (s), if any.

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

Padam Singh Saini ...Appellant.

Versus

Megh Singh ...Respondent.

Criminal Appeal No.592 of 2016
Reserved on: 11.6.2018
Decided on : 18th June, 2018.

Code of Criminal Procedure, 1973- Section 256- **Negotiable Instruments Act, 1881-** Section 138- Trial Court dismissed complaint for non-appearance of complainant or his counsel on date fixed for appearance of accused and acquitted him (accused) – Appeal against – Held – Plea of complainant that he remained under impression that case was for formal hearing whereas his counsel could not appear as he was busy in some other court, appears to be genuine – Order of trial court set aside – Case remanded to trial court to proceed in accordance with law.

(Paras-5 and 6)

For the appellant : Mr. H.S. Rangra, Advocate.
For respondent : Mr. Naveen Kumar Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant, under Section 378 of the Code of Criminal Procedure, for quashing and setting aside the impugned order dated 23.12.2015, passed by the Court of learned Judicial Magistrate 1st Class, Court No.III, Mandi, District Mandi, (H.P), in Criminal Complaint No.196/2015.

2. The key facts, giving rise to the present appeal are that the appellant/complainant (*hereinafter referred to as the 'complainant'*) maintained the complaint, under Section 138 of the Negotiable Instruments Act, 1881 (*hereinafter referred to as 'Act'*) against the respondent/accused (*hereinafter referred to as the 'accused'*). As per the complainant, on 10.10.2014, complainant presented a cheque, bearing No.159566, dated 17.9.2014, amounting Rs.1,00,000/-, drawn on State Bank of India, Branch Pandoh, District Mandi, H.P. The said cheque was presented and the same was dishonoured by the accused's banker, vide memo, dated 10.10.2014 for the reason "***Funds Insufficient***". Thereafter, the complainant served the accused through registered notice and demanded the cheque amount, which was duly served upon the accused, but the accused had neither replied nor had arranged for the payment of the said cheque and on his failure the complainant maintained the complaint before the learned Court below. The learned Court below issued notice for the service of accused on 23.12.2015, on the said date, the complainant was under the impression that the learned counsel will appear on his behalf, before the learned Court and could not appear, the learned counsel also not appeared before the learned Court below as and when the said case was called, as the learned counsel was busy in conducting the criminal trial before the learned lower Appellate Court and when appeared in the court regarding the said complaint and enquired about the case, then it come to know to the learned counsel that the learned Court below had dismissed the complaint of complainant, under Section 256 of the Code of Criminal Procedure and acquitted the accused, vide order dated 23.12.2015.

3. Learned counsel appearing on behalf of the appellant-complainant has argued that the impugned order passed by the learned Court below is unjust, unreasonable and liable to be set aside. On the other hand, learned counsel appearing on behalf of the accused-respondent has argued that as the appellant-complainant was unable to appear before the learned Court below and prays that the present appeal deserves to be dismissed. He has further argued that there is no irregularity and illegality in the impugned judgment passed by the learned Court below.

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

5. From the perusal of record, it is quite clear that the appellant-complainant could not appear before the learned Court below, as he was, under the impression that his counsel will appear before the learned Court below and it was only a formal date, however, his counsel also could not appear due to unavoidable circumstances. So, this Court comes to the conclusion that non-appearance of the appellant-complainant as well as his counsel was neither intentional nor willful, but was beyond their control. Accordingly, the impugned order dated 23.12.2015, passed by the learned Court below is required to be set aside and the case is remanded back to the learned Court below to meet the ends of justice.

6. Resultantly, the present appeal is allowed and the impugned order dated 23.12.2015 passed by the learned Court below is set aside and the complaint is remanded back to the learned Court below with a direction to dispose of the same, in accordance with law. Both the parties, through their learned counsel, are directed to put in appearance before the learned Court below on ***26th* July, 2018**.

7. In view of the above, the present appeal is disposed of in the aforesaid terms with no order as to costs. Pending application (s), if any, shall also stands disposed of.

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

State of Himachal Pradesh .....Appellant.
Versus
Ramesh Chand .....Respondent.

Cr. Appeal No.136 of 2009.
Reserved on : 23.5.2018.
Date of Decision:18.6.2018.

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal – Accused was tried by trial court on allegations that he gave beatings to complainant "P" and also threatened to kill him – Accused acquitted by Trial Court – Appeal by the State on ground that acquittal is based on wrong appreciation of evidence by trial court- High Court found that FIR was belatedly filed and no reason for delay was given, there was no medical evidence qua injuries, one of eye-witness "A" was not examined by prosecution during trial- Held – Prosecution failed to establish guilt of accused beyond reasonable doubts – Acquittal upheld- Appeal dismissed. (Paras- 7 & 8)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals with Mr. Rajat Chauhan, Law Officer.
For the respondent Mr. Neel Kamal Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of accused in a case, under Sections 341, 355, 323 and 506 of the Indian Penal Code, passed by the learned Additional Chief Judicial Magistrate, Sarkaghat, District Mandi, (H.P) dated 8.9.2008, in Police Challan No.69-II/2005.

2. Briefly stating facts giving rise to the present appeal are that on 15.3.2005, complainant-Prem Singh (PW-1) had gone to the house of Ashwani Kumar, around 10:00 AM, at village Bassi Satmala. Near the house of Ashwani Kumar, there is a shop of Roshan Lal (PW-2). Thereafter, the complainant (PW-1) went to the shop of Roshan Lal, where he was talking with him. In the meantime, accused came there and threatened the complainant to kill him. Accused gave four slaps to the complainant (PW-1) and threw him on the earth and also gave kicks blows to him. Ashwani Kumar and Roshan Lal (PW-2) rescued the complainant from the clutches of accused. During the course of investigation, statement of witnesses recorded and site plan was prepared. Thereafter, codal formalities were completed and *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as three witnesses. Statement of accused was recorded, under Section 313 of the Code of Criminal

Procedure, wherein he has denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. Learned Additional Advocate General appearing on behalf of the appellant has argued that the judgment of acquittal passed by the learned Court below is without appreciating the evidence correctly. He has argued that the learned Court below has failed to take into consideration the fact that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt.

5. On the other hand, learned counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. He has argued that no one from the locality was joined as a witness, which shows that the case prepared by the prosecution is false. He has further argued that the delay in lodging of FIR itself shows that nothing has happened on the spot. He has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt, the case of the prosecution was without any basis and the findings recorded by the learned Court below are as per law.

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

7. In order to prove its case, the prosecution has examined PW-1, Prem Singh, he has deposed that the occurrence took place on 15.3.2005, but the application was given by him to the Police on 17.3.2005. He has further deposed that Ashwani Kumar and Roshan Lal (PW-2) were present at the spot, but said Ashwani Kumar, has not been examined by the prosecution. Roshan Lal-PW-2 has stated that accused had thrown the complainant-Prem Singh (PW-1) on the earth and gave kicks blows to him. He has deposed that there was exchange of words going on between the parties. He has given different version by saying that accused caught hold the complainant-Prem Singh from his arms and took him on the road. He has simply deposed that he tried to rescue the complainant from the accused, which fact, is contrary to the facts, as mentioned in the FIR. In his cross-examination, he has stated that no one was present at the spot, whereas in application Ex.PW1/A, it is mentioned that one Ashwani Kumar had also rescued the complainant-Prem Singh (PW-1) from the clutches of accused. He has also stated that accused had threatened the complainant to do away with his life. PW-3, Inspector Hari Ram-Investigating Officer, who has deposed that an application was given by the President, Prem Singh, on the basis of which, FIR, Ex.PW3/A was registered. He has admitted that he had received the application of the complainant (PW-1) in Police Station on 17.3.2005.

8. At the very outset, in the present case, there is no medical of the injured meaning thereby that the prosecution has failed to prove the guilt of the accused by leading cogent and convincing evidence that any injury was received by the injured. At the same point of time, non-examination of the independent witness, who as per the prosecution, rescued the complainant (PW-1) has not been examined. In these circumstances, the prosecution evidence is analysed that as per the complainant, he was present in the shop of Roshan Lal (PW-2) at Satmala. Accused came there and wrongfully restrained the complainant from going forward and gave kicks blows to him. Accused also assaulted the complainant with intention to dishonour him and threatened him to do away with his life. All these facts coupled with the fact shows that there is delay of two days in lodging of FIR and there is also no medical evidence, which shows that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt.

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

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

11. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal :

> *"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:*
>
> *(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*
>
> *(2) The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
>
> *(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*
>
> *(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*
>
> *(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."*

12. The net result of the above discussion is that the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt. There is no illegality and infirmity in the findings, so recorded by the learned trial Court.

13. Accordingly, in view of the observations and analysis, made hereinabove, there is no merit in the appeal and the same is dismissed. Record of the learned trial Court be sent back forthwith.

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

Sh. Ajay Kaundal .....Petitioner/Applicant.

Versus

Sh. Santosh Kumar .....Respondent/Non-applicant.

Cr. MP No. 485 of 2018 in
Cr. Revision No. 225 of 2016.
Reserved on: 15th June, 2018.
Date of Decision: 20th June, 2018.

Code of Criminal Procedure, 1973- Sections 362 and 482- Bar against reviewing or altering judgment – Petitioner was convicted and sentenced by trial court for offence under Section 138 of Negotiable Instruments Act - His appeal against judgment of conviction and order of sentence dismissed by Appellate Court and revision by High Court – Petitioner/accused thereafter filing petition under Section 482 before High Court seeking leave to compound offence – Held – Composition of offence can be made when case is actually pending in Court and not after court has rendered a verdict - Contrary interpretation would amount to reviewing or altering of judgment which is impermissible in view of Section 362 of Code – Petition dismissed - K. Subaramanian vs. R. Rajathi represented by P.O.A.P Kaliappan, (2010)15 SCC 352 distinguished.

(Paras- 2 and 3)

Case referred:

K. Subaramanian vs. R. Rajathi represented by P.O.A.P Kaliappan, (2010)15 SCC 352

For the Appellant/Petitioner: Ms. Soma Thakur, Advocate.
For the Respondent: Mr. Sanjeev Mankotia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This Court while pronouncing an order, upon, Cr. R. No. 225 of 2016, had, after dismissing the aforesaid criminal revision petition, hence, affirmed the concurrently recorded verdicts of conviction, and, consequent sentence imposed, upon, the convict/petitioner herein, by, both the learned Courts below, (i) hence, subsequently, the convict has instituted the instant application, cast under Section 482 of the Cr.P.C., (ii) with averments being borne therein, qua the willingness and readiness of the convict, to, deposit the entire liabilities encumbered upon him, and, as arise, from the dishonour of negotiable instrument, (ii) also, underlinings occur therein qua hence this Court, being, constrained to order, for, compounding the apt offence.

2. Be that as it may, obviously, the aforesaid endeavour, is, a post verdict endeavour. However, the learned counsel appearing for the petitioner/convict, for hence sustaining it, has placed reliance, upon, the mandate occurring, in, Section 147 of the Negotiable Instrument Act. Provisions whereof read as under:-

> "**147 Offences to be compoundable**. —Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

In the afore-extracted provisions, though, an explicit and express diktat hence occurs, of, despite, no apposite therewith provisions, being, borne in the Code of Criminal Procedure, rather per se thereupon not interdiction being cast, upon, the courts concerned, to, hence make/record an order, qua compounding the apt offence arising from the dishonour, of, negotiable instrument, (i) therefrom, the learned counsel appearing for the petitioner, contends that the post verdict compository endeavour(s), rather being both legally permissible besides legally apt. The learned counsel appearing for the convict/petitioner, has, in making the aforesaid endeavour, hence, assayed to obtain succor, from, a verdict of the Hon'ble Apex Court, rendered, in a case titled as ***K. Subaramanian vs. R. Rajathi represented by P.O.A.P Kaliappan***, reported in ***(2010)15 SCC 352***, relevant paragraphs No. 6 to 9 whereof, stand extracted hereinafter:-

> "6. Thereafter a compromise was entered into and petitioner claims that he has paid Rs.4,52,289/- to respondent. In support of this claim, the petitioner has produced affidavit sworn by him on December 1, 2008. The petitioner has also produced affidavit sworn by P.Kaliappan, Power of Attorney holder of R.Rajathi on December 1, 2008 mentioning that he has received a sum of Rs.4,52,289/- due under the dishonoured cheques in full discharge of the value of cheques and he is not willing to prosecute the petitioner.

> 7. The Learned Counsel for the petitioner states at the bar that the petitioner was arrested on July 30, 2008 and has undergone the sentence imposed on him by the Trial Court and confirmed by Sessions Court, High Court as well as by this Court. The two affidavits sought to be produced by petitioner as additional documents would indicate that indeed a compromise has taken place between petitioner and the respondent and the respondent has accepted the compromise offered by petitioner pursuant to which he has received a sum of Rs.4,52,289/-. In the affidavit filed by the respondent a prayer is made to permit the petitioner to compound the offence and close the proceedings.
>
> 8. Having regard to the salutary provisions of Section 147 of Negotiable Instruments Act read with Section 320 of the Code of Criminal Procedure, this Court is of the opinion that in view of the compromise arrived at between the parties, the petitioner should be permitted to compound the offence committed by him under Section 138 of the Code.
>
> 9. For the foregoing reasons CRL.M.P. No.12801 of 2009 in which prayer to condone the delay of 39 days caused in filing review application is allowed and delay is condoned. The Review Petition succeeds. The Order dated September 11, 2008 dismissing SLP (Crl) No.6974 of 2008 @ CRL.M.P. No.14586 of 2008 is recalled. The said SLP is restored on file with its original number.
>
> 8. The CRL.M.P. No.12804 of 2009 in which the prayer is made by petitioner to permit him to produce affidavits sworn by him on December 1, 2008 as well as affidavit sworn by P. Kaliappan power of attorney holder of R. Rajathi on December 1, 2008, as additional documents is allowed. CRL. M.P. No.12803 of 2009 in which the petitioner has prayed to permit him to compound the offence and acquit him by setting aside the conviction recorded in Criminal case No. 726/2003 under Section 138 of the Negotiable Instruments Act by Learned Judicial Magistrate, Karur is allowed. The petitioner is permitted to compound the offence."

However, the aforesaid submission addressed before this Court, by the learned counsel for the petitioner, is, rather rendered amenable to founder, for the reasons, (a) the apt affirmative order, made, by the Hon'ble Apex Court in Subramanian case (supra), arising, from the factum of the Hon'ble Apex Court, after, affirming the verdicts, of, conviction, and, consequent sentence imposed, upon, the accused/convict therein, by the learned courts below and by the Hon'ble High Court concerned; (b) also visibly therein, with, the sentence imposed upon the convict/accused therein, rather standing undergone by him, (c) thereafter, though, through an affirmative order recorded, upon, the review petition filed, before, the Hon'ble Apex Court, subsequent to its affirming, the verdicts, of, conviction, and, consequent sentence imposed upon the accused/convict therein, the Hon'ble Apex Court had obviously set aside, the order, of, conviction pronounced, upon, the accused therein, and, had also permitted the accused/convict therein, to compound, the offences arising, out of dishonour, of, negotiable instrument. However, yet, the cullings of the aforesaid factual scenario prevailing therein, is imperative, as the post verdict compository endeavour, in consonance therewith, as, made before this Court, by the petitioner/applicant herein, has, to obviously hence satiate, in entirety, the factual matrix, borne in pargraphs No.6 to 9, of the verdict pronounced in Subramanian case (supra), whereupon, alone the verdict (supra) would be rendered applicable hereat, (d) paragraphs whereof make explicit underlining(s), qua, the accused/convict therein, serving, the sentence of imprisonment imposed upon him, and, only for removing the stains, of, guilt, rather hence Hon'ble Apex Court, permitting the apposite post verdict endeavour, (e) whereas, hereat evidently the applicant/petitioner/convict herein, has not served, the sentence of imprisonment imposed upon him, emphatically hence the aforesaid trite non serving, of, sentence, of, imprisonment, is a stark distinctive factum therefrom, whereupon, the mandate supra is rendered unattracted hereat. In aftermath, the post verdict compository endeavour, as , hereat made by the applicant/petitioner

herein, hence, cannot come to be accepted. The further reason being, (f) though, Section 147 of the Negotiable Instruments Act, rather bestows, upon, courts, the apt jurisdiction, to render an order vis-a-vis compounding, of, offences, arising from the dishonour, of, negotiable instrument, even despite no mandate, in consonance therewith, standing, borne in the Code of Criminal Procedure, (g) yet sweep thereof, is, unextendable, vis-a-vis any post verdict endeavour, given the Negotiable Instruments Act, not, containing any explicit categorical diktat, whereunder hence stand excluded, the clout, of, the mandate of Section 362 of the Cr.P.C., thereupon mandate thereof is to be concluded to hold sway, and, the mightiest clout, provisions thereof stand extracted hereinafter:-

> "362. Court not to after judgement. Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

(h) wherein therein is a complete bar, against, the recalling or reviewing, of, a judgment, excepting, for correcting typographical or clerical mistakes, mistakes whereof, are not occurring hereat, rather when hereat, the verdict, of conviction, and, consequent sentence, imposed upon the accused/applicant concerned, is assayed to be recalled, (i) thereupon the post verdict compository endeavour is impermissible, given, thereupon hence standing visibly begotten, an apt infringement, of the aforesaid statutory provisions, wherein, there occurs a complete bar, against, the recalling or reviewing, of, a sealed, signatured, and, pronounced judgment.

3. For the reasons which have been recorded hereinabove, there is not merit in the instant applicant and it is dismissed accordingly.

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

Smt. Gangi Devi & others ....Appellants/defendants.

Versus

Prem Singh & others .....Respondents

RSA No. 415 of 2016.
Reserved on : 18th June, 2018.
Decided on :20th June, 2018.

Specific Relief Act, 1963- Section 38- Suit for injunction – Plaintiff seeking decree of permanent prohibitory injunction against defendants for restraining them from interfering in his possession over suit land- Defendants denying exclusive possession of plaintiff and asserting their own joint possession – Suit decreed by trial Court- Appeal of defendants also dismissed by First Appellate Court- Regular Second Appeal- Exclusive possession of plaintiff over suit land was inferable from revenue record, statements of revenue officers examined before trial court and from sale deed executed in his favour as well as from decree of court passed in previous litigation – Held - Plaintiff's suit for permanent prohibitory injunction was rightly decreed- Regular Second Appeal dismissed. (Para-9 and 10)

For the Appellants: Mr. Sanjeev Kumar Thakur, Advocate.

For Respondent No.1: Mr. George, Advocate.

Proforma respondents No.2 and 3 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for permanent prohibitory injunction qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiff had filed the suit for permanent prohibitory injunction for restraining the defendants from interfering in his peaceful ownership and possession, from cutting trees and changing the nature of the suit land. IN alternative, relief of possession had also been prayed for. It was pleaded that the plaintiff was exclusive owner and in possession of the suit land. The defendants being forceful persons were inimical towards the plaintiff. The suit land had properly been demarcated and boundaries had been fixed at the spot. When the plaintiff had started raising construction, the defendants pelted stones at him and his labour. Cause of action accrued on 11.01.2008 when the defendants created hindrance in the construction work of the plaintiff. Hence the suit.

3. The defendants No.1 to 4 contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia maintainability, cause of action, valuation, jurisdiction and estoppel. On merits, the contents of the plaint were denied It was asserted that the plaintiff was not exclusive owner of the suit land. He had purchased the land from Lekh Ram son of Kirpa Ram. Lekh Ram had sought partition of the land measuring 7.1 bighas, comprised in Khasra No.177/1 and the partition order of Assistant Collector 1st Grade was set aside by the Sub-Divisional Collector, Sadar, Bilaspur, on 10.03.1998, the suit land was in the joint possession of the parties and was not maintainable against the other co-owners. It was also asserted that revenue entries were wrong and illegal. It was specifically denied that the plaintiff was exclusive owner in possession of the suit land. He was not entitled to the discretionary relief of injunction, as he had not approached the court with clean hands.

4. Defendant No.5 filed separate written statement, wherein, he has taken preliminary objections qua maintainability, cause of action, suppression of facts etc. The contents of the plaint were denied on merits and prayed that the suit be dismissed.

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

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

1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for?OPP.
2. Whether the plaintiff has cause of action to file the present suit?OPP
3. Whether the plaintiff is estopped by his own act and conduct from filing the present suit?OPD.
4. Whether the suit of the plaintiff is not maintainable?OPD.
5. Whether the civil Court has no jurisdiction to try the present suit? OPD.
6. Relief.

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

8. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on -5.10.2016, admitted the appeal instituted by the defendants/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the suit for permanent prohibitory injunction is not maintainable by a co-sharer who is not in physical possession of a parcel of land and the plaintiff could not have claimed injunction against the defendants in the present case especially when no claim for partition has been made?

b) Whether the judgment and decree passed, on the basis of compromise arrived at between the parties, in Civil Appeal No.98 of 1999 titled as Lekh Ram vs. Balia and others, decided on 8.9.2004, holding lekh Ram to be owner in possession of suit land and restraining Balia etc., from interfering in his possession in any manner, whatsoever, to which late Sh. Durga Ram i.e. husband of defendant No.1 and father of defendants No.2 to 4 was not party would have any binding effect on Durga Ram and in sequel on his legal representatives i.e. defendants No.1 to 4?

Substantial questions of Law No.1 to 2:

9. The plaintiff, in, support of the trite factum, of his, holding exclusive possession of suit kahsra No. 215/177/48, carrying an area of two biswas, has, placed reliance, upon, the testification rendered by Shri Kanshi Ram (PW-2), Kanungo, wherein, the latter testified, (i) of Prem Singh (plaintiff) being owner in possession, of, the suit land, borne in Khasra No. 215/177/48. PW-3 Ramesh Chand, Patwari, in his testification, as, comprised in his examination-in-chief, has testified of Lekh Ram being owner in possession of the suit land, now bearing Khasra No.215/177/48, (ii) and, he has further testified, of mutation, on anvil, of sale of the aforesaid parcel of land, standing attested, vis-a-vis, the suit land, on 30.09.2006. The afore referred rendered testification, by PW-3, qua, the plaintiff holding possession, of, the suit khasra number, carrying an area, of, two biswas, is apparently rendered, on anvil, of the apt khasra girdawari prepared by him. Since, a presumption of truth, is enjoyed, by the apposite entries, carried in the khasra girdwari, appertaining to the suit land, and, when therein one Lekh Ram wherefromwhom, the plaintiff hence purchased, the suit land, in the year 2006, is, recorded to be owner in possession thereof, (iii) besides when in consonance therewith, the jamabandi, apposite to the suit land, and, as comprised in Ex. PA also carries therein hence akin therewith reflections, (iv) thereupon, the presumption of truth enjoyed, by the afore-referred reflections, carried, both in khasra girdawari appertaining to the suit land, and, in the jamabandi borne, in Ex.PA, rather acquire conclusivity. More so, when the aggrieved defendants, omitted, to adduce any cogent evidence, for dislodging the truth(s) thereof.

10. Furthermore, with Lekh Ram, wherefromwhom, the plaintiff had purchased the suit land, hence making its purchase from one Dugra Ram, and, in contemporaneity thereof, tatima borne in Ex.DW1/C was also prepared, in respect of the specific parcel of land, qua, wherewith a sale occurred inter se one Durga Ram, and, Lekh Ram, thereupon, the aforesaid tatima, also, corroborates the deposition of PW-3, in respect of the plaintiff, holding, possession of the suit land, (i) especially, and, reiteratedly when he acquired title thereof, from, one Lekh Ram, and, with the latter making its purchase, from one Durga Ram, and, when in contemporaneity, of purchase whereof, tatima borne in Ex.DW1/C was prepared, validity whereof, remains rather hence unshred of its efficacy. Moreover, affidavit borne, in Mark Z/1, personifying the factum of delivery, of, possession of the suit land, being made to Lekh Ram, by one Durga Ram, was also tendered into evidence, (ii) and, despite its being tendered into evidence, the aggrieved defendants' counsel, omitted to contest the truthfulness, of, all the recitals borne therein, specifically appertaining, to the delivery of the possession of the suit land, being made to one Lekh Ram, by one Durga Ram, the latter being the predecessor-in-interest, of one Gangi Devi. The effect(s), of,

lack of adduction, of, any efficacious or potent evidence, for overwhelming, the effect of the aforesaid recitals hence occurring in Mark Z/1, does constrain a conclusion, of it, acquiring an aura of veracity, besides also its corroborating the deposition of PW-2. In aftermath, the learned Courts below, apparently did not err, in concluding, of, the suit khasra number being exclusively owned, and, possessed by the plaintiff.

11. Be that as it may, both the learned Courts below, had placed reliance upon Ext. PX, exhibit whereof, comprises, a verdict pronounced by the learned District Judge, Bilaspur, upon, Civil Appeal No.98 of 1999, in a lis inter se Lekh Ram, and, against four defendants, two amongst whom, are, the successors-in-interest, of, one Durga Ram, AND, whereunder, on anvil of a compromise deed Ex. CA, which occurred inter se the litigant(s) therein, (i) hence a declaratory decree, carrying a vivid pronouncement qua one Lekh Ram, wherefromwhom, the plaintiff, had, purchased the suit land, comprised in khasra No. 177/48/1 measuring 2 biswas, being owned and possessed, by the aforesaid Lekh Ram. Uncontrovertedly, the, therein ascribed suit kahsra No., is, Khasra No. 177/48/1, and, the extant suit khasra Number whereof, is, 215/177/48, and, it carries an area of two biswas, and, reiteratedly uncontestedly the aforesaid previous suit, is, vis-a-vis the extant suit khasra numbers, and, alike in respect(s) whereof Ex.Px, was pronounced. Consequently, given the similarity, of, the apt khasra number, in respect whereof Ex. Px was pronounced, vis-a-vis the extant suit khasra number, (ii) thereupon, the affirmative declaratory decree, as, pronounced, vis-a-vis, the person(s), wherefromwhom, the plaintiff, has, derived his right, title or interest in the suit land, is hence enjoined to be revered, (iii) besides is biding upon the defendants, who are the successors-in-interest, of, one Durga Ram, wherefromwhom, one Lekh Ram, the vendor of the plaintiff, purchased the suit khasra number. (iv) More so, when two, amongst the successors-in-interest, of, one Durga Ram, were arrayed, in Ex. Px, as party(ies), in, the apposite array of defendants, (v) and when no evidence, is adduced, qua the subsisting interest(s), in, the estate of one Durga Ram, the predecessor-in-interest, of, the aggrieved defendants, being also amenable to be represented by the aggrieved defendants, whereas, it being therein represented, by only two amongst, his heirs, namely, Balia and Nathy, (vi) evidence whereof, was, comprised in the legal heir certificate, being tendered into evidence. However, the apposite legal heir certificate remained untendered into evidence, thereupon, the pronouncement, borne in Ex.Px, is construed, to be binding, upon, the aggrieved defendants herein, despite, theirs being not arrayed, in Ex. Px, in the apposite array of defendants.

12. Furthermore, even if, for, ensuring the appropriate watching, of, the apt interest(s), in litigation, in, Civil Suit bearing No. 136/1 of 1997, decided on 25.8.1999, wherefrom Civil Appeal No. 98 of 1999, had arisen, and, whereon a decision borne in Ex.PX was rendered, also rendered imperative hence the participation therein, of, even the aggrieved defendants, (I) thereupon, it was incumbent, upon, the aggrieved defendants, to, adduce forthright evidence, with, candid displays in concurrence therewith, hence, occurring therein. However, the aforesaid evidence is amiss hereat, (ii) consequently, even if, the aggrieved defendants, had a right, to participate in the earlier suit, whereon, an pronouncement, borne in Ex.PX, hence occurred, (iii) yet when their apt interests therein were watched, by two amongst the successors-in-interest of Durga Ram, thereupon, it is to be concluded, that despite, their non participation therein, their interest, in the earlier litigation, being, properly watched, by two amongst the successors-in-interest, of Durga Ram, thereupon, the pronouncement made in Ex.Px, is, also compatibly binding upon the aggrieved defendants.

13. However, the learned counsel appearing for the defendants, contends, that with Prem Singh, not standing arrayed, as party in the earlier suit, hence he cannot derive any leverage therefrom. However, the aforesaid submission, is rudderless, as Prem Singh, plaintiff herein, has apparently, derived his interest in the suit land, from the arrayed therein plaintiff, one Lekh Ram, hence, all the benefits bestowed thereunder, upon, Lekh Ram, his vendor, are compatibly accruable besides bestowable upon the plaintiff herein.

14. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature

appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondent/plaintiff and against the appellants/defendants.

15. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Guman .....Petitioner/Plaintiff.
Versus
Ram Chand & others .....Respondents/Defendants.

CMPMO No. 42 of 2018.
Reserved on : 14th June, 2018.
Date of Decision: 20th June, 2018.

Code of Civil Procedure, 1908- Section 151- Police assistance – Permissibility – Trial Court by way of ad interim injunction directing plaintiff to remove obstruction from path situated over his land and leading to house of defendants and village abadi – Defendants then filing application for police assistance for removal of barricades allegedly erected by plaintiff over said path – Court appointing commissioner for local investigation and his report not corroborating allegations of barricading of path by plaintiff – Yet, trial Court directing SHO concerned to remove obstruction from plaintiff's land- Petition against – Held – If trial court was not satisfied with report of Local Commissioner, it should have appointed some revenue officer as fresh Local Commissioner and call his report as to exact place where barricading was done by plaintiff before granting police assistance to defendants- Order of trial court set aside – Case remanded with direction to appoint revenue officer as Local Commissioner, call his report and then proceed further in accordance with law. (Paras-7 and 8)

For the Petitioner: Mr. Sumeet Raj Sharma, Advocate.
For the Respondents: Mr. Rupinder Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition, is, directed against the orders pronounced by the learned Civil Judge (Junior Division), Nahan, District Sirmour, H.P., upon, CMA No. 43/6 of 2017, whereunder, the SHO concerned, was directed, to implement the orders, rendered, on 28.02.2017 upon CMA No. 27/6 of 2017.

2. The learned Civil Judge (Junior Division) concerned, on 28.02.2017, pronounced, a common order, upon, CMA No. 200/6 of 2016, and, upon CMA No. 27/6 of 2017. One amongst the aforesaid application, was cast, by the plaintiff/non-counter claimant, and, the other application, was, cast by the defendants/counter claimants.

3. The plaintiff/non-counter claimant, in his application, had contended of his being owner, in possession, of the suit land, borne in Khata Khatauni No.112/167, Khasra No.733/103, measuring 2-03 bighas, situated at Mauza Trilokpur, Tehsil Nahan, District

Sirmaur, H.P., and, the defendants/non-applicants/ counter claimants, holding no right, title or interest, upon, the aforesaid khasra numbers, (i) and, theirs rather on 7.12.2016, making an unlawful attempt, to use a portion of the aforesaid khasra numbers, as a path, for, theirs accessing their homestead. Consequently, the plaintiff/non-counter claimant, contended, that the relief of ad interim injunction, being granted qua him, and, against the defendants, for restraining them, from using any part of the suit land, as a path, for theirs accessing their homestead(s).

4. In paragraph No.7, of, the common verdict pronounced, by the learned Civil Judge (Junior Division) concerned, upon, CMA No. 200/6 of 2016, and, upon CMA No. 27/6 of 2017, there is a pointed reference, of the apposite path, (i) user whereof is espoused, by the defendants/counter claimants, (ii) being borne in khasra numbers 113, 110, 11, 107, 733/103, 102 and 85, and, it being reflected, in the site plan, with red line depicted, by letter B.A., and, C. A perusal, of the contents of paragraph No.7, of, the aforesaid verdict, hence reveal, that, the aforesaid path, is existing, on the spot, since time(s) immemorial, and, except, the disputed path, there being no other path, from the abadi land, to approach the village well, and, the shamlat land of the village. It appears that in consonance, with, paragraph 7, borne in the verdict pronounced, by the learned Civil Judge (Junior Division) concerned, the latter proceeded, to allow the application, filed by the defendants/counter claimants, and, he hence, refused, the, relief vis-a-vis the plaintiff, of, ad interim injunction, qua the defendants being restrained from using the path, (iii) besides also directed the plaintiff/non-counter claimant, to unblock, the path for facilitating its user by the villagers. Moreover, (iv) a direction was also pronounced upon the defendants/counter claimants, whereunder, they were prohibited, against, causing any sort of interference, vis-a-vis, the property, of the plaintiff/non-counter claimant, which exists, in the shape of constructed structure or cultivable area. Apparently, the aforesaid verdict, rendered, by the learned Civil Judge (Jr. Divn.) concerned, upon CMA No. 200/6 of 2016, and, upon CMA No. 27/6 of 2017, has acquired conclusivity, given no appeal being preferred therefrom, before the learned appellate court. Consequently, the pronouncement, made by the learned Civil Judge (Jr. Divn.) concerned, upon CMA No. 200/6 of 2016, and, upon CMA No. 27/6 of 2017, was enjoined to be, given, the profoundest deference, by each of the litigating party(ies).

5. Be that as it may, despite, purported infringements, being committed by the plaintiff/non-counter claimant, vis-a-vis, the mandate recorded, by the learned Civil Judge (Jr. Divn.) concerned, upon, CMA No. 200/6 of 2016, and, upon CMA No. 27/6 of 2017, yet the defendants/counter claimant, did not, constitute any apposite motion, cast under the provisions of Order 39, Rule 2A of the CPC, before the learned trial Court, for hence, appropriate action being taken, against, the errant/non compliant plaintiff/non-counter claimant, (I) nor the aforesaid endeavour, is, preceded, by, any validly conducted demarcation, of the relevant site, with pointed depictions therein, vis-a-vis, the specific area or tracts, of land, whereat the path, stood barricaded, by the plaintiffs/non counter claimant. Contrarily, an application, was, preferred by the aggrieved defendants/counter claimants, whereunder, they sought, an order for police assistance, being purveyed vis-a-vis them, for, rather ensuring the removal, of, the apt barricades or obstructions, as, purportedly raised by the plaintiff/non-counter claimant, (ii) for, hence ensuring, the free user, of the path qua, wherewith, a conclusive mandate was recorded by the learned Civil Judge (Jr. Divn.) concerned, on 28.02.2017, upon CMA 200/6 of 2016, and, upon CMA No. 27/6 of 2017, (iii) AND, Upon the aforesaid motion, the impugned order was rendered, by the learned Civil Judge (Jr. Divn.) concerned.

6. A perusal of the record, as also, a reading of the impugned order, makes it vividly clear qua (i) during the pendency of the apposite application, a Local Commissioner, being appointed by the learned Civil Judge (Jr. Divn.) concerned, for, his making, the relevant spot inspection, and, his purveying a report vis-a-vis it. The Local Commissioner, did visit, the relevant site, and, in his report, there is a clear echoing, qua in his relevant spot inspection, his being accompanied, by the patwari of the patwar circle Trilokpur, and, the latter also carrying thereat, the revenue records, apposite to the suit land. He has proceeded to make a graphic display therein, of the plaintiff/non-counter claimant, not barricading the path, in respect of user

whereof, a conclusive mandate, was recorded, on 28.02.2017, by the learned Civil Judge (Jr. Divn.) concerned. However, the learned trial Court, discarded the report, whereas, it proceeded, to ensure the removal of the purported barricading, of the path, by issuing apposite directions upon the SHO concerned. Undisputedly, with, the mandate pronounced, by the learned Civil Judge (Jr. Divn.) concerned upon CMA No. 200/6 of 2016, and, upon CMA No. 27/6 of 2017, acquiring conclusivity, thereupon, the plaintiff/non-counter claimant, was, enjoined, to, hence revere the apposite pronouncement, made thereunder, upon him. As aforestated, even if, assumingly, he purportedly infringed, the diktat of the order, pronounced by the learned Civil Judge (Jr. Divn.) concerned, on 28.02.2017, upon CMA No.200/6 of 2016, and, upon CMA No. 27/6 of 2017, (i) thereupon, it was open, for, the aggrieved defendants/counter claimants, to upon evident breaches, in respect thereof being made, hence cast a motion under Order 39, Rules 2-A of the CPC,. However, no such motion, was, cast by the aggrieved defendants/counter claimants, before the learned Civil Judge (Jr. Divn.) concerned. As aforestated, they sought rendition, of police help, to ensure, qua the plaintiff/non-counter claimant, hence removing, the purported barricadings, erected by him, upon his land, whereon, the defendants/counter claimants, were declared to be holding a right, of, trudging thereon, for theirs hence accessing their homestead(s), located beyond the land, exclusively owned and possessed, by, the plaintiff/non-counter claimant.

7. The purveying, of, police assistance, to the aggrieved defendants/counter claimants, was, both valid and permissible under law, (i) only, upon an apposite valid demarcation report, making, with pin pointed specificity, hence depictions, qua the area or tract(s) of land, whereon, the plaintiff/non-counter claimant, had purportedly erected barricades, for, hence, preempting, the apt user thereof, as a path, by the defendants/counter claimants. However, despite, the local Commissioner visiting the spot, and, whereat he was accompanied, by the patwari, of the patwar circle concerned, who also thereat, hence carried, the relevant records, apposite, to the suit land, (ii) and, with his disapprobating, the espousal reared, by the aggrieve defendants/counter claimants, (iii) it, was, rather inappropriate for the learned Civil Judge (Jr. Divn.) concerned, to discard, his report, and, thereafter to untenably, render an order for police assistance, being provided to the aggrieved defendants/counter claimants, for, the relevant, purported barricading(s), hence being ensured to be removed by the plaintiff/non-counter claimant. Contrarily, the appropriate mode available for recourse, to the learned Civil Judge (Jr. Divn.) concerned, was, even if he was dis-satisfied, with the report of the local commissioner, to, rather appoint a Revenue Officer, as a Local Commissioner, and, upon the latter making, clear echoings, in his apposite report, preceding wherewith, a valid demarcation was carried by him, (iv) echoings whereof making a clear, candid telling bespeakings, and, also specifying, the exact place, whereat, the purported barricading, were done, by the plaintiff/non-counter claimant, (v) and, the apt barricadings also being spelt therein, to, fall within the range of the path, in respect whereof, a binding, conclusive order, stood, previously recorded by the learned Civil Judge (Jr. Divn.) concerned, (vi) conspicuously when hence they comprised the best material, for hers thereafter, making the impugned order. However, the aforesaid appropriate mode remained, un-endeavoured, to be resorted, to, by the learned Civil Judge (Jr. Divn.) concerned. In aftermath, the impugned order, is, construable to be hence vitiated.

8. For the foregoing reasons, the instant petition is allowed. In sequel, the impugned order rendered by the learned Civil Judge (Jr. Divn.) concerned on 18.03.2017 upon CMPA No.43/6 of 2017, is, set aside. However, the matter, is, remanded to the learned Civil Judge (Jr. Divn.) concerned, with a direction that after, appointing a revenue officer, as a Local Commissioner, for his making, the relevant determinations, and, thereafter his/hers inviting the objections thereto, from, the aggrieved, hers/his thereafter proceeding, to make a fresh adjudication, upon, the extant application, cast before him/her, for rendition, of police assistance. The parties are directed to appear before the learned trial Court, on 29th June, 2018. All pending applications also stand disposed of. Records be sent back forthwith.

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

Mehar Singh .....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 314 of 2017.
Reserved on: 13th June, 2018.
Date of Decision: 20th June, 2018.

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860-** Section 436- Mischief by fire- Trial Court convicted and sentenced accused on finding that he collected grass on roof of village temple and set it on fire- Appeal against on ground that evidence was misread by trial court - High Court found that accused was caught red handed accumulating grass on roof top of village temple and setting it ablaze – Statements of complainant and other eye-witnesses corroborate each other and are trustworthy - Conviction upheld, appeal dismissed.

(Paras- 6 and 9)

For the Appellant: Mr. Varun Rana, Advocate.
For the Respondent: Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the convict/ accused/appellant, against, the pronouncement made by the Additional Sessions judge (I), Shimla, H.P., upon Sessions Trial No.3-R/7 of 2015/13, whereunder, he convicted, besides imposed consequent sentence, upon, the convict/accused, for, his committing an offence punishable under Section 436 of the IPC.

2. The facts relevant to decide the instant case are that on 20.04.2013, a telephonic call was received in police station Roharu from Mali Kimoli Devta temple that one person was apprehended, who had put the fire in Kimoli temple. On the aforesaid information, ASI Sumiter Singh along with other police officials visited the spot, whereat, ASI Sumiter Singh recorded statement of complainant Baby Bekta under Section 154 Cr.P.C., to the effect that on 20.4.2013 at about 4.00 a.m, when he was sleeping, got awakened on seeing the fire set in the village temple Pakhu. He had also got awakened other villagers by yelling. Thereafter, all the villagers had gone together nearby the temple where they saw accused Mehar Singh son of Sh. Karam Singh, who was putting fire by collecting grass on the roof of the temple. Firstly, they all put off the fire and thereafter, apprehended the accused. On the aforesaid statement made by the complainant, the police recorded the FIR against the accused.. The police, thereafter carried and concluded all the investigation(s) formalities.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, a report, under Section 173 of the Code of Criminal Procedure, was prepared, and, filed before the learned trial Court.

4. The accused/appellant herein stood charged, by the learned trial Court, for, his committing offences, punishable under Section 436 of the IPC. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/ appellant herein, for his hence committing the aforesaid offence.

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

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The accused/convict/appellant herein, is alleged to set ablaze, a place of worship, dedicated to Devta Pakhu. The complainant while stepping into the witness box, as PW-7, has deposed a version qua the genesis of the occurrence, bearing, absolute tandem with the version borne, in Ex.PW7/A. The testification of the complainant (PW-7), embodied in her examination-in-chief, is bereft of (a) any gross improvements or embellishments, vis-a-vis, the version reported to the police, and, as comprised in Ex.PW7/A; (b) her testification borne in her cross-examination, not making any voicings qua hence, hers deposing, with gross rife contradictions, vis-a-vis, her version qua the occurrence, embodied, in her examination-in-chief, thereupon, implicit reliance/credence, is, hence lent to her testification. Apart therefrom, the incident, was, witnessed also by other ocular witnesses. The other ocular witnesses, to the occurrence, respectively stepped into the witness box, as PW-5, PW-8, PW-9, and, PW-10. All the aforesaid ocular witnesses, to, the relevant incident, deposed, a version containing, pointed, forthright and candid corroboration, vis-a-vis, the version qua the occurrence, as testified by PW-7. A closest reading of their respective testifications, occurring, both in their examinations-in-chief, and, in their cross-examinations, bring forth the imminent fact (i) of none of them deposing with gross improvements or embellishments, vis-a-vis, their respectively recorded previous statements in writing; (ii) none of the ocular witnesses, deposing, with any material rife, and, open intra se contradictions, in their testifications, as, occurring, in their respective examinations-in-chief, and, their respective cross-examinations; (c) qua their respective testifications, embodying, any echoings qua theirs deposing with any gross material, inter se contradictions. Contrarily, with hence theirs deposing a version qua the occurrence, with utmost inter se concurrence also hence with each deposing, a version qua the incident, bearing corroboration, vis-a-vis, the version deposed, by the complainant, thereupon, it is to be concluded, that the prosecution has succeeded, in, proving the charge against the accused.

10. Be that as it may, the afore referred manner, of appraisal of the tesitifications, of all the ocular witnesses, to the occurrence, does, coax this Court to conclude, that the accused, had, by accumulating grass on the roof, of the temple, dedicated to Devta Pakhu, his setting it, ablaze, hence, concomitant sequel thereof, being of the aforesaid temple, suffering evident depredation.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, not suffering from any gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

12. Consequently, the appeal is dismissed. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Roshan Lal (since deceased) through his legal heirs .....Appellants.

Versus

Land Acquisition Collector & Anr. .....Respondents.

RFA No. 117 of 2010.
Reserved on : 15th June, 2018.
Date of Decision: 20th June, 2018.

Land Acquisition Act, 1894- Sections 18 and 23- Market value – Determination of – Exampler sale deed(s)- Held – Date(s) of execution of sale deed(s) must be in closest proximity to date of issuance of notification under Section 4 of Act – Further, there should be similarity in land acquired and land mentioned in sale deed(s) vis-à-vis location, nature etc. – Since, reference court had wrongly ignored exampler sale deeds, market value of land enhanced on their basis.

(Paras- 4 and 5)

For the Appellant(s): Mr. Jagdish Thakur, Advocate.
For the respondent(s): Mr. Yudhvir Singh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the award pronounced by the learned Reference Court, upon, Land Reference Petition No. 2 of 2004, whereunder, the the learned Reference Court, had, determined the market value of the land, brought to acquisition @ Rs.18,000/- per marla, and, awarded thereon, the apt compulsory acquisition charges @30% of the market value of the land, also, on the aforesaid enhanced amount of compensation, it, had, assessed interest @12% per annum, for the period commencing, on and from the date of issuance of notice under Section 4(i) of the Land Acquisition Act (hereinafter referred to as the Act).

2. The learned counsel appearing for the appellant has contended with much vigour, before this Court, that, in, the learned reference Court, not placing reliance, upon, sale exemplars, respectively borne in Ex.P-1, and, in Ex.P-2, is, thoroughly inappropriate, (I) given a co-ordinate bench of this Court while pronouncing, a decision upon RFA No. 334 of 2006, as arose, before this Court, against, the award pronounced, upon the landowners concerned, in land reference petition No. 1 of 2004, (a) AND the land borne therein, appertaining, to, a notification bearing commonality, vis-a-vis, the notification hereat, (b) and, the co-ordinate bench of this Court, while, making the apt pronouncement, its placing reliance upon the aforesaid exhibits, bearing Ex. P-1, and, Ex.P-2, thereupon, alike the co-ordinate bench of this Court, placing reliance upon Ex.P-1, and, Ex.P-2, both exhibits whereof, are akin to hereat exhibits P-1, and, P-2 , (ii) hence, it being imperative also for this Court, to place reliance, upon, the apt aforesaid sale exemplars, given theirs rather bearing, the closest apt analogity, inter se the Land Reference Petitions, wherefrom hence arose RFA No.334 of 2006, vis-a-vis, the instant land reference petition, wherefrom, the extant RFA No. 117 of 2010, hence arises.

3. Before proceeding, to, accept the aforesaid submission addressed, before this Court, by the learned counsel, appearing for the petitioner, it is imperative, to allude to the trite evidence, existing on record, in display, of, the apt sale exemplars, respectively borne in Ex.P-1,

and, in Ex.P-2, hence, satiating the twin principles of (a) date, of, execution thereof bearing the closest proximity vis-a-vis the date, of, issuance of notification, under Section 4 of the Act, and (b) the lands borne therein also holding the apt locational proximity, vis-a-vis, the location of the lands of the landowners, as, stood brought to acquisition. Evidence in satiation thereof, is borne in the testification, comprised in the examination-in-chief, of, one Roshan Lal (PW-1), who during, course thereof, tendered and enabled, the exhibition, of, the sale exemplars aforesaid, and, who, thereafter, has made a firm testification, as borne, in, his examination-in-chief, of the land borne in the aforesaid exhibits, also holding the apt locational proximity, vis-a-vis, the acquired lands. The aforesaid testification, borne in the examination-in-chief, of PW-1, remained un-attempted, to be ridden, of its veracity, even during, the course of his, being held to cross-examination by the learned DA concerned, nor the respondents adduced any evidence, wherefrom, emanations occur, for hence rebutting the afore rendered unrebutted testification, occurring, in his examination-in-chief. In aftermath, the apt sale exemplars, respectively borne in Ex.P-1, and, in Ex.P-2, are held to be satiating the twin principles (a) of their execution occurring in close proximity, to, the issuance of the notification under Section 4 of the Act and (b) the lands borne therein, holding, the apt locational proximity, vis-a-vis, the location of the lands, as, brought to acquisition. In sequel, hence, reliance is amenable, to be placed on Exts. P-1, and, P-2, whereas, in the learned reference Court, rather not placing reliance thereon, has hence committed a gross illegality, whereas, it constituted the apt evidence, germane for pronouncing a just and equitable decision, upon, the issue appertaining, to the fair determination, of market value of the lands, as, stood brought to acquisition.

4. Be that as it may, the effect of the aforesaid inference, is, that the judgment pronounced, by the co-ordinate bench of this Court in RFA No.334 of 2006, as arose before this Court, against, a verdict rendered, upon, the Land Reference Petition No. 1 of 2004, being construable to be, vis-a-vis, the apt notification, hence, holding commonality, with, the notification hereat, whereunder lands hereat, stood acquired, (i) thereupon, in consonance therewith, this Court, as directed therein, after making 30% deductions, upon the market value, of the lands borne, in Ex.P-P1 and in Ex. P-2, hence determines the per marla market value of the land acquired @ Rs.29,145/- per marla, also in consonance therewith, all statutory benefits accruing thereon, are meteable to the appellants herein.

5. The learned Reference Court, had omitted, to, in consonance, with the mandate of Section 34 of the Act, contemplating, the levying of interest @ 9% per annum, from the date of taking of possession of the acquired land, till its realization, hence make the apposite levyngs thereon, and, also omitted, to, in consonance with the mandate of Section 28 of the Act, to hence levy interest, on, the enhanced compensation amount @ 9% per annum, from the date of taking of possession of the acquired land, till realization of the excess amount, both the provisions whereof stand extracted hereinafter:-

> "**28. Collector may be directed to pay interest on excess compensation**. If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of [nine per centum] per annum from the date on which he took possession of the land to the date of payment of such excess into Court:
>
> Provided that the award of the Court may also direct that where such excess or any part thereof is paid into Court after the date of expiry of a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of such excess or part thereof which has not been paid into Court before the date of such expiry.
>
> **34. Payment of interest.** When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the

amount awarded with interest thereon at the rate of [nine per centum] per annum from the time of so taking possession until it shall have been so paid or deposited:

Provided that if such compensation or any part thereof is not paid or deposited within a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry."

(i) whereas with the possession of the acquired land, being evidently taken on 8.3.2004, and, the compensation amount, being deposited on 30.07.2004, thereupon, interest @ 9% per annum, from, 8.3.2004 uptill 30.07.2004, as contemplated, by Section 34 of the Act, is leviable upon the compensation amount, as, determined by the land acquisition Collector. (ii) Apart therefrom, interest, on the enhanced amount, of compensation, within, the mandate, of the statutory contemplations, as, borne in Section 28 of the Act, is also leviabe upon the enhanced amount, of compensation, and, @ 9% per annum from 30.07.2004, till, the deposit, of the apt amount.

6. Consequently, the instant appeal is allowed, and, it is held that the rate of compensation, for the land(s), as, brought to acquisition, shall be at the rate Rs.29.145/- per marla along with all the statutory benefits leviable, on the enhanced amount, and more particularly in accordance with the law laid down by the Apex Court in ***Sunder versus Union of India, (2001)7 SCC 211***. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Cr. M.P. (M) No. 667 of 2018 along with
Cr.M.P. (M) No. 666 of 2018.
Reserved on: 15th June, 2018.
Date of Decision: 20th June, 2018.

1. <u>Cr.MP (M) No. 667 of 2018.</u>

Suresh Kumar @ Shivam Sharma .....Petitioner.
Versus
State of H.P. .....Respondent.

2. <u>Cr.MP (M) No. 666 of 2018.</u>

Ravinder .....Petitioner.
Versus
State of H.P. .....Respondent.

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 2(vii-a)(xxiii-a), 21 & 37- Grant of bail- Small or commercial quantity – Determination of – Whether only pure contents of contraband concerned or entire recovered stuff is to be looked into? – Recovery of Nitrosun tablets and Onerex syrup bottles from accused – Each tablet of Nitrosun containing 10.0 mg. ntirazepam, whereas 5.0 ml. of syrup carrying 4.0 mg Chlorpheniramine Maleate and 10.0 mg Codeine Phosphate – Pure contents alone of recovered substance(s), however bringing contraband into less than commercial quantity – Held – In each such case applicant/petitioner is to satisfy court: (a) Narcotic Drug or Psychotropic Substance was not exceeding the prescribed per dose unit, and (b) it was being transported only for therapeutic use- Otherwise, entire contents of 'prohibited substance alone' are to be taken for human consumption – While relying upon E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008)5 SCC 161 only the contents

of prohibited substance were taken into consideration – Recovered stuff (Codeine Phosphate) being in 'small quantity' category – Petition allowed – Bail granted subject to condition.

(Paras- 7 and 9)

Cases referred:

E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008)5 SCC 161
Mohd. Sahabuddin and another vs. State of Assam, (2012) 13 SCC 491
Harjit Singh vs. State of Punjab, (2011)4 SCC 441

For the Petitioner(s):	Mr. Dushyant Dadwal, Advocate in Cr.MP(M) No. 667 of 2018. Mr. P.M. Negi, Advocate in Cr.MP(M) No. 666 of 2018.
For the Respondent(s):	Mr. Vikrant Chandel and Mr. Yudhveer Singh Thakur, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Since, common facts, and, questions of law are involved in both the aforesaid petitions, hence, both are being, disposed of, by a common order.

2. The instant petitions, warrant adjudication being meted, vis-a-vis, (a) the aggregate or the total, of, the banned narcotic drug, rather comprising the apposite parameter, for, making a further determination, qua, thereupon, the purported recovery(ies), from, the alleged conscious and exclusive possession of the petitioners, being amenable, for, being categorized, as, (a) commercial quantity or more than commercial quantity thereof, (b) AND the aggregate or the gross weight, of, the entire contents, as, carried in all the seized strips, (c) AND, aggregate weight, of, the entire liquid, as, carried in all the seized bottles, likewise constituting the reckonable parameter, for making the apt determination, qua effectuation, of recovery(ies) thereof, from, the exclusive, and, conscious possession, of, the respective accused, being, hence construable to be (i) small quantity or (ii) more than small quantity or (ii)commercial quantity thereof.

3. In FIR No. 113 of 2018, registered against accused/petitioner herein, the FSL concerned (i) qua the nitrosun tablets allegedly recovered, from, the exclusive and conscious possession of accused Suresh Kumar, has opined, of each tablet carrying, only, 10.0 mg ntirazepam, (ii) yet the aggregate weight, of, the total tablets, as, recovered from the exclusive possession of the accused, without segregating therefrom, the pure contents, of nitrazepam, renders, the apposite haul, to fall, within, the domain, of it being construable to be categorized, as, more than commercial quantity, of nitrazepam. Moreover, the FSL concerned (iii) qua the Onerex bottles, allegedly recovered from the exclusive and conscious possession, of accused Suresh Kumar, has opined of each 5.0 ml carrying, only 4.0 mg Chlorpheniramine Maleate, and, 10.0 mg Codeine Phosphate, yet, the aggregate or the gross weight, of, the total haul, of, bottles, as, recovered, from the exclusive possession of the accused, without separating therefrom the apt pure contents, as borne therein, also hence renders, it, to fall within commercial quantity thereof, (iv) also an adjudication is to be meted, qua, and, contarily whereto, after segregating therefrom, the pure contents of Chlorpheniramine Maleate, and, of Codeine Phosphate, only the gross aggregate weight thereof, rather constituting the apt reckonable parameter, for, hence rendering the cache to fall, within, the domain of it, being amenable to be categorized, as, more than commercial quantity, of Chlorpheniramine Maleate, and, of Codeine Phosphate. Furthermore, the FSL concerned, qua the bottles of Wincerex allegedly recovered, from, the exclusive and conscious possession, of accused Suresh Kumar, has opined, of, each 5.0 ml carrying only 10.0 mg, of, Codeine Phosphate, and, 1.25 mg, of, Triprolidine Hydrochloride, yet, the aggregate or the gross weight, of, the entire cache of bottles, without, segregating, therefrom, the pure contents of triprolidine Hydrochloride, and, of, Codeine Phosphate, rather renders, the seizure, to, fall,

within, the domain of it, being amenable to be categorized, as, more than commercial quantity, of, triprolidine Hydrochloride, and, of Codeine Phosphate.

4. In FIR No. 82 of 2018, registered against accused/petitioner herein, namely, Ravinder, the FSL concerned, qua, the bottles, of, Codectuss syrup bottles allegedly recovered from the exclusive, and, conscious possession, of accused Ravinder, has opined of 0.5 ml carrying, only 10. mg Codeine Phosphate, and, 1.25 mg, of, triprolidine Hydrocholride, yet the gross aggregate weight thereof, without, segregating therefrom the pure contents, of, triprolidine Hydrochloride, and, of, Codeine Phosphate, rather renders the apt seizure, to fall, within, the domain of it being amenable to be categorized, as, more than commercial quantity, of, triprolidine Hydrochloride, and, of Codeine Phosphate, (i) thereupon reiteratedly also an adjudication, is to be meted qua apt pure contents thereof, hence, comprising the apt parameter(s).

5. Mr. P.M. Negi, Advocate, and, Mr. Dushyant Dadwal, Advocate, respectively, appearing, for the petitioners, contends, that, with hence codeine occurring, at serial No.18, of, the table appended, with, the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act), and, with a clear and candid prescription, borne therein, wherein rather 10 gm, is specified, as, small quantity thereof, (i) hence, the aggregate quantum of codeine, as, borne in each of the sezied bottle(s), alone, being construable, to be the apt reckonable principle, for making the further determination, vis-a-vis, the bottles recovered, from the exclusive and conscious possession, of the accused, dehors, the aggregate or total of the contents, of the liquid borne, in each of the seized bottles, hence, falling or not falling, within the domain, of, small or more than small or commercial quantity thereof, (ii) specifically, when the table, with, clear explicity hence refers to codeine, and, omits to make any explicity reference therein, vis-a-vis, the other part of the liquid, carried in each of the seized bottle(s), rather, being also reckonable, nor , with, the total or aggregate, of, the entire milli-literage, carried in each of the seized bottles, being mandated to comprise, the justifiable principle, hence, for making, the apt reckoning qua, the seizure falling within the domain of small quantity or more than small or commercial quantity thereof. Likewise, with nitrazepam, occurring at serial No.221, of the table appended, to, the NDPS Act, making with specificity an alike narration, vis-a-vis, the aforesaid narcotic drug, hence, the pure contents thereof, as, pronounced singularly, and, with specificity, in the report of the CTL, also, comprising the justifiable principle, for making the apt reckoning qua hence the seizure falling, within, the domain of small quantity or more than small quantity or commercial quantity.

6. In making the aforesaid submissions, the learned counsel, appearing for the petitioner, has placed reliance, upon, the verdict pronounced, by, the Hon'ble Apex Court, in a case titled as ***E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau***, reported in ***(2008)5 SCC 161***, the relevant paragraph No.19 whereof stand extracted hereinafter:-

> "16. On going through Amarsingh case (2005)7 SCC 550, we do not find that the Court was considering the question of mixture of a narcotic drug or psychotropic substance with one or more neutral substance/s. In fact that was not the issue before the Court. The black-coloured liquid substance was taken as an opium derivative and the FSL report to the effect that it contained 2.8% anhydride morphine was considered only for the purposes of bringing the substance within the sweep of Section 2(xvi)(e) as `opium derivative which requires a minimum 0.2% morphine. The content found of 2.8% anhydride morphine was not at all considered for the purposes of deciding whether the substance recovered was a small or commercial quantity and the Court took into consideration the entire substance as an opium derivative which was not mixed with one or more neutral substance/s. Thus, Amarsingh case (supra) cannot be taken to be an authority for advancing the proposition made by the learned counsel for the respondent that the entire substance recovered and seized irrespective of the content of the narcotic drug or psychotropic substance in it would be considered for application of Section 21 of the NDPS Act for the purpose of imposition of punishment. We are of the view that when

> any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration." (p.170-171)

(a)wherein an affirmative view has been pronounced, (i) vis-a-vis any narcotic drug, and, psychotropic substance(s), upon, theirs being found rather mixed with one or more neutral substance(s), thereupon, for the purpose of imposition of punishment, only the weight, of, pure contents of the narcotic drug, and, the weight, only of, the psychotropic substance, being the alone reckonable besides the apt parameter(s).

7. The learned counsel appearing for the petitioners also placed reliance, upon, a judgment of the Hon'ble Apex Court, rendered, in a case titled, as, ***Mohd. Sahabuddin and another vs. State of Assam***, reported in ***(2012) 13 SCC 491***, relevant paragraph(s) No.11 and 12 whereof, stand extracted hereinafter:-

> "11. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg. of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means 'contributing to cure of disease'. In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.
>
> 12. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the Courts below does not arise."
>
> (p.495-496)

(a)wherein it stands expostulated, qua, for the accused/bail applicants concerned, deriving, the benefits, of, notifications respectively issued, on 14.11.1985, and, on 29.1.1993, it being incumbent, for them to establish (a) the twin conditions qua the contents of narcotic substances imperatively, not, exceeding 100 mg per dose unit, (b) and with a concentration of, not, more than 2.5% in undivided preparation, and, apart therefrom, the other condition, of, it being evidently transported, only for therapeutic practice i.e. for contributing to cure of disease, also, necessitating, its, imperative satisfaction. However, the reliance placed thereupon, is inapt, for the reasons (i) the counsel not bearing in mind the trite factual matrix, as, appertaining to the case supra, as, occurs in preceding paragraph No.10 thereof, wherein, there is a trite display, of the apt recovery, effectuated, from, the accused therein, being vis-a-vis bottles of Phensedyle cough syrup, whereinwithin existed, hence, 183.15 to 189.85 mg of codeine phosphate, and, each 100 ml bottle of Recodex cough syrup, also, contained 182.73 mg of codeine phosphate, (ii) AND

obviously, even after, multiplying the aforesaid quantum of codeine phosphate, as, carried in each 100 ml., bottle(s) of Phensedyle cough syrup, and, of Phensedyl, with the respective numerical strength, of, the respective cache, of, bottles, thereupon, also the level of the banned narcotic drug, namely, codeine phosphate, being, in a quantum, whereupon, obviously the carrying thereof, of, even pure contents of codeine phosphate, as, borne in the cache, of, seized bottles, of, Phensedyle cough syrup, and, of Recodex cough syrup, is rendered hence, to fall within the ambit, of, commercial quantity thereof, (iii) hence, in succeeding paragraph No.12, the Hon'ble Apex Court, had propounded that, yet, with a notification of 14.11.1985, and, of 29.1.1993, enjoining upon the accused, to satisfy the aforesaid twin conditions, and, the material also evidently, bearing out, qua its being transported, for therapeutic practice, thereupon, alone all the benefit(s) thereof, being accruable, vis-a-vis, the accused. Contrarily hereat, the level or extent or quantum, of the pure content, of the banned narcotic drug(s), namely, codeine phosphate, as, carried, in each, of the seized bottles, after, segregating therefrom hence the contents of the other part of the mixture, borne in each of the bottle(s), renders apt quantum thereof, to, fall within small quantity thereof, (iv) thereupon, hence the ratio decidendi, propounded, in the aforesaid case, being unavailable for bestowal upon the accused herein, (v) more so when neither the notifications alluded therein, are, espoused hereat, for deriving, of, apposite benefits thereof, nor the twin conditions embodied, therein, are, hereat propagated nor when the extant cache, is, espoused, to be transported, only for therapeutic use. Consequently reliance upon the case supra, is, inaptly placed. Contrarily, the factual scenario prevailing hereat, is, covered by the pronouncement, made, in E. Micheal's case (supra).

8. The learned counsel appearing for the petitioners also places reliance, upon, a judgement of the Hon'ble Apex Court, rendered in a case titled, as, ***Harjit Singh vs. State of Punjab, (2011)4 SCC 441,*** (i) wherein, vis-a-vis, the seizure of 7.10 kg of opium, as, effectuated, from, the exclusive and conscious possession of the accused therein, and, with its being opined, to contain 0.8% morphine, it standing expostulated qua hence the entire mass or gross weight, of the opium rather being the apt reckoner, dehors the percentum of morphine, occurring therein. (ii) It has also been expostulated, therein that the entire quantity or the gross weight, of the entire ill substance, being rather recknonable, for making the further apt determination, qua whether the recovered substance, hence falling within small quantity or greater than small quantity or commercial quantity thereof. The apt paragraph No.21 of Harjit Singh's case (supra), stands extracted hereinafter,

> "21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 1018(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity."

(iii) Though evidently, the seized contraband i.e. opium, did, contain some per centum of morphine, yet therein, it, has also been propounded, that the existence, of, some per centum of morphine therein, being an irrelevant factor, for determining qua hence the substance or contraband seized, from, the exclusive and conscious possession of the accused therein, being

construable to be opium, rather the entire quantum, of, the narcotic drug or substance, as, recovered from the exclusive and conscious possession of the accused therein, being the solitary apt determination, (iii) thereupon also the aforesaid, expostulation, does not give any leverage to the espousal, of, the counsel for the bail applicants, rather contrarily support therefrom, is, derived by the State, for contending that the gross weight or the aggregate, of the entire mixture, borne in all the seized bottles or the entire weight or the total of the tablets, carried, in,all strips, as recovered, from the conscious and exclusive possession, of the accused, being, the only recknonable factor, for making the apt determination.

9. The learned Deputy Advocate General submits, that with notification bearing S.O.2941(E) of 18.11.2009 whereunder Note 4 in the table, at the end of Note 3, is added, (i) with a prescription therein, qua the quantum or the level of presence, of, the pure banned narcotic drug, in, the seized cache, being the singular, reckonable parameter, for making an apt determination, of, quantification thereof, thereupon, the espousal addressed before this Court, by the counsel for the petitioners, hence, warranting rejection. The aforesaid submission, is anvilled, upon, a verdict pronounced by the Hon'ble Apex Court in ***Cr. Appeal No. 722 of 2017, titled as Hira Singh & Anr. vs. Union of India***, decided on 3.07.2017, whereunder, the hereinafter extracted questions, stand referred, for determination, by a larger Bench of the Hon'ble Apex Court, and, more particularly with the apt reference, appertaining, vis-a-vis, the legal expostulation settled by the Hon'ble Apex Court in E. Micheal Raj's case (supra), being or not being per incuriam, vis-a-vis, the notification of 19.10.2001, rather hence awaiting rendition thereon, thereupon, the benefits of all the trite expostulations, borne in, E. Micheal Raj's Case (supra) being not affordable, to the bail petitioners,

> "(a) Whether the decision in this Court in E. Micheal Raj (supra) requires reconsideration having omitted to take note of entry No.239 and Note 2(two) of the notification dated 19.10.2001 as also the interplay of other provisions of the Act with Section 21?
>
> (b) Does the impugned notification issued by the Central Government entail the redefining the parameters for constituting an offence and more particularly for awarding punishment?
>
> (c) Does the Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?
>
> (d) Whether Section 21 of the Act is a stand alone provision or intrinsically linked to the other provisions dealing with "manufactured drug" and "preparation" containing any manufactured drug?

However, the aforesaid submission is rejected, for the reasons, (ii) despite nowat, with, the larger Bench of the Hon'ble Apex Court, not making any pronouncement, upon the afore-extracted questions, as, referred thereto, for meteing, of, an adjudication, (ii) AND in aftermath, with, the vires of the apt notification standing not upheld nor reversed nor the verdict pronounced by the Hon'ble Apex Court, in, E. Micheal Raj's case (supra), with, expostulations (supra) occurring therein, standing neither quashed nor set aside, thereupon, dehors any apt non rendition thereon , it is not deemed just, fit and appropriate, to curtail the liberty of the bail petitioners. Consequently, both the petitions are allowed, and, the bail petitioners are ordered to be released, on bail, subject to theirs complying with the following conditions:

(i) that the bail applicants shall furnish personal bond in the sum of Rs.2,00,000/- each with two sureties each in the like amount to the satisfaction of the learned Sessions Judge, Solan ;

(ii) that the bail applicants shall join the investigation, as and when required by the Investigating Agency;

(iii) that they 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 from disclosing such facts to the Court or to any police officer;

(iv) that they shall not leave India without the prior permission of the Court ;

(v) that they shall deposit their respective passports, if any, with the Police Station concerned; and

(vi) that in case of violation of any of these conditions, the bail granted to the petitioners shall be forfeited and they shall be liable to be taken into custody.

10. Any observation made hereinabove, shall not, be taken as an expression of opinion on the merits, of the case, and, the trial Court shall decide the matter uninfluenced by any observation made hereinabove.

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

Vakil Singh and others .....Appellants/Plaintiffs.

Versus

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

RSA No. 252 of 2006.
Reserved on : 12th June, 2018.
Decided on : 20th June, 2018.

Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974– Section 10– Bar of jurisdiction – Whether order of vestment can be challenged by way of civil suit? – Held – Yes – Orders regarding vestment of suit land in Panchyat and then State of H.P., which was statutorily excluded from vestment being Shamlat Deh Hasab Rasad Malgujari in cultivatory possession of proprietors, were void- Plaintiffs have remedy to file suit and challenge such orders – Section 10 of the Act has no applicability. (Para-10)

Punjab Village Common Lands (Regulations) Act, 1961 (Punjab Act)- Section 4(3)(ii) - **H.P. Village Common Lands Vesting and Utilization Act, 1974 as amended vide Amendment Act of 2001 (Himachal Act)–** Section 3- Suit for declaration and injunction- Plaintiffs claiming cultivatory possession since before 26.1.1950 over suit land, which was recorded as Shamlat Deh Hasab Rasad Malgujari in revenue record - And disputing its vestment in Panchyat under Punjab Act and subsequently in State of H.P. under Himachal Act– Alternatively, they are also claiming title over land by way of adverse possession - State of H.P. denying plaintiffs' title and justifying vestment of land in it – Also pleading that some villagers illegally encroached government land during settlement in 1983-84 – Trial court dismissed suit of plaintiffs and their appeal was also dismissed by First Appellate Court- Regular Second Appeal – On facts, High Court found suit land consistently recorded as Shamlat Hasab Rasad Malgujari since 1912 and in cultivatory possession of proprietors - Held – Suit land was not liable to be vested first in Panchyat under Punjab Act and then in State of H.P. under Himachal Act – Mutation orders, passed by revenue officer(s) qua vestment of land set aside – Plaintiffs held to be owners in possession of suit land – Appeal of plaintiffs allowed – Judgment of lower Courts set aside and suit decreed.

(Paras-8 and 13)

Case referred:

Gurbachan Singha and another vs. Gram Pancyayat and others, (2000)10 SCC 594

For the Appellant:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishta, Advocate.
For Respondent No.1:	Mr. Vikrant Chandel and Mr. Yudhveer Singh Thakur, Deputy Advocate Generals.
For Respondents No.3(a) to 3(h):	Mr. J. L. Bhardwaj, Advocate.
Other respondents already ex-parte.	

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts, by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, as well as for, rendition of a decree for permanent prohibitory injunction qua the suit khasra number(s), was, hence dismissed.

2. Briefly stated the facts of the case are that the plaintiffs have filed a suit for declaration tot he effect that they are owners in possession of the land comprised in Khata No.18 min, Khatauni No.59 min, Khasra Nos. 17, 22, 26, 4,5,6, 7, 9, 14, 16, 21, 23, 24, 25, 27, 28, 29, 31, 15, 30, plots 20, measuring 14-45-02 hectare meters, situated in village Ban, Chariyati, Mouza Barla, Tehsil Jawali, District Kangra, H.P. It has been averred that they have been coming in cultivating possession of the suit land, since the time of their fore-fathers and the said possession is before 26.01.1950. The plaintiffs further averred that their possession is continuous, open, peaceful and without interruption to the knowledge of the defendants for more than 12 years and as such their possession has ripened into the ownership by efflux of time. It has further been averred that defendant No.3 had been in possession of the different land equal to the suit land and he go no concern or connection with land in dispute. The plaintiff also averred that prior to the Punjab Re-organization Act, 1966, the area in which the suit land is situated was a part of Punjab and as such the Punjab Village Common Lands (Regulations) Act, 1961 was prevalent. The plaintiffs also averred that the suit land did not vest under defendant No.2 under the said Act as per Section 4 (3) (ii) because of the legal position, however, mutation No.2 of 29.05.1955 was illegally sanctioned in favour of defendant No.2, which is illegal and void and has got no effect on the right of the plaintiffs. It has further been averred by the plaintiffs that subsequently this area in which the suit land is situated became a part of Himachal Pradesh and after the enforcement of H.P. Village Common Lands Vesting and Utilization Act, 1974, mutation No.4, of 10.01.1976 was sanctioned and said mutation is also illegal and without the consent and knowledge of the plaintiffs and is not binding on them. The plaintiffs also averred that the revenue record which is in the custody of defendant No.1 is liable to be corrected accordingly. That in the year 1980, the plaintiffs came to know about the illegal record, which was contrary to the spot situation and the defendants have been asked number of times to make necessary correction in the revenue record. The plaintiffs further asserted that a notice under Section 80 CPC was also served, but to no avail. It has been averred by the plaintiffs that vide order dated 3.5.1991 in second appeal, the Hon'ble High Court, permitted the plaintiffs to withdraw the previously instituted suit with permission to file fresh on the same cause of action and that the second suit was instituted without service of notice, therefore, the plaint was rejected for non-service of the same. However, the plaintiffs again served a notice to the State of H.P. on 18.3.1994 and the present suit was filed in the yea 1996. The plaintiffs further averred that cause of action accrued to them in the year 1955, 1976, 1980 and 22.1.1980 onwards and on 18.3.1994 and the existence of wrong entries is continuous cause of action. Hence the suit.

3. The defendants contested the suit and filed separate written statements. In the written statement filed by defendants No.1 and 2, various preliminary objections have been taken inter alia, maintainability, locus standi, estoppel, resjudicata, jurisdiction etc. On merits, it has been averred by defendants No.1 and 2 that the plaintiffs had never been in possession of the suit land but during the settlement operation, in the year 1983-84, some of the inhabitants of the

locality have encroached the government land, and their possession is illegal and without any authority. The defendants further averred that the suit land is a forest land and the same was rightly vested in favour of defendants No.1 and 2 and that the order of vestment was never challenged by the plaintiffs. Defendant No.3, in his written statement, has submitted that the plaintiffs were not in possession of the suit land and it has been denied that the plaintiffs were in possession of the suit land prior to 26.01.1956. The defendant further averred that the plaintiffs have no right in the suit land and the revenue record is correct, according to the spot situation.

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

1. Whether the plaintiffs are owners in possession of the suit land, as alleged?OPP
2. If issue No.1 is not proved in the affirmative, whether the plaintiffs have also become the owners of the suit land by way of adverse possession, as alleged?OPP.
3. Whether this Court has no jurisdiction to entertain and try the present suit, as alleged?OPD.
4. Whether the plaintiffs are estopped by their acts and conduct to file the present suit, as alleged?OPD.
5. Whether the suit is not maintainable in the present form, as alleged?OPD.
6. Whether the suit is barred under the principle of resjudicata, as alleged? OPD.
7. Whether the plaintiffs have no cause of action, as alleged?OPD.
8. Whether the suit is bad for non joinder of the necessary parties, as alleged?OPD.
9. Relief.

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

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 26.04.2007, admitted the appeal instituted by the plaintiffs/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether respondent No.1 and 2 have any right, title and interest in the suit land which was originally recorded as “Shamlat Deh Hasab Rasad Malgujari” in the revenue record (Ex. D-5 Jamabandi of 1943-44) and whether any subsequent entries to the contrary in the revenue records would affect the right and possession of the appellants?

b) Whether in view of the entry of “Shamlat Deh Hasab Rasad Malgujari” with respect to the suit land coming the revenue records of 1943-44, as per Ex. D5, would the provisions of the Punjab Village Common Lands (Regulation) Act, 1961 and then the H.P. Village Common Lands Vesting and Utilization Act, 1974, as amended from time to time be applicable to the suit land entitling the respondents to take possession of the same from the appellants?

c) Whether the courts below have rendered totally erroneous and rather contradictory findings while deciding issue Nos. 1,2,3,5 and 8 and if so its effect on the judgments and decrees of the Court?

d) Whether the judgments of the learned Courts below are sustainable in view of the amendment made in the Himachal Pradesh Village Common Lands Vesting and Utilization Act by Act No.20 of 2001?

Substantial questions of Law No.1 to 4:

7. Before alluding to the factual matrix, prevailing in the extant suit, it is of utmost importance, to bear in mind, the apposite provisions borne, in Section 4, of the Punjab Village Common Lands (Regulation) Act, 1961, provisions whereof stand extracted hereinafter:-

> 4. Vesting of rights in Panchayats and non-proprietors. - (1) Notwithstanding anything to the contrary contained in any other law for the time being in force or in any agreement, instrument, custom or usage or any decree or order of any court or other authority, all rights, title and interests whatever in the land:-
>
> (a) which is included in the shamilat deh of any village and which has not vested in a panchayat under the shamilat law shall, at the commencement of this Act, vest in a panchayat constituted for, such,village, and, where no such panchayat, has been constituted for such village; vest in the panchayat on such date, as a panchayat having jurisdiction over that village is constituted;
>
> (b) which is situated within or outside the abadi deh of a village and which is under the house owned by a non-proprietor, shall on the commencement of the shamilat law, be deemed to have been vested in such non-proprietor.
>
> (2) Any land which is vested in a panchayat under the shamilat law shall be deemed to have been vested in the panchayat under this Act.
>
> (3) Nothing contained in clause (a) of sub-section (1)and in sub-section (2) shall affect or sholl' be deemed ever to hove
>
> affected the-
>
> (I) existing rights, title or interest of persons who though not entered as occupancy tenants in the revenue records are accorded a similar status by custom or otherwise, such as Dholidars, Bhondedars, Butimars, Bosikhuopahus, Saunjidars, Muqararidars;
>
> (ii) rights of persons in cultivating possession of shamilat deh for more than twelve years without payment of rent or by payment of charges not exceeding the land revenue and cesses payable thereon;
>
> (iii) rights of a mortagee to whom such land is mortgaged with possession before, the 26th January, 1950."

wherein in sub section 3 (ii) thereof, a specific mandate is engrafted, whereby, stand pointedly excluded, the diktat, hence, of, the preceding thereto provisions, rather, containing an explicit mandate, vis-a-vis, the vestment of all rights qua lands reflected, as Shamlat Deh, in the revenue records apposite thereto, (i) besides thereunder preservation of all rights, is, bestowed upon persons in cultivating possession, of Shamilat Deh, for more than twelve years, without payment of rent or by payments of charges not exceeding the land revenue and cesses payable thereon, (ii) or in other words, the aforesaid mandate borne in clause (ii) of sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, 1961, excludes, the operation, of, the preceding thereto provisions, occurring, in Section 4 of the aforesaid Act, wherein rather shamlat land, is, ordained to stand vested, in the Panchayat deh, (iii) also apart therefrom, provisions analogous, to the aforesaid provisions, are, also borne in clause (d) of Section 3, of The Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment) Act, No.20 of 2001, provisions whereof stand extracted hereinafter:-

> "(d) land records as "Shamlat tika Hasab Raad Malguzari" or by any such other name in the ownership column of jamabandi and assessed to land revenue and has been continuously recorded in cultivating possession of co-sharers so recorded before 26th January, 1950 to the extent of their shares therein"

(iv) wherein a specific mandate, is engrafted, qua vis-a-vis all land(s) recorded, as "Shamlat Tika Hasab Rasad Malguzari" or by any such other name in the ownership column, of jamabandi, and, assessed to land revenue, and, continuously recorded in cultivating possession, of the cosharers, and, cultivating possession whereof, is evidently existing, in records, prepared prior to 26th January, 1950, (v) thereupon, rather the mandate of preceding thereto provisions, contrarily, ordaining its/their vestment in the "panchayat deh", being hence specifically excluded besides excepted.

8. Both the aforesaid statutory provisions, for hence purveying strength, to the espousal of the counsel, for the appellant, (i) that, with theirs excluding, the mandate, and, operation, of the substantive provisions, borne respectively, in sub-section 3(ii) of Section 4, of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization (amendment) Act, No.20 of 2001, (a) AND, whereunder, stand statutory excluded hence the prior thereto explicit statutory contemplation(s), rather ordaining the vestment of shamlat land, in, the panchayat concerned, (b) does, obviously, and, necessarily require an allusion to the evidence, bearing absolute tandem, with, the afore-referred apt exclusionary provisions, as, contained in the afore stated statutory provisions. The apt revenue record, is borne in Ex. D-1, exhibit whereof comprises, a copy, of, jamabandi, appertaining to the suit land, and, it appertains to the year 1912-1913, (c) wherein, in the column, of classification, reflections occur qua, vis-a-vis, land classified, as Shamlat deh Hasab Rasab Malgujari, hence the apt co-sharer therein, holding, the apposite rights, in proportion of their/his shares, hence making user thereof. The afore referred, entries borne in Ex. D-1, are not contested nor evidence, is adduced, for ripping apart the presumption of truth, carried by them, consequently, it is to be concluded, that the afore referred, displays occurring therein, hence enjoying conclusivity, (d) whereupon, it is to be concluded, of the suit land holding hence the apposite description, of "Shamlat tika hasab rasad Malguzari", thereupon, the exclusionary mandate borne, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting, and, Utilization (amendment) Act, No.20 of 2001, against its vestment, in the "panchayat deh" concerned, concomitantly making its evident surfacing, (e) and, also the apt therewith exclusionary benefits thereof, hence, ensuing, vis-a-vis, the appellants/plaintiffs. Moreover, the afore-referred reflections, borne in ex. D-1 are lent vigorous succor, by Ex. D-10, whereon, is borne, an order of mutation attested on 29.05.1995, and, wherein a clear display is embodied, of despite, the suit land being reflected in the apposite order, to be bearing the classification of "Shamlat Hasab Rasab Malgujari", (f) yet, in consonance with a letter issued by the Government of Punjab, bearing No.382, even the afore-referred classification, evidently donned by the suit land, purportedly rendering valid, its, vestment, in, the government/panchayat. Nowat, the reflections, in the apposite order, hence, attesting mutation qua vestment, of the suit land, in the Panchayat concerned, suit land whereof, rather carries the classification of "Shamlat Hasab Rasab Malgujari", reiteratedly renders the aforesaid factum, as, clearly borne, in the order attesting the relevant mutation, order whereof, is, borne in Ex. D-10, to, hence thereupon acquire conclusivity, (g) thereupon, the evident mantle, donned by the suit land, vis-a-vis, it being "Shamlat Hasab Rasab Malgujari", is both obviously, and, openly, acquiesced by the respondent/State, also, hence the factum probandum, of the suit land, earlier depicted, in Ex. D-1, to be bearing the character, of "Shamlat Hasab Rasab Malgujari", rather acquires corroborative vigour, as also, conclusivity. The order borne in Ex. D-10, in pursuance whereof, also jamabandis, were, prepared subsequent thereto, hence, also carrying reflections in compatibility thereof, is apparently, made on anvil, of a letter issued, by the Government of Punjab. However, the letter, mentioned in Ex. D-10, and, as issued by the Government of Punjab, and, in compliance wherewith, the vestment of the suit land, occurred, in the panchayat deh concerned, despite, it evidently, bearing, the exclusionary classification, of "Shamlat Hasab

Rasab Malgujari", (h) is neither at par, nor is construable to be any piece, of a valid legislation, whereunder, rather occurred, any apposite valid supplantation or amendment, vis-a-vis, the mandate of clause (ii) to sub section (3) of Section 4, of the Punjab Village Common Lands (Regulation) Act. In aftermath, with the provisions, borne in clause (ii), to sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, remaining hence unsubstituted, through, a valid amendment, rather carried, by the legislative assembly concerned, (i) thereupon, with a candid diktat borne therein, especially, vis-a-vis, preservations of rights, of persons, in cultivating possession, of "shamlat land rather for more than 12 years, without payment of rent or by payment of charges nor exceeding the land revenue, and, cesses payable thereon", (j) in category whereof, both the suit land, and, the appellants/plaintiffs, fall, given emphatically, with both Ex. D-1 and Ex. D-10, for reasons aforesaid, bearing out the factum, of, the predecessors-in-interest, of, the appellants/plaintiff, holding continuous cultivating possession, of shamlat land, since 1912 upto 1955, whereat Ex. D-10,hence was prepared, (k) thereupon, with the suit land, falling, within the ambit, of, the apposite exclusionary mandate, borne in clause (ii) to sub section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, vis-a-vis, the preceding thereto mandate, (i) wherein, contrarily, excepting, the lands evidently falling, within, the domain of clause (ii) to sub-section (3) of Section 4, of, the Punjab Village Common Lands (Regulation) Act, and, bearing the classification of Shamlat deh, are, rather mandated to be vested, in the Panchayat, (l) sequelly, hence, the lack of valid supplantation thereof, through, a valid legislative amendment, rather rendered, the apposite exclusionary mandate, borne in clause (ii) to sub Section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, to, both hold clout and sway, (m) whereas, Ex.D-10, rather unveiling, of the order made thereunder, being a sequel of a letter issued, by the Government of Punjab, letter whereof, obviously did not, either override or benumb the operation or clout, and, the command, of the apposite exclusionary statutory provisions, vis-a-vis, the preceding thereto provisions, borne in Section 4, of the Punjab Village Common Lands (Regulation) Act, hence renders any meteing, of, reverence thereto, in, the apt order, to be not thereupon clothing it, with any sanctity.

9. Be that as it may, even during, the pendency of the instant suit, through, a valid legislative amendment, as, occurred, vis-a-vis, Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, whereby, the apt exclusionary clause (d), was, added to Section 3 thereof, (i) wherein, clearly and expressly the coinage "Shamlat tika hasab Rasad Malguzari", hence occurs, also the land bearing the aforesaid coinage, is expressly excluded, from vestment, in the panchayat, (ii) thereupon, with, for all reasons aforestated, the suit land, being evidently, described, in the apt revenue records, to carry, the classification of "Shamlat Hasab Rasab Malgujari", hence, the evident apt classification, donned, by the suit land, did hence render, it to fall, within, the ambit, of clause (d) of Section 3, of the Himachal Pradesh Village Common Lands Vesting and Utilization (amendment) Act, No.20 of 2001, (iii) and, also rendered mandate thereof being attractable vis-a-vis the suit land, (iv) besides obviously, when the apt exclusionary mandate, is foisted, upon land hence bearing, the aforesaid evident classification, in the apposite revenue records, prepared prior to January, 1950, (iii) thereupon, with Ex. D-1 standing prepared prior to 1950, hence, the apt therewith reflections, occurring therein, acquires conclusivity, (iv) hence, the recording of or making, of, Ex. D-10, whereunder, the suit land is ordered to be vested, in the panancyat, is stained with a vice, of , aforesaid entrenched statutory infractions, besides all the reflections in revenue records, prepared subsequent thereto, and, in consonance therewith, are, also rendered void and nonest.

10. Be that as it may, the learned counsel appearing. for the respondents places reliance. upon a judgment of the Hon'ble Apex Court, rendered, in a case titled as ***Gurbachan Singha and another vs. Gram Pancyayat and others***, reported in ***(2000)10 SCC 594***, the relevant paragraphs whereof are extracted hereinafter:-

> "1. This litigation has had a chequered history; the dispute confining to jurisdiction. The High Court has taken the view that the civil suit did not lie and that an application under Section 11 of the Punjab Village Common Lands (Regulation) Act, 1961 will lie before the Collector of the district. In our view, the High Court was right

in coming to that view especially when a question of title has been raised and Section 13 of the said Act puts a bar to the civil court determining that question. We, therefore, dispose of this appeal in letting the appellants approach the Court of the Collector under Section 11 of the said Act.

2. Under interim orders of this Court dated 27-11-1990 the appellants were required to deposit a sum of Rs 100 p.m. regularly. In terms of that order, the said sum was required to be depositedan the District Court. The sum thus collected be handed over to the respondent Gram Panchayat. This order would not, however, preclude the appellants from obtaining interim orders from the Collector when proceeding under Section 11 of the Act. In this manner, the appeal stands disposed of. No costs.

Wherein, Section 13, of the Punjab Village Common Lands (Regulation) Act, alike Section 10, of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, foists a statutory bar, against, the civil Court, exercising jurisdiction, over any matter, arising, from the question of title, (i) and, when in absolute alikeness or affinity therewith, provisions also occur in Section 10 of the Himachal Pradesh Village Common Lands Vesting and Utilization Act, (ii) AND when in respect whereof, the Hon'ble Apex Court, in the apt paragraphs extracted hereinabove, had concluded of the civil courts, holding no jurisdiction, vis-a-vis, any matter falling with the domain, of the aforesaid Act, (iii) hence, no pronouncement, in the affirmative being meted, vis-a-vis, the substantial question of law, whereon, the second appeal is admitted. However, the reliance, as placed by the learned counsel appearing, for the respondents, upon, the aforesaid statutory bar, created in the apposite provisions, occurring in both, the Himachal Pradesh Village Common Lands Vesting, and, Utilization Act, and, in the Punjab Village Common Lands (Regulation) Act, for hence rendering, not maintainable, the extant suit, before the civil court concerned, (iv) is clearly a sequel, of his misreading, the entire statutory provisions, as, borne in both the afore referred statutes, (v) also arises from his being unmindful vis-a-vis (a) the evident description, of the suit land, in the apt record, as “Shamlat Hasab Rasab Malgujari, whereon, the apt exclusionary statutory provisions, as, referred hereiabove, are firmly concluded, to hence stand attracted, (vi) and, as a corollary thereof, the vestment of the suit land in the panchayat concerned, is, concluded to stand stained, with, vices of apt statutory infractions. The sequel of the learned counsel appearing, for the respondents, hence remaining unmindful, vis-a-vis, the afore referred conclusions, is obviously qua hence, the apt hereafter ensual, rather arising, (vii) qua with all revenue records, specifically Ex. D-10, being manifestly prepared in derogation, of, the apt exclusionary statutory provisions, and, in sheer derogation, of, apposite therewith classification hence donned, by the suit land, (viii) thereupon with the apt order comprised in Ex. D-10 being invalidly recorded, (ix) besides, its begetting open infraction, of, the mandate of the apt exclusionary provisions, borne in clause (ii) to sub-section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting and Utilization (Amendment) Act, 20 of 2001, (x) thereupon, unless the apt excepting relief(s), as, created in the afore referred statutes, is accepted, and, is applied hereat, (xi) thereupon, alone the solemn holistic purpose, of the apt exclusionary mandate, would be preserved, (xii) concomitantly, for keeping alive the apt excepting mandate, thereupon, the apt statutory bar, rather hence cannot be construed, to be creating any obstruction. Contrarily, rather, the ill besides insagacious sequel, would ensue, of even invalidly made orders, anchored upon a clear lack of adherence, to the revenue records, bearing absolute congruity, with the mandate of the apt exclusionary clauses, to the relevant inclusionary or vesting provisions, respectively, borne in clause (ii) to sub-section (3) of Section 4 of the Punjab Village Common Lands (Regulation) Act, and, in clause (d) of Section 3 of the Himachal Pradesh Village Common Lands Vesting, and, Utilization (Amendment) Act, 20 of 2001, rather, being hence untenably validated. Corollary thereof, is that the bar, of jurisdiction, is applicable, vis-a-vis, only validly made orders, by the revenue officers, and, it being not be applicable, vis-a-vis, any invalidly made orders or orders made in blatant transgression, of, the apt excepting statutory provisions. Moreover, the judgment whereon, the learned counsel, appearing for the respondents, has, placed reliance, makes a clear display, of the Hon'ble Apex Court, affirming the view taken,

by the Hon'ble High Court, (i) that, the remedy available, to the aggrieved litigant, being to cast, an application under Section 11 of the Act, before the revenue officer concerned, and, not by his canvassing, his grievance, through, his instituting, a civil suit suit. Consequently, with Section 11 of the Punjab Village Common Lands (Regulation) Act, hence, appertaining to an interdiction, against, any preemption, against, sale of land, in shamlat deh, (ii) whereas, contrarily, hereat, there is open, gross and blatant transgression, of, the apt statutory hence excepting exclusionary mandate, vis-a-vis, the mandate, of, apt vesting provisions, (iii) thereupon, no remedy other than, for setting aside, the apposite order or for setting aside, all concurring therewith entries, as, carried in the revenue record, through, the institution of the civil suit, rather comprised the only remedy available, vis-a-vis, the aggrieved, and, also vis-a-vis the appellants/plaintiffs herein.

11. The learned counsel appearing, for the respondents, has made a vehement, espousal before this Court (I) that with this Court while making a pronouncement, upon, CMP No. 380 of 1990, instituted, in RSA No.410 of 1988, whereunder (ii) after the impugned judgments and decrees, rendered by both the learned courts, being set aside, hence, liberty was afforded to the plaintiffs, to institute a fresh suit, on the same cause of action, (iii) hence, enjoined, the plaintiffs, to with utmost promptitude, since the rendition upon CMP No.380 of 1990, on 3rd May, 1991, rather institute, the instant suit, whereas, theirs instituting it, after five years elapsing therefrom, (iv) hence, the suit being grossly barred by limitation, (v) hence, the disaffirmative findings, rendered on the issue, appertaining, to the suit being barred by limitation, being enjoined to be revered. However, the aforesaid submission, cannot be accepted, given (a) with pervasive stains of statutory illegalities, ingraining, the order borne in Ex. D-10, and, in pursuance wherewith, erroneous entries were made, in the revenue records apposite to the suit land, (b) thereupon, with the order borne, in Ex. D10, and, consequent therewith entries, occurring in the revenue records, being stained with vices of entrenched statutory infractions, and, their inceptive makings, rather being gripped with vices, of nullity, consequence whereof being, of, the order borne in Ex. D-10, being both void and nonest, (c) hence, all the evident stains of voidness or illegalities, being construable, to be removable or remediable, at any time, and, the bar of limitation, not being attracted, for baulking the setting aside or the quashing, of, both the apt orders or the revenue entries. Concomitantly, the order borne in Ex. D-10, and, consequent therewith entries, occurring, in the revenue records, appertaining to the suit land, rather being construable to be a continuing wrong or besides bestowing a continuing cause of action, qua, the aggrieved, hence, the mere factum of any bar, of, limitation, purportedly arising, since this court making a pronouncement on 3rd May, 1991, yet, the plaintiffs instituting, the suit with five years elapsing therefrom, is not attractable, vis-a-vis, the plaintiffs' suit and nor hence the embargo, of limitation is attractable hereat.

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

13. In view of the above discussion, the present Regular Second Appeal is allowed. In sequel, the judgments and decrees rendered by both the learned Courts below are set aside, and, the suit of the plaintiff is decreed. Consequently, the plaintiffs are held owners in possession of the land comprised in khata No.18 min, Khatauni No. 59 min, Khasra Nos. 17, 22, 26, 4, 5, 6, 7, 9, 14, 16, 21, 23, 24, 25, 27, 28, 29, 31, 15, 30, measuring 15-45-02 HM, situated in village Ban Chariyati, Mauza Barla, Tehsil Jawali, District Kangra, H.P. and mutation No.2 of 29.5.1955, and, mutation No.4 of 10.01.1976 attested in favour of the defendants No.1 and 2 are held to be null and void. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Sahab Singh .....Petitioner.
Versus
State of H.P. ....Respondent.

Cr. Revision No. 188 of 2018
Decided on : 21.6.2018

Juvenile Justice (Care and Protection of Children) Act, 2015- Section 12- Bail – Entitlement- Juvenile Justice Board as well as Sessions Judge declining bail to child-in-conflict with law (CCL) on ground of possibility of his being exposed to physical, moral or psychological danger in event of release on bail and also CCL would face outrage of members of victim's family – Petition against – Held – there is absolutely no material on record to entertain a belief that CCL would meet with some danger physical, psychological or moral if released on bail- Bail to CCL thus cannot be refused – Petition allowed- CCL directed to be released on bail subject to conditions. (Para-4)

For the petitioner: Mr. Sudhir Thakur, Advocate.
For the respondent: Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs., for the respondent.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The apposite application, as, preferred by the applicant/ accused, before the Principal Magistrate, Juvenile Justice Board, Solan, District Solan, H.P., seeking therein relief, of, his being released from judicial custody, where he is lodged, for his allegedly committing offences, punishable under Sections 302 and 201 of the Indian Penal Code, in case FIR No. 192/17 of 15.9.2017, stood rejected by the aforesaid, and, in an appeal preferred therefrom before the learned Sessions Judge, Solan, the latter, also declined relief to the bail applicant, hence the instant petition.

2. The apt provisions, borne, in Section 12, of, the Juvenile Justice (Care and Protection of Children) Act, 2015, provision whereof, is, extracted hereinafter, confer a special statutory right, upon a juvenile offender, to, dehors any fettering provisions, existing, in the Cr.P.C., against the affording of indulgence, of, bail, vis-à-vis him, for his allegedly committing, a non-bailable heinous offence, to rather in consonance therewith, hence, espouse relief, of his being enlarged on bail, even vis-à-vis any non-bailable heinous offence, and, importantly upon satiation, of, the all apt condition precedent(s) borne in sub-section (1) thereof, whereupon , hence the Courts of law, are, enjoined to release him on bail, with or without surety:-

> "**12. Bail of juvenile**.- (1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety [or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person] but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral physical or psychological danger or that his release would defeat the ends of justice.
>
> (2) When such person having been arrested is not released on bail under sub-section (1) by the officer incharge of the police station, such officer shall

> cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.
>
> (3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

However, the aforesaid statutory power and jurisdiction, as, bestowed upon Courts of law, is subject, to, the condition, (i) of there appearing no reasonable grounds for believing, of, hence his being likely to be brought into association with any known criminal, (ii) nor there appearing any reasonable ground for believing of his being hence exposed to moral, physical or psychological danger or his release defeating the ends of justice, (ii) The learned Principal Magistrate Juvenile Justice Board, had, in paragraph-7, para whereof is extracted hereinafter, hence concluded, that the initial aforestated imperative condition, embodied in Section 12 of the Act, comprised in the factum of there being hence likelihood, of the juvenile offender being brought into association with any known criminal, rather remaining unsatiated. However, the succeeding thereto apt conditions precedent also enjoining their apt satiation, and, comprised in there appearing no reasonable grounds, for believing qua upon his being released from custody, his being imminently exposed to moral, physical or psychological danger or his release defeating the ends of justice, (i) quathereupon both the courts had concluded of there rather appearing a reasonable ground, for believing of hence his being exposed to moral, physical or psychological danger, thereupon both the courts hence declined the apt facility, to the bail applicant. The reasons prevailing with the learned courts below, for their making, the aforesaid conclusion is anvilled, upon the possibility, of, the outrage, of, the members of the family of the victim, pointedly upon being released, rather being sparked, concomitantly, hence there being imminent likelihood, of his being exposed to moral, physical or psychological danger. The tenacity, of, the aforesaid reasons, in both, the courts making the aforesaid conclusion, is to be tested, upon existence of firm material, adduced therebefore by the prosecution, displaying therein, of, all the aforestated danger(s) being visitable, upon, the juvenile offender, (ii) thereupon alone it could be concluded, of there being sufficient material, with both the learned courts below, to, conclude of there appearing reasonable ground, for hence believing qua the aforesaid endanger besetting the juvenile offender, upon, his being released from custody. However, the apposite material did not exist, before the learned courts below, thereupon the mandate of the aforestated condition precedent(s), as attracted, against the juvenile offender, and, as also led the courts below, to, decline the apposite relief, to the juvenile offender appears to be both surmisical, and, conjectural:

> "In the present case, there is nothing on record to suggest that release of juvenile is likely to bring him into association of any known criminal, therefore, the ground of denial of bail for juvenile does not exist. However, other 2 grounds mentioned above seem to have been existing because firstly, since, the juvenile allegedly has committed the offence of murder, the anger amongst the relatives, friends, well-wisher of the deceased can not be ruled out and if juvenile is released on bail, in that eventuality, the harm can be caused to the juvenile by members of society due to alleged offence. Therefore, release of juvenile in the considered opinion of the board can expose him to physical danger. Secondly, since, the juvenile has allegedly committed capital offence and as per police version, after committing the same, he escaped from the spot, the possibility cannot be ruled out that since juvenile is belonging to another State, his presence might be difficult to procure during inquiry which will not be conducive for interest of justice."

4. Mr. Vikrant Chandel, the learned Deputy Advocate General has also submitted before this Court, that, upon the juvenile offender being released from the custody, there is no material, qua thereupon there being every likelihood of the apposite endangerment(s) hence ensuing, vis-à-vis, the person, of, the juvenile offender, (iii) thereupon with there being no material, to make a firm conclusion qua upon the juvenile being released, from judicial custody,

there appearing reasonable grounds, for, believing qua hence there being every likelihood of his being exposed to moral, physical or psychological danger. Consequently the juvenile is ordered to be released from custody, subject to compliance by him with the following conditions:-

i) That he shall furnish personal bonds of Rs. 1,00,000/- with two local sureties in the like amount, of, persons holding property in the State of Himachal Pradesh, to the satisfaction of the learned Judicial Magistrate, Nalagarh, District Solan, H.P.

ii) That he shall continuously, during the period of his being enlarged on bail, remain under the supervision of the District Welfare Officer, District Rampur, U.P.

iii) That he shall join the investigation, as and when required by the Investigating agency.

iv) That he 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 from disclosing such facts to the Court or to the Police.

v) That he shall not leave India without the prior permission of the Court.

vi) That he shall deposit his passports, if any, with the Police Station, concerned.

vii) He shall manage to reside at least five k.m. away from the residence of the victim.

viii) That in case of violation of any of the conditions, the bail granted to the petitioner shall be forfeited and he shall be liable to be taken into custody.

5. In view of the above directions, the instant petition as well as all pending application(s), if any, stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

The State of H.P. .....Appellant.
Versus
Kundan Lal .....Respondent.

Cr. Appeal No. 511 of 2010
Decided on: 21.06.2018

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20 and 42- Possession – Proof of - Recovery of 'charas' from a trunk kept in a room adjoining to shop alleged to be in possession of accused – Accused acquitted by Special Judge – Appeal against – On facts, even police witnesses admitted that shop and said room were owned by one 'M' – Also admitting that accused was only a salesman at shop of 'M' - Plea of prosecution that room was in exclusive possession of accused and he was using it as a residence, not substantiated- Evidence regarding accused having handed over keys of room to police, is contradictory – Held – Exclusive possession of accused with respect to contraband in question, not proved beyond doubts – Acquittal upheld- Appeal dismissed. (Paras-10, 12 and 17)

Cases referred:
T.Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant: Mr. Sudhir Bhatnagar, Additional Advocate General, with Mr. Bhupinder Thakur, Deputy Advocate General.

For the respondent: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. (oral)

The present appeal is maintained by the appellant/State, laying challenge to judgment dated 20.07.2010, passed by learned Special Judge, Fast Track Court, Kullu, District Kullu, H.P., in Sessions Trial No. 06 of 2010, whereby the accused/respondent (hereinafter referred to as "the accused") was acquitted for the commission of offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "ND&PS Act").

2. Succinctly, the facts giving rise to the present case can be summarized thus:

On 24.10.2009 a police party was at place Jari in connection with investigation of FIR No. 397 of 2009. Police personnel received secret information that accused is involved in selling of narcotics. On the way, the police associated independent witnesses, i.e., Smt. Saraswaati Devi and Shri Dot Ram. An intimation in compliance of Section 42 of the Act was reduced into writing and the same was sent, through Constable Sanjay Kumar, to Additional Superintendent of Police, Kullu. After receipt of the information, the Additional Superintendent of Police made an endorsement thereon and HC Nirat Singh made an entry at Sr. No. 73 in the register. SI Onkar Singh alongwith the independent witnesses went to the shop of the accused, where the accused was present. Firstly, SI Onkar Singh gave his personal search to the accused, but nothing incriminating was found. Subsequently, search of the shop and residential room of the accused was conducted and a polythene bag was recovered, which was kept in a trunk. The said bag was checked and it was found to have contained *charas* in ball shape. On weighment, the recovered contraband was found to be 500 grams. The contraband was taken in possession and sealed with six seals having impression 'H'. Facsimile seal was taken on a separate piece of cloth and seal, after its use, was handed over to Constable Munish Kumar. Photographs of the spot were also taken. *Rukka* was prepared and it was sent to police station, through HC Mukesh Kumar, whereupon FIR registered by ASI Rattan Chand and the case file was handed over HC Mukesh Kumar. Site plan was prepared and the statements of the witnesses were recorded. NCB form, in triplicate, was filled in on the spot. The accused was arrested and the case property was produced before ASI Rattan Chand, who resealed the same with four seals having impression 'E' and the seal impression was taken on a separate piece of cloth. ASI Rattan Chand filled in the relevant columns of NCB form and the case property alongwith other documents was entrusted in the custody of MHC Ram Krishan qua which he made an entry at Sr. No. 221 of the *malkhana* register. On 25.10.2009 Constable Kishan Chand took the case property alongwith the documents to FSL, Junga, and after deposit of the same in FSL, Junga, receipt was handed over to MHC Ram Krishan. A special report was prepared and on 25.10.2009 and it was submitted before Additional Superintendent of Police, who after endorsing the same, handed over the same to HC Nirat Singh. HC Nirat Singh made an entry at Sr. No. 74 qua the special report in the register. Forensic analysis report demonstrated that the sample of contraband contained 46.88% W/W resin and thus it was *charas*. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as ten witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he pleaded that he was present in the shop as salesman and a polythene containing *charas* was found outside the shop. Investigating Officer inquired about the polythene and when he feigned his ignorance an altercation took place and a false case foisted on him. The accused, in his defence, examined Shri Makund Lal as defence witness.

4. The learned Trial Court, vide impugned judgment dated 20.07.2010, acquitted the accused for the offence punishable under Section 20 of the ND&PS Act, hence the present appeal preferred by the State.

5. The learned Additional Advocate General has argued the impugned judgment is based on hypothetical reasoning, surmises and conjectures and the learned Trial Court has failed to appreciate the evidence, which has come on record, to its right perspective. He has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. Conversely, the learned counsel for the respondent has argued that the judgment of acquittal has been passed by the learned Trial Court after appreciating the evidence, which has come on record, to its true perspective, thus the judgment of acquittal, as passed by the learned Trial Court, needs no interference and the appeal be dismissed.

6. In rebuttal, the learned Additional Advocate General has argued that after re-appreciating the evidence the accused be convicted, as the learned Trial Court has failed to appreciate the evidence correctly and the appeal be allowed.

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

8. In the case in hand, as alleged, police associated two independent witnesses, i.e. Smt. Saraswati Devi (PW-1) and Shri Dot Ram, but only Smt. Saraswati Devi was examined in the Court. PW-1, Smt. Sraswati Devi, deposed that on 24.10.2009, at about 11:00 a.m., she was called by the police at Baladhi, at the shop of Mukund Lal Gopi Chand. As per this witness, she was asked by the police to become a witness, as they had recovered *charas* from outside the shop. She deposed that in a room some *charas* was being weighed and some was being sealed. On the asking of the police, she signed some documents. Photographs were also taken in her presence. She further deposed that accused used to work in the shop of Mukund Lal. This witness was declared hostile and subjected to exhaustive cross-examination, however, nothing favourable to the prosecution could be elicited from her. This witness, in her cross-examination, has categorically stated that accused is resident of village Seun, which is 12-13 kilometers far away from village Baladhi. The accused has also examined Shri Mukund Lal (DW-1), who has fortified the fact that accused lives in village Seund, which is at a distance of 13-14 kilometers from village Baladhi. He has further deposed that he is owner of the shop and the room and the accused is salesman in his shop.

9. Undisputedly, the only independent witness, who was examined by the prosecution, did not support the prosecution case. Now, in order to establish the guilt of the accused, the testimonies of key official prosecution witnesses is to be looked into, as the other independent witness, i.e. Shri Dot Ram, was not examined by the prosecution.

10. In the present case, the statement of Investigating Officer, who was examined as PW-10, is full of suspicions. PW-10, SI Onkar Singh, admitted in his cross-examination that accused is resident of village Seund and one Mukund Lal is the owner of the shop (from where the alleged contraband is alleged to have been recovered). Another prosecution witness, Constable Munish Kumar (PW-2) categorically deposed in his cross-examination that accused was salesman in the shop. PW-3, HC Mukesh Kumar, in his cross-examination, deposed that owner of the shop and building was Mukund Lal. Now, it stands proved that from the shop where the alleged recovery of contraband was made was owned by Shri Mukund Lal (DW-1) and the accused was working as a salesman in the shop. The prosecution has tried to prove that the room was being used by the accused as his residence, but nothing has come on record which could remotely point out towards this fact. In contrast to this, there is evidence on record which establish this fact that accused is resident of village Seund, which is 12-13 kilometers away from village Baladhi, and he used to come to the shop daily. PW-1, Smt. Saraswati Devi and DW-1 Shri Mukund Lal unambiguously deposed to this effect that accused is resident of village Seund, which is 12-13 kilometers away from village Baladhi. DW-1 has deposed that accused used to work in his shop as salesman and his village is Seund, which is 13-14 kilometers from village

Baladhi. The accused used to come daily to his shop from village Seund. Thus, from the testimonies of PW-1, Smt. Saraswati Devi (only examined independent witness) DW-1 Shri Mukund Lal (owner of the shop from where the alleged recovery of contraband was made) and even from the testimonies of official prosecution witnesses, it is amply proved that accused was neither owner nor in possession of the shop and he used to come to the shop daily from his village, which is 12-13 kilometers away from village Baladhi. Thus, the prosecution has miserably failed to establish on record that the premises from where the alleged contraband was recovered was owned and possessed by the accused and he was in exclusive and conscious possession of the contraband. In the wake of the above facts and circumstances, it is more than safe to hold that prosecution has failed to establish even remotely that the contraband was recovered from the conscious and exclusive possession of the accused, as the prosecution has failed to prove that the room from where the recovery was effected was owned or possessed by the accused.

11. The police could have associated local inhabitants of the area in order to prove the fact that the room from where the alleged recovery of contraband was effected, was occupied exclusively by the accused, but the only independent witness, i.e., PW-1, Smt. Saraswati Devi, does not support the prosecution case. DW-1, Shri Mukund Lal (owner of the shop) categorically deposed that accused does not reside in the room in question.

12. PW-3, HC Munish Kumar, deposed that the room was bolted, but PW-2 Constable Munish Kumar and PW-10 SI Onkar Singh, have deposed that the room was locked and the key was provided by the accused. There is clear glaring variance even in the versions of the official prosecution witnesses, thus it cannot be accepted that the room was locked and the key was provided by the accused. Moreover, if the key was provided by the accused to the police and the room was locked, then it is no doubt an important fact, which the police should have mentioned in the in *rukka,* but non-existence of this fact in the *rukka* gives air to the presumption that the story qua giving of key of the locked room by the accused is just an afterthought and the same cannot be believed.

13. Now, as per the site plan, the room above the shop was locked and the recovery was effected from the room, which was adjoining this locked room, thus recovery was not effected from the room located above the shop of the accused. There is variance in the statements of the official prosecution witnesses, which makes their testimonies doubtful. The prosecution case lacks support from the only examined independent witness, PW-1, Smt. Saraswati Devi. So, it is clear that the prosecution has miserably failed to prove the recovery of contraband from the exclusive and conscious possession of the accused.

14. As discussed hereinabove, the prosecution has failed to prove the recovery of alleged contraband from the conscious and exclusive possession of the accused, so other evidence qua sampling, sealing etc. needs no discussion, hence deliberately left.

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

16. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***

2. The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

3. Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

4. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

5. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."

17. In view of the settled legal position, as aforesaid, and on the basis of material, which has come on record, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond reasonable doubts and the findings of acquittal, as recorded by the learned Trial Court, needs no interference, as the same are the result of appreciating the facts and law correctly and to their true perspective. Accordingly, the appeal, which sans merits, deserves dismissal and is dismissed.

18. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

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

M/s Ashok Kumar Sharma and Company ...Applicant

Versus

M/s Kapil Electronics and another ...Respondents

CrMP(M) No. 1079 of 2016
Reserved on: 13.06.2018
Decided on: 22.06.2018

Code of Criminal Procedure, 1973- Section 378- **Negotiable Instruments Act, 1881-** Section 138- Leave to appeal – Complainant alleged before trial court that accused had issued post dated cheque to discharge its remaining liability accruing against two bills regarding supply of goods by complainant- Accused issuing direction to its banker for stoppage of payment – Accused taking plea in his reply to demand notice of having made payment in cash on complainant's request against receipts with respect to amount covered by cheque – Also averring in reply that goods supplied by complainant were defective- Trial Court acquitting accused for said offence - Leave to appeal by complainant – On facts, complainant was found having admitted various written

communications between him and accused including a document that he had received payment against (blank) cheque and nothing was due towards him – If liability of accused was to the extent of Rs.1,71,191/- and complainant, as per evidence had already received a sum of Rs. 1,62,100/-, then, cheque in question could not have been issued for a sum of Rs.40,000/- as remaining liability was only to tune of Rs. 9,091/- - Held – No valid ground exists to grant leave to complainant to file appeal – Leave refused – Application dismissed. (Paras- 15, 16 and 25)

For the applicant:	Mr. Sanjeev K. Suri, Advocate.
For the respondents:	Mr. Malay Kaushal, Advocate, for respondent No. 1.
	Mr. Shiv Pal Manhans and Ms. Rameeta Kumari, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

By the medium of this application, the applicant has sought leave to file appeal against judgment, dated 23rd June, 2016, passed by learned Judicial Magistrate 1st Class, Court No. 1 Una, H.P. in Criminal Complaint No. 100-I-09, whereby complaint preferred by the applicant under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'NI Act') has been dismissed.

2. As per complaint, the case, in brief, is that respondent No. 1 had an outstanding payment of ₹ 1,71,191/- to be paid to the complainant-applicant against supply of articles against bill Nos. 216 (Ex. CW-3/A) and 260 (Ex. RW-6), out of which a sum of ₹ 82,100/- had been paid by respondent No. 1 and to discharge remaining liability, respondent No. 1 had issued a cheque No. 262102 (Ex. CW-1/A), dated 10th April, 2009, worth ₹ 40,000/- to be drawn at UCO Bank, Berthin, as a part payment with request to present the same in the month of July, 2009. The said cheque was presented by the proprietor of the applicant (hereinafter to be referred to as 'applicant') for encashment in his Bank, i.e. Canara Bank, Nangal Road, Una, but, on 30th July, 2009, applicant received an information from his Banker vide memo, dated 17th July, 2009, (Ex. CW-1/B) about dishonour of the said cheque for the reason that the drawer had stopped the payment, whereby complainant served a notice, dated 6th August, 2009 (Ex. CW-1/F) through registered post, but, respondent No. 1 had failed to make the payment within statutory period under the NI Act and, therefore, applicant had filed the complaint under Section 138 of the NI Act.

3. Issuance and signing of cheque (Ex. CW-1/A), instructions to the Bank to stop the payment thereof and also receipt of notice, dated 6th August, 2009 issued by the applicant was not disputed during the trial, rather, reply, dated 12th August, 2009 (Ex. RW-8) sent in response to notice, dated 6th August, 2009 was placed on record admitting therein the initial liability of ₹ 1,71,191/-, however, it was contended that out of the said amount, only ₹ 80,000/- was due after making all deductions including discount and for payment thereof, two cheques No. 262101 and 262102, worth ₹ 40,000/- each, were issued with request to encash the same on or after 10th April, 2009, but, the applicant visited respondent No. 1 prior to aforesaid date and demanded the cash on the pretext that he was in a dire need of money, whereupon respondent No. 1 had paid ₹ 20,000/- each in four installments vide receipts No. 1996, dated 2nd April, 2009 (Ex. RW-1); 1997, dated 3rd April, 2009 (Ex. RW-2); 1998, dated 4th April, 2009 and 1999, dated 6th April, 2009 (Ex. RW-3) and resultantly, entire due amount, for which cheques were issued, was paid, however, the applicant did not return cheque No. 262102 worth ₹ 40,000/- despite assurance to return the same.

4. It has further been contended in the reply to notice that 21 fridges and four washing machines supplied by the applicant were not up to the standard and out of these 21

fridges, 12 fridges were dented and defected and two washing machines were not working properly and despite repeated requests, no service to repair the aforesaid defected articles was provided by the applicant causing loss of ₹ 1,50,000/- to respondent No. 1 and it was requested in the reply to the notice either to repair the defected articles or receive back the same and it was stated that there was no occasion for presenting the cheque in question for encashment as respondent No. 1 had already cleared the payment. Respondent No. 1 had also produced a settlement, dated 21st August, 2009 on a letterhead of applicant (Ex. RW-4) and a letter, dated 26th August, 2009 (Ex. RW-7) received from the applicant asking respondent No. 1 to send back defected refrigerators enabling him to return the same to the Company.

5. Documents placed on record by respondent No. 1 had also not been disputed by the applicant except endorsement on receipt No. 1998 (Ex. RW-3) wherein the said receipt had been shown to have been issued against cheque No. 262101 and the settlement, dated 21st August, 2009 (Ex. RW-4) on the ground that endorsement on Ex. RW-3 and the date of the document Ex. RW-4 had been manipulated and tampered with by respondent No. 1 by changing the same from 21st August, 2000 to 21st August, 2009.

6. As issuance of cheque, presentation thereof and dishonouring of the same for instructions of respondent No. 1 to stop the payment are not in dispute, statements of Ashok Kumar (CW-1), Satpal Singh (again recorded as CW-1) and Raj Kumar (CW-2) are not necessary to be discussed as the facts and documents proved by these witnesses are not in dispute.

7. Respondent No. 1 has examined one witness, namely Madan Lal as RW-1, who proved on record the fact of repair of defective articles, i.e. refrigerators, by him in the shop of respondent No. 1. However, he had shown his ignorance about the source from where those refrigerators were procured/purchased by respondent No. 1 and also about the pendency of the transaction with regard to those articles with anyone.

8. Applicant has filed his affidavit in his evidence reiterating his complaint and in his cross-examination, he admitted that vide invoice No. 216, dated 23rd March, 2009 (Ex. CW-3/A) and vide invoice No. 260, dated 6th April, 2009 (Ex. RW-6) etc, he had sold refrigerators and washing machines etc. to respondent No. 1 and had received the cost thereof, however, he again self-stated that he had not received the cost. He admitted letter, dated 26th August, 2009 (Ex. RW-7) and contents thereof whereby respondent No. 1 was asked to return the defective refrigerators further stating therein that cost of defective articles would be deducted from the account of respondent No. 1. He also admitted that he had received the payment vide receipts No. 1996, 1997, 1998 and 1999 and in the document, dated 21st August, 2009 (Ex. RW-4), he had accepted that he had received payment against the blank cheque issued by respondent No. 1 and nothing had been left to be received, however, he had disputed the endorsement on receipt No. 1998 showing the said receipt against cheque No. 262101. He also stated that the letterhead (Ex. RW-4) claimed to be dated 21st August, 2009 was actually dated 21st August, 2000. Receipt of reply, dated 12th August, 2009 (Ex. RW-8) in response to notice, dated 6th August, 2009 (Ex. RW-1/F) and contents thereof had been admitted by him. It has also been admitted in cross-examination that respondent No. 1 had made the payment against the purchase at the time of purchasing the articles and respondent No. 1 had informed about the defective pieces of 21 refrigerators and four washing machines with request to take those articles back. However, he self-stated that respondent No. 1 was not having any defective piece and he came to know about those defective articles only when he received the information about the stopping the payment from the Bank.

9. Applicant has based his claim for payment on the basis of bills No. 216 and 260 (Ex. CW-3/A and RW-6). Bill No. 216 is dated 23rd May, 2009 whereas Bill No. 260 is dated 6th April, 2009. Case of the applicant is that respondent No. 1 had made payment to the tune of ₹ 82,100/- against the amount of these bills and to discharge his remaining liability, he had issued cheque No. 262102, dated 10th April, 2009 (Ex. CW-1/A) for ₹ 40,000/-. Perusal of bill No. 216 also reflects that receipt of ₹ 82,100/- cash payment has been mentioned on this bill

whereas on the back side of bill No. 260 (Ex. RW-6), receipt of ₹ 86,400/- has been endorsed by the applicant. In the front of bill No. 260, there is a mention of ₹ 86,400/- with initials of applicant. Further, receipt of ₹ 82,100/- is an admitted fact and the receipt shown vide endorsement made on the back side on bill No. 260 for ₹ 86,400/- has also not been disputed by the applicant. Further, respondent No. 1 has placed and proved on record receipts No. 1996, 1997, 1998 and 1999 (Ex. RW-1 to RW-3), which were issued by the applicant on 2nd April, 2009; 3rd April, 2009; 4th April, 2009 and 6th April, 2009 against receipt of payment to the tune of ₹ 20,000/- each. Applicant has admitted receipt of this amount, but, disputed the claim of respondent No. 1 that receipts No. 1998 and 1999 were issued for receipt of payment against cheques No. 262101 and 262102. But, admittedly, the fact remains that after purchase against bill No. 216 on 23rd March, 2009, a sum of ₹ 80,000/- was received by the applicant besides the payment of ₹ 82,100/- shown in front of bill No. 216 as also admitted and pleaded in the complaint to have been paid by respondent No. 1 against the purchase of articles against bills No. 216 and 260. The receipt vide endorsement on back side of bill No. 260 does not bear any date. Similarly, the time and date of payment of ₹ 82,100/-, mentioned in front of bill No. 216, has also not been mentioned. According to applicant, cheque No. 262102 for ₹ 40,000/- was issued as part payment of balance amount after payment of ₹ 82,100/-. Meaning thereby, payment of ₹ 82,100/- was made prior to 10th April, 2009. Bill No. 216 also has endorsement of cheques 01 and 02 worth ₹ 40,000/- each. These endorsements have not been disputed by the applicant. From endorsement made in front of bill No. 216 and also receipts, Ex. RW-1 to RW-3, it is evident that after 23rd March, 2009 till 6th April, 2009, respondent No. 1 has proved the payment of ₹ 1,62,100/-. These payments have been admitted by the applicant. Apart from this, endorsement on the back side of bill No. 260 issuing receipt for ₹ 86,400/- is also there. At what stage and time, this receipt was endorsed is not clear, but, the fact remains that this amount has been stated to have been received against bill No. 260, dated 6th April, 2009.

10. Though, letter Ex. RW-7 finds mention in the last line making a request on 26th August, 2009 on behalf of the applicant to respondent No. 1 to make the balance payment, but, for admitted payments against bills No. 216 and 260, it is apparent that there was a minor amount not more than ₹ 2,000/- pending against these bills. Therefore, it is not clear that the request for making which balance payment has been made in letter, dated 26th August, 2009 (Ex. RW-7).

11. Respondent No. 1 had replied the legal notice issued by applicant on 12th August, 2009, but, in the complaint, applicant has omitted to mention the said fact. In the said reply, respondent No. 1 has claimed payment of ₹ 80,000/- (₹ 20,000/- each) vide receipts No. 1996, 1997, 1998 and 1999 (Ex RW-1 to RW-3) and also claimed that the two cheques for ₹ 40,000/- each, bearing No. 262101 and 262102, were issued against the balance payment of ₹ 80,000/- and after receiving ₹ 80,000/-, cheque No. 262102 for ₹ 40,000/- was not returned despite assurance and, thereafter, in the notice, there is a reference of defective articles supplied by the applicant. This reply was received by the applicant, which has not been denied and from letter, dated 26th August, 2009 written by applicant, its receipt by applicant has been fortified for the reason that letter, dated 26th August, 2009 (Ex. RW-7) starts with the reference of written communication received by applicant from respondent No. 1. There is no communication between applicant and respondent No. 1 in those days except legal notice and reply.

12. From the aforesaid evidence on record, respondent No. 1 has rebutted the claim of applicant with regard to issuance of cheque No. 262102, dated 10th April, 2009 against the payment of cost of articles purchased vide bills No. 216 and 260 to the touchstone of preponderance of probability. Respondent No. 1 has discharged the onus, which was upon him under the provisions of NI Act and after discharging of the onus by respondent No. 1, it was upon the applicant to lead cogent, reliable and convincing evidence to prove that cheque No. 262102 was issued against payment to be received by him as claimed in the complaint.

13. Claim of applicant is based on bills No. 216 and 260, dated 23rd March, 2009 and 6th April, 2009, respectively. There is endorsement of cash payment to the tune of ₹ 82,100/- on bill No. 216 and it is also the case of applicant that cash payment to the tune of ₹ 82,100/- was made by respondent No. 1 and for remaining payment against these bills, cheque No. 262102, dated 10th April, 2009 was issued by respondent as a part payment against the outstanding amount. The date of payment of ₹ 82,100/- is not mentioned on bill No. 216, but, it appears from the complaint as well as affidavit of complainant-applicant filed in evidence that ₹ 82,100/- had been paid against the outstanding amount of ₹ 1,71,191/- of these two bills. Meaning thereby, a sum of ₹ 82,100/- was paid after 23rd March, 2009 and probably, on or before 10th April, 2009, as it is case of applicant that against outstanding amount, the cheque was issued as a part payment. During the intervening period between 23rd March, 2009 and 6th April, 2009, there are receipts of payment of ₹ 80,000/- by respondent No. 1 to applicant, which is not disputed by the applicant, but he has only disputed that the payment against receipts No. 1998 and 1999 was not against cheques, as has been endorsed in these receipts.

14. Be that as it may, the fact remains that ₹ 80,000/- was paid by respondent No. 1 after 23rd March, 2009 till 6th April, 2009. Again, there is endorsement on the back of bill No. 260 with respect to payment of ₹ 86,400/- against this bill made by respondent No. 1. In these circumstances, it appears that the payment due against bills No. 216 and 260 had already been made by respondent No. 1 prior to presentation of cheque for encashment.

15. As per admitted record/documents placed on record, receipt of a sum of ₹ 1,62,100/- after 23rd March, 2009 till 6th April, 2009 (i.e. ₹ 20,000/- each against receipts No. 1996, 1997, 1998 & 1999 and ₹ 82,100 cash payment pleaded in complaint and affidavit as complainant) is admitted by the applicant. According to applicant, the outstanding amount was ₹ 1,71,191/- (i.e. bill No. 216 to the tune of ₹ 84,163/- and bill No. 260 to the tune of ₹ 87,028/-). After deducting the admitted payment, i.e. ₹ 1,62,100/-, the outstanding amount remains to be ₹ 9,091/-.

16. Therefore, plea that cheque No. 262102, dated 10th April, 2009 for ₹ 40,000/- was issued as a part payment against outstanding amount of bills No. 216 and 260 appears to be incorrect as the applicant has admitted the receipt of ₹ 1,62,100/- and out of this, a sum of ₹ 82,100/- has been admitted to be received against these bills, but, he has not disclosed that against which amount, he had received a sum of ₹ 80,000/- vide receipts Ex RW-1 to RW-3.

17. Applicant is not a layman, but, is an established businessman dealing with retailers as well as company as evident from his letter Ex. RW-7. He must have been maintaining the ledger account of his customers including respondent No. 1. When he is claiming non-receipt of payment against bills No. 216 and 260 and simultaneously, admitting the receipt of ₹ 80,000/- apart from ₹ 82,100/-, it was incumbent upon him to explain purpose for receipt of ₹ 80,000/- , which was received by him after 23rd March, 2009, on which date, according to applicant, respondent No. 1 had purchased the items/articles on credit. It is mentioned in bills No. 216 and 260 that these items were supplied on credit, but, at the same time, after date of bill No. 216, there is receipt of ₹ 80,000/- through receipts Ex. RW-1 to RW-3 and also admitted payment of ₹ 82,100/-. Not only this, there is an endorsement on the back side of bill No. 260 with regard to receipt of ₹ 86,400/-. In such circumstances, it cannot be said that cheque No. 262102, dated 10th April, 2009 was issued against the outstanding payment related to bills No. 216 and 260.

18. The applicant had not produced the copy of reply to legal notice alongwith his complaint nor he had referred the same in his complaint, but, remained silent about the response of respondent No. 1 to his legal notice. However, the said reply has not been disputed, rather, copy of the same was consented to be placed on record as Ex. RW-8 by the applicant. In the said reply, there is reference of payment of ₹ 80,000/- on 2nd April, 2009; 3rd April, 2009; 4th April, 2009 and 6th April, 2009 vide receipts Ex. RW-1 to RW-3 and also issuance of two cheques No.

262101 and 262102 for ₹ 40,000/- each with further averment that the payment of ₹ 80,000/- was made prior to 10th April, 2009, i.e. date of post-dated above referred cheques, was made on the request of applicant and in lieu of which the cheques were to be returned, but cheque No. 262102 was not returned.

19. Supply of defected pieces of articles has also been mentioned in the reply. Reply is dated 12th August, 2009 whereafter the applicant had written a letter, dated 26th August, 2009 (Ex. RW-7) to respondent No. 1 asking him to send back defected refrigerators with further request to send the remaining payment. Neither in the reply nor in letter, dated 26th August, 2009, there is any reference of date of supply of refrigerators, which were found to be defective.

20. From the evidence on record, it is apparent that payment against bills No. 216 and 260 had already been made and, therefore, there might be further supply of articles against which some payment might have been due, but, so far as issuance of cheque No. 262102, dated 10th April, 2009 as a part payment against bills No. 216 and 260 is concerned, the same is not substantiated from the record, rather, it is falsified from the documents as well as admissions of applicant in his cross-examination.

21. From the above discussion, it emerges that there is possibility of issuance of cheque, not for part payment against bills No. 216 and 260, but, for any other payment due on account of supply of articles other than the articles mentioned in bills No. 216 and 260 as applicant himself has admitted the receipt of ₹ 1,62,100/- after 23rd March, 2009. Had the said receipt of amount been against the supply of other articles, the applicant would have brought relevant material on record by leading evidence in that regard. Omission on the part of applicant to do so is definitely fatal for his complaint rendering his plea of issuance of cheque against part payment for articles purchased vide bills No. 216 and 260 as false.

22. Making endorsement in receipts Ex. RW-3 mentioning them against cheque No. 262101 and 262102 by respondent No. 1 does not make any difference except that this endorsement is to be discarded, but, as discussed above, the receipt of amount against these receipts has not been disputed and, therefore, the claim of payment by respondent No. 1 against these receipts is undisputed and such endorsement by respondent No. 1 does not render these documents liable to be rejected.

23. Even if it is considered that payment of ₹ 80,000/- vide receipts No. 1996, 1997, 1998 and 1999 (Ex. RW-1 to RW-3) was not against either cheques No. 262101 and 262102 or Bill No. 216, then also, cash payment of ₹ 82,100/- is admitted in complaint and affidavit of applicant filed in evidence and payment of ₹ 86,400/- against Bill No. 260, endorsed on its back side, has not been disputed. Rather, this bill (Ex. RW-6) alongwith other documents, was placed on record with consent of applicant, which indicates that against payment of ₹ 1,71,191/- of two bills No. 216 and 260, an amount of ₹ 1,68,500/- had already been paid and, therefore, cheque No. 262102 worth ₹ 40,000/- cannot be said to have been issued as part payment of balance amount of Bills No. 216 and 260, which comes to be ₹ 2,691/-.

24. So far as documents/settlement, dated 21st August, 2009 (Ex. RW-4) is concerned, the same does not pertain to the cheque involved in present dispute as in the last line of the said document, it has specifically been stated that cheque No. 0187977, dishonoured by the Bank, had no value after the settlement whereas in present dispute, cheque No. 262102 is involved. Plea of applicant that the date in the said document has been tampered with and manipulated by respondent No. 1 may be correct, but, this document is liable to be discarded for reasons discussed hereinbefore. Rejection of this document does not make any case in favour of the applicant.

25. From the evidence on record, it emerges that the defence version was more probable and plea of applicant-complainant is not plausible and no fruitful purpose is going to be served by granting the leave, as prayed. There is not even a single remote issue, consideration of

which may have any positive result in favour of applicant-complainant. Therefore, it is not a fit case for grant of leave to appeal. Hence, the application is dismissed.

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

State of H.P. .....Appellant
Versus
Rajinder Kumar ....Respondent.

Cr. Appeal No. 702 of 2008
Decided on : 25.6.2018

Code of Criminal Procedure, 1973- Section 378**- Indian Penal Code, 1860**- Sections 279, 337 and 338- Appeal against acquittal- Accused was tried on allegations that he was driving a Maruti Car on public highway in a rash and negligent manner – Also that he came to wrong side of road and hit against jeep of complainant coming from opposite side – Accused acquitted by trial court- Appeal by State - Plea of accused being that complainant suddenly flashed head lights of his jeep and same caused accused's vehicle uncontrollable - Further, pleading that accident was not on account of any rash or negligent act on his part – On facts, High Court found prosecution witnesses clearly denying flashing of head light by driver of jeep i.e. complainant, site plan showing that vehicle of accused had gone to its extreme right side of road – Held – Plea of accused of his having been rendered momentarily blind because of flash of head light, is not worth credence – Accident was result of his rash and negligent driving- Appeal of State allowed – Judgment of acquittal set aside - Accused convicted for offences under Sections 279, 337 and 338 of IPC. (Paras- 10 to 12)

For the appellant: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs., for the appellant.
For the respondent: Mr. Dheeraj Thakur, Advocate, legal aid counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeal stands directed, against, the verdict, recorded, by the learned Judicial Magistrate, Court No. 4, Mandi, District Mandi, H.P. in Police Challan No. 224-1/04, of, 14.7.2008 whereby the learned trial Court hence acquitted the respondent (for short "accused"), for the offences charged.

2. Brief facts of the case are that 24.3.2004 at about 8.00 PM at NH near Banala, the accused was driving the Maruti Car bearing registration No. HP-58-0545 and was going towards Aut from Kullu and was also carrying one child with him. The Accused was driving the aforesaid Car in a rash and negligent manner and he came on the wrong side and hit jeep bearing registration No. HP-32-1823, as a result of which, he got stuck in the car and sustained injuries along with the child namely Paras. Thereafter, both of them were sent to RH Kullu for treatment and information was given telephonically to the police station on which HC Jaspan Singh and Constable Chander Mani reached on the spot and recorded the statement of the complainant Parveen Kumar under Section 154 Cr.P.C. Ext. PW1/A, on the basis of which FIR Ext. PW9/A was registered and endorsement of which is Ext. PW9/B. After inspection spot map Ext. PW9/C was prepared, photographs of spot Ext. PW9/D was taken, negatives of which is Ext. PW9/E. The jeep and the car were taken into possession vide memos Ext. PW2/A and and Ext. PW3/A and these were also got mechanically examined and reports Ext. PW5/A and Ext. PW5/B were

obtained. MLC Ext. PW6/A and Ext. PW6/B were also obtained and it was found that the accused and the child who was sitting with him sustained simple as well as grievous injuries on their person. Statement of witnesses were recorded as per their versions. The accused was challaned accordingly.

3. Notice of accusation stood put to the accused, by the learned trial Court qua his committing offences punishable under Sections 279, 337, and, under Section 338 of the Indian Penal Code, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded, wherein, he claimed false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

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

7. The learned counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below, standing based, on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The prosecution case is squarely anvilled, on, the testifications rendered, respectively by PWs 1, 2 and 4. The aforesaid ocular witnesses to the occurrence, in their respectively rendered testifications, deposed, with utmost inter-se corroborations, and, also in their respectively rendered testifications, borne, in their respective examinations-in-chief, and, in their respective cross-examinations each rendered, a, version qua the genesis, of the prosecution case, bereft of, any, gross embellishments or improvements, vis-à-vis, their previously recorded statements in writing.

10. Be that as it may, the learned trial Magistrate had contrarily not meted credence, vis-à-vis, their respectively rendered testifications, qua, the genesis of the occurrence, (i) merely on the ground, of, the learned defence counsel rather succeeding, in, establishing his apt espousal qua the flashing of light, at the relevant site, by the driver of jeep bearing No. HP-32-1823, hence deterring the accused to maneuver his vehicle, (ii) thereupon the collision inter-se the jeep, and, the car driven by the accused, being construable to not arise, from, any negligent manner, of, driving, of, the offending vehicle by the accused. However, in making the aforesaid conclusion, the learned trial Magistrate, has committed a gross mis-appreciation, of the evidence, on record, mis-appreciation whereof, is, constituted, by (a) the aforesaid suggestion meted, to, the PWs concerned rather standing negated by each of the prosecution witnesses, (b) the site plan borne in Ext. PW9/C, being proven by the Investigating Officer, who, stepped into the witness box, as PW-9, and, for shattering his credibility, the, learned defence counsel, omitting, to, mete any suggestions, for hence belying, all the recitals borne, in Ext. PW-9/C, (c) thereupon with the recitals borne, in Ext. PW-9/C, unveiling qua the vehicle driven by the accused, hence occupying the inappropriate side of the road, hence the mere factum, of flashing light, by the complainant while his driving the jeep, and, hence its purportedly blinding the accused, and, concomitantly precluding him, to maneuver his vehicle, is rendered wholly unworthy. Furthermore, when PW-9 also remained rather unmeted any apposite suggestions, vis-à-vis, the

portrayals, borne in site plan Ext. PW9/C, being a sequel, of, sheer concoction or the depiction(s), borne therein being incredible, arising from its preparation, occurring, even with the vehicles standing removed, from, the relevant site, thereupon the non meteing of the aforestated apposite suggestions, to PW-4, by the learned defence counsel, while holding him to cross-examination, rather reenforcingly bolster an inference, qua, the vehicle driven, by the accused hence occupying the inappropriate side of road, and, thereupon, the accused being negligent in driving, the, offending vehicle.

11. At this stage, the learned counsel appearing, for the accused contended with vigor, that with an echoing hence occurring in the cross-examination, of, PW-4 qua a steep gradient occurring on either side (i) of the relevant site, hence per-se, thereupon an inference being spurred, of, there being no penal negligence on the part of the accused. However, the aforesaid acquiesce(s), hence occurring, in the cross-examination, of PW-4, also cannot be capitalized by the counsel for the respondent, given, even if, on, either side, of, the site of occurrence, there visibly existing, a, steep gradient, yet with this Court, meteing credence to Ext. PW-9/C, and, with the aforesaid site plan, vividly depicting, of, the vehicle driven by the accused, occurring, on, the inappropriate site of the road hence, (ii) thereupon with his being negligent, hence the factum, of existence of, a, steep gradient on either side, of, the site, of, occurrence, is, reiteratedly unworthy. Furthermore, the learned counsel for the accused has also contended with vigor, that with accused, and, his son alone suffering injuries, as borne, in the apt MLC(s), thereupon it being per-se inferable, qua, the driver of the offending vehicle, being not negligent in driving it. However, the, suffering of injuries by the accused, and, by his son, is likewise also rendered insignificant, and, also with no damage being caused to the vehicle driven by the complainant, is also insignificant, given, with the vehicle driven by the complainant, being bigger in size, than the vehicle driven by the accused, thereupon with there being every likelihood, of, upon their inter-se collision, rather damage hence being singularly caused, to, the vehicle driven by the accused.

12. The appreciation of the evidence as done by the learned trial Court, suffers, from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded that the findings of the learned trial Court hence merit interference. Accordingly, the respondent/ accused stands convicted for the offence(s) punishable under Sections 279, 337 and 338 of the Indian Penal Code. Let the accused/convict be produced on 10.7.2018 before this Court for his being heard on the quantum of sentence. Records of the learned trial Court be sent back forthwith.

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

Health Department ....Petitioner.
Versus
Dr. Shobha Thakur. ....Respondent.

Cr.MP(M) No. 458 of 2018
Decided on : 26.6.2018

Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996- Rule 12- Expl. (3)– 'Seize' and 'Seizure' – Procedure of – Held – It is mandatory for authority seizing incriminatory articles to emboss thereon 'seal' impression – It is necessary to make articles identifiable and relatable to accused during trial – Cartons containing alleged incriminatory equipments were merely taped with no identifying seals on them – Findings of trial court acquitting accused for offences under Act upheld. (Paras– 2 and 3)

For the petitioner: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.Gs., for the respondent.

For the respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant application is directed, against, the verdict recorded by the learned Judicial Magistrate, 1st Class, Court No.3, Hamirpur, District Hamirpur, H.P. in Complaint Challan No. 38-1-2015.

2. The State being aggrieved therefrom, has, hence sought the leave of this Court, to, assail it. The relevant hereat provisions, of, Rule 12, of, The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996, are, extracted hereinafter:-

> "**12. Procedure for search and seizure**.- (1) The Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times and Genetic counseling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses for the purposes of search and examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and size the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.
>
> *Explanation.*- In these Rules-
>
> (1) 'Genetic Laboratory/Genetic Clinic/Genetic Counselling Centre' would include an Ultrasound Centre/Imaging Centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used;
>
> (2) 'material object' would include records, machines and equipments; and
>
> (3) 'seize' and 'seizure' would include 'seal and 'sealing' respectively……."

In, sub-section (3) whereof, a, specific mandate, is, cast upon the seizing authorities, to upon, the seized incriminatory materials, hence emboss thereon, seal impression(s). Sub-section (3) of Rule 12, defines, "seize" to include seal and sealing respectively, thereupon it was imperative, for the seizing officer, to, upon the seized incriminatory materials, hence emboss seal impression(s), (i) also, it was incumbent, upon, the prosecution to hence produce, before the learned trial Court, the seized items, lodged, in carton boxes, , with embossing(s) thereon, of, seal impression(s). The aforesaid manner, of, production, of, the seized property, with existence, of, seal impression thereon, was, imperative (a) for facilitating the learned trial Magistrate concerned, to, dispel arousal, of, inferences, qua hence stratagem(s) of, invention, of, concoction(s), being rather deployed by the seizing officer, in his seizing, the, carton boxes (b) and also was imperative, for, enabling the learned trial Magistrate, for invincibly, concluding, qua the seized incriminatory materials, as carried in carton boxes, being related to seizure thereof, as, made through memos. However, as apparent, on, a reading of paragraphs 66, and, 67 of the impugned verdict, the seized incriminatory materials, though, were lodged, in, carton boxes, yet, theirs remaining unembossed, with, seal impression(s), rather, with the carton boxes being sealed, with a tape, thereupon the aforesaid manner, of, sealing the seized carton boxes, carrying therewithin, the seized materials, hence is in complete blatant infringement, of, the prescribed statutory manner, qua their sealing. In aftermath, the seizure(s), are, both fragile and unworthy, of, any credence.

3. For the reasons which have been recorded hereinabove, this Court holds that the

learned trial Court, has appraised, the entire evidence on record, in a wholesome and harmonious manner, apart therefrom, the analysis of the material on record by the learned trial Court, does not, suffer from any perversity or absurdity of mis-appreciation and non-appreciation of evidence on record. Consequently, the leave to appeal is declined. The impugned verdict is affirmed and maintained.

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

Lalit Kishore ...Appellant

Versus

State of H.P. & others ...Respondent

RFA No. 464 of 2012 & Cross Objections No. 897 of 2012 a/w RFA No. 465 of 2012 & Cross Objections No. 898 of 2012

Judgment reserved on : 11.06.2018.

Date of decision: 26.06.2018.

Land Acquisition Act, 1894- Sections 4, 18 and 23- Market value of land – Land was acquired by Government for raising housing colony – On reference, Reference Court assessed market value of land at Rs.1,800/- per Sq. mts. irrespective of classification - Appeal by claimants against award of reference Court for enhancement on ground that potentiality of land was not considered - Cross-objections by beneficiaries/department on ground that deductions towards development charges were not made by District Judge in his award - High Court found that i) acquired land was sloppy (ii) below National Highway and totally undeveloped (iii) drain crossing through acquired land also required channelization before constructing building blocks (iv) Road to be constructed by raising retaining walls right up to National Highway (v) only 30% of acquired land is to be actually used for construction (vi) Huge amount required for development activities etc. – Held – Acquired land is certainly undeveloped and as it has been acquired for construction of buildings, therefore, 1/3rd of assessed value should normally be deducted towards development charges – After taking into consideration annual average value of revenue estate, sale deed executed with respect to adjoining land and making 1/3rd deduction towards development charges, High Court assessed market value of acquired land at Rs. 1,717/- per square metre – Reference court had awarded compensation at Rs. 1,800/- per square metre irrespective of classification – Award of Reference Court upheld – Appeals as well as cross-objections dismissed.

(Paras- 32 and 37)

Cases referred:

Chimanlal Hargovinddas v. Land Acquisition Officer, (1998) 3 SCC 751

Kolkata Metropolitan Development Authority vs. Gobinda Chandra Makal & another, (2011) 9 SCC 207)

Viluben Jhalejar Contractor vs. State of Gujarat, 2005 (4) SCC 789

Trishala Jain & Anr. vs. State of Uttranchal & Anr., 2011 (6) SCC 47

Wave Industries Pvt. Ltd. vs. Attar Singh & Ors. 2011 (14) SCC 745

Indraj Singh (dead) through Lrs. vs. State of Haryana, 2013(14) SCC 491

Union of India vs. Raj Kumar Baghal Singh & Ors. 2014 (10) SCC 422

Bhupal Singh & ors. vs. State of Haryana, 2015 (5 SCC 801

Ashrafi & ors. vs. State of Haryana & ors., 2013 (5) SCC 527

Valliyammal & anr. vs. Special Tahsildar (Land Acquisition) & Ors. 2011 (8) SCC 91

Maya Devi vs. State of Haryana (2018) 2 SCC 474

For the Appellant(s)	Mr. Y.P. Sood, Advocate
For the Respondents	Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. A.Gs. with Mr. Bhupinder Thakur, Dy. A. G. for respondents No. 1 and 3. Mr. Bhupender Gupta, Sr. Advocate, with Mr. Ajeet Pal Singh Jaswal, Advocate, for respondent No. 2/Cross Objector.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

Since common question of law and fact arises for consideration in these appeals and cross-objections, they were taken up together for consideration and have been disposed of by way of a common judgment.

2. The appellants are the erstwhile owners of the land whose land have been compulsorily acquired whereas the respondents are the beneficiaries of the acquisition.

3. Briefly stated facts of the case are that after issuing the requisite notification as envisaged under the Land Acquisition Act (for short the 'Act'), the Collector assessed the market value of the land vide Award No. 2 of 2007, dated 30.03.2007 at the rate of Rs. 1453.57 paise per square metre i.e. Rs. 10,93,084/- per bigha.

4. Aggrieved by the inadequacy of the award the petitioners preferred the Reference Petitions which were allowed and they were held entitled to compensation at the rate of Rs.1800/- per square metre irrespective of the classification of the land.

5. However, still aggrieved by the inadequate compensation as awarded by the learned Reference Court, the claimants have filed the instant appeals mainly on the ground that the learned Reference Court has erred in not taking into consideration the fact that the acquired land had great potential for development into a residential colony as the area was abutting the National Highway and adjoining the acquired land, the land had already been developed by the government and, therefore, its market value are much more than Rs.1800/- per sq. metre.

6. On the other hand, the beneficiaries of the acquisition have preferred cross-objections assailing therein the award on the ground that since the land under acquisition was under-developed land, out of which 50% of the land had actually been utilised for construction whereas rest of 50% had been utilised for carrying out the development works like provision of roads, sewers, drains and green space etc., therefore, this amount of 50% was required to be deducted out of the compensation amount towards development charges.

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

7. At the outset, it would be necessary to set out certain broad parameters and principles that are required to be borne in mind while determining the compensation under the Land Acquisition Act.

8. The first and foremost is the price paid in a bona fide transaction of sale by a willing seller to a willing buyer subject to transaction being for the land adjacent to the land, proximity to the date and possessing similar advantages. Of course, the other well-known methods of valuation like opinion of experts and yield method. In absence of any evidence of a similar transaction, it is permissible to take into account the transaction of nearest land around the date of notification under section 4 of the Act by making suitable alliance. There can be no fixed criteria as what would be the suitable addition or subtraction from the value of the land relied upon.

9. In ***Chimanlal Hargovinddas v. Land Acquisition Officer, (1998) 3 SCC 751***, the Hon'ble Supreme Court summed up the principle as follows:

[4] The following factors must be etched on the mental screen :

(1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition Officer in his Award unless the same material is produced and proved before the Court.

(2) So also the Award of the Land Acquisition Officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the court hearing the Reference. It is merely an offer made by the Land Acquisition Officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and proved before it. It is not the function of the court to sit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate Court.

(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.

(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under S. 4 of the Land Acquisition Act (dates of Notifications under Ss. 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under S. 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

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

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

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

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

(i) proximity from time angle

(ii) proximity from situation angle.

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

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

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

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

Plus factors Minus factors

1. Smallness of size. 1. largeness of area.

2. Proximity to a road. 2. situation in the interior at a distance from the road. 3. frontage on a road. 3. narrow strip of land with very small frontage compared to depth.

4. nearness to developed area. 4. lower level requiring the depressed portion to be filled up.

5. regular shape. 5. remoteness from developed locality.

6. level vis-a-vis land under acquisition. 6. some special disadvantageous factor which would deter a purchaser.

7. special value for an owner of an adjoining property to whom it may have some very special advantage.

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say 10000 eq. yds. or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction byway of an allowance at an appropriate rate ranging approx. between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards.

(16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.

(17) These are general guidelines to be applied with understanding informed with common sense.

10. Bearing in mind the aforesaid exposition of law, this Court shall not determine the merits of these appeals.

11. The record reveals that sale deed dated 10.11.2006 Ext.PW2/A was executed by Smt. Chander Lata through her GPA in favour of Smt. Dropti Devi, whereby the vendor had sold the land measuring 564 square metres, situated at Mauja Chhota Shimla, for a sale consideration of Rs.20,00,000/- i.e. @ Rs. 3546/- per square metre.

12. Ext. PW2/B is the sale deed dated 30.05.2000, executed by Shiv Kumar Sood in favour of Hindustan Petroleum Corporation Ltd., whereby the vendor had sold the land measuring 764-63 square metres, situated at mauja Chhota Shimla, for a sale consideration of Rs. 29,82,057/- i.e. @ Rs. 3900/- per square metre.

13. Ext.RW1/A is the sale deed dated 13.07.2005 executed by one Shri Rajeev in favour of Smt. Sarita, whereby the vendor had sold the land measuring 841-87 square metres situated at Mauja Chhota Shimla, for a consideration of Rs. 5,50,000/- i.e. @ Rs. 653.30 per square metre.

14. Sale deed dated 05.06.2004, Ext. RW1/B executed by Shri Lalit Kishore in favour of Rakesh Verma, whereby the vendor had sold the land measuring 598.89 square metre, situated at Mauja Chhota Shimla, for a sale consideration of Rs. 7,00,000/- i.e. @ Rs.1168.82 per square metre.

15. The sale deed dated 2.11.2004 Ext. RW1/C executed by Shri Moti Ram through his power of attorney, whereby the vendor had sold the land measuring 52.66 square metres situated at Mauja Chhota Shimla, for a sale consideration of Rs. 45,000/- i.e. Rs. 854.53 paise.

16. Admittedly, the land acquired is in Muhal/Mauja, Chhota Shimla, therefore, the aforesaid sale exemplars shall have to be kept in mind while determining the market value of the land. However, only those of the sale exemplars can be taken into consideration that were at the close proximity of time with the notification under Section 4 of the Act, as it is more than settled law that compensation to be awarded has to be determined by the learned Reference Court based upon the market value under Section 4(1) of the Act. (***Ref: Kolkata Metropolitan Development Authority vs. Gobinda Chandra Makal & another, (2011) 9 SCC 207***).

17. Adverting to the evidence led by the claimants, PW1 Manmohan Singh, Patwari, Patwar Circle Chhota Shimla proved on record the one year average market price for the period 01.07.2004 to 31.10.2005 Ext.PW1/A, according to which the value of the cultivated land was assessed at 3103.48 paise per square metre. The testimony of this witness went unrebutted as the cross-objector despite opportunity did not choose to cross-examine him.

18. PW2 Gauri Shankar, Registration Clerk, Office of Sub Registrar (Urban), Shimla, appeared and proved on record the sale deed Ext.PW2/A, even this witness was not cross-examined by the cross-objector.

19. PW3 Lalit Kumar is one of the claimant and stated that the value of the acquired land was more than Rs. 3000/- per square metre as it abuts the National Highway and even otherwise it was situated in fast developing area and there was petrol pump, BCS School, Kasumpati Commercial Complex, office of various firms, banks and market near the acquired land. He further stated that in the close proximity of the acquired land, the cross-objector had already constructed residential colony. In cross-examination, he denied that the acquired land was sloppy but feigned ignorance about the acquired land being connected through road. He denied the suggestion that adjoining lands were having modern amenities.

20. PW4 Lalit Kishore is one of the other claimant, tendered in evidence his affidavit Ext.PW4/A, wherein the contents of the Reference Petition were reiterated. In cross-examination, this witness denied the suggestion that the acquired land was a under developed land but then he candidly stated that he had not seen his land for a considerable period.

21. PW5 Arvind Kumar is the third claimant filed his affidavit Ext.PW5/A in his evidence. He reiterated therein the contents of the Reference Petition. On being cross-examined, this witness admitted that no construction had been carried out over the acquired land. He further admitted that the same was totally undeveloped. He admitted that the acquired land was sloppy and was below the National Highway.

22. As against this, the respondents have examined as many as five witnesses in support of their claim.

23. RW1 Gulab Singh, Registration Clerk in the office of Tehsildar, Urban, Shimla proved on record sale deed Ext. RW1/A, dated 13.07.2005, executed by Rajeev in favour of Sarita He further proved on record the sale deed Ext.RW1/B executed by one of the claimant Lalit Kishore in favour of Rakesh Verma and further proved the sale deed Ext. RW1/C, dated 02.11.2004 executed by Shiv Ram in favour of Bimla Devi, which according to him were true and correct as per the original brought by him. The claimants did not choose to cross-examine this witness even though afforded opportunity for the same.

24. Rakesh Verma appeared as RW2 who was the buyer of the property as reflected in sale deed Ext.RW1/B. According to him, he purchased 598.89 square metres of land from Lalit Kishore (one of the claimant) for a sale consideration of Rs.7,00,000/- on 05.06.2004. This land was situated at a distance of about 20-30 feet from the boundary of petrol pump of Hindustan Petroleum, however, he feigned ignorance regarding the location of the acquired land but stated that his land was at a distance of 15-20 feet down from National Highway which was known as Shimla Bye-pass. In cross-examination, this witness clearly admitted that the land purchased by him was having commercial potentiality and was located in the developed area where all the facilities of water, electricity, road etc. are available. He further admitted that the area of new Shimla, BCS, Chhota Shimla, colonies of Housing Board and Kasumpati commercial complex adjoins to this land. He further stated that the commercial complex of Kasumpati was at a distance of 50 metres from the acquired land.

25. RW3 Bimla Sharma stated that she had purchased 52.66 sq. metres of land from Shiv Ram for a sale consideration of Rs.45,000/- and proved on record Ext. RW1/C.

26. RW4 Ashok Kumar Gupta, who was posted as Senior Architect, HIMUDA, stated that he had prepared the lay out plan Ext. RW4/B and the cross section of the proposed buildings Ext.RW4/C. He further stated that the land was sloppy but was abutted to the National Highway. For the construction purposes 22.05 metres from the centre of National Highway had to be left out on which no construction work could be carried out but the space could be utilised for construction of approach road. He further stated that taking into consideration the terrain of the land only 31% against the permissible limit of 50% could be utilised for the purpose of raising construction. In cross-examination, this witness denied that the acquired land was near BCS School and 300 metres from new Shimla Chowk. He further stated that the acquired land abutted the National Highway and further stated that the cross-objector may have acquired the land because it was most suitable for residential colony. He further admitted that before acquiring the land the department would take into consideration the various factors like suitability, advantageous, commercial viability. He further admitted that the acquired area was already connected with other kind of modern facilities including electricity, offices, hospitals, water supply etc.

27. As regards the testimony of RW5 Lalit Kumar, he was posted as Sub Divisional Officer with the petitioner and stated that he had dealt with and processed the files regarding acquisition of the land in question. He stated that there was one nala which was required to be channelised for the protection of building blocks and likewise 200 metres wide road was required to be constructed in the acquired land by constructing retaining wall for achieving six metres width. However, this road has to be constructed by leaving land from the acquired land up to the width of the National Highway measuring 22 ½ metres from the central line of the National Highway. He also stated that the acquired land was sloppy but denied that the same abuts the National Highway. According to him, the estimated cost of the developmental activities was worked out at Rs.4,73,71,403 as prepared by the H.P. Public Works Department. The acquired land was about 1 km. from BCS and 1 Km. from SDA Complex. The building blocks were to be constructed in 30% of the acquired land whereas in the rest of the land developmental activities required to be carried out. In cross-examination this witness clearly admitted that the cross-objector had acquired the land keeping in view its suitability and advantage of land for residential and commercial purposes. He further stated that even though there was another piece of land near the acquired land, however, the said land was not acquired. He further stated that towards the Eastern side of the acquired land was a petrol pump and towards the Western side the prestigious BCS school. He further admitted that on the Northern side above the National Highway was Knollswood colony. Volunteered to state that the same was at a considerable distance, however, he again admitted that the area above the colony had already been developed by the cross-objector and the locality where the land had now been acquired was having all modern faculties like water, electricity, road, banks, post office, market and government offices though he again volunteered to state that above facilities are not on the acquired land that these are far away from the acquired land. However, again he admitted that on both sides of the

acquired land there was large number of residential houses where people are residing. He further admitted that in BCS, the cross-objector had constructed number of residential colonies and otherwise also large number of private houses had been constructed in that area by the private owners. He further admitted that modern amenities available in BCS including government, private establishments and market.

This in entirety is the oral evidence led by the parties.

28. A close perusal of the evidence would reveal that even though the acquired land abuts the National Highway but the same is situated below it. It also cannot be disputed that a considerable amount was required to be spent by the cross-objector for carrying out the development work.

29. Learned counsel for both the parties have cited number of judgments regarding the percentage of amount which shall have to be spent for such development purposes. Shri Bhupinder Gupta, learned Senior Counsel has placed reliance on the following judgments:

1. Viluben Jhalejar Contractor vs. State of Gujarat, 2005 (4) SCC 789

2. Trishala Jain & Anr. vs. State of Uttranchal & Anr., 2011 (6) SCC 47

3. Wave Industries Pvt. Ltd. vs. Attar Singh & Ors. 2011 (14) SCC 745

4. Indraj Singh (dead) through Lrs. vs. State of Haryana, 2013(14) SCC 491

5. Union of India vs. Raj Kumar Baghal Singh & Ors. 2014 (10) SCC 422

6. Bhupal Singh & ors. vs. State of Haryana, 2015 (5 SCC 801

30. On the other hand Mr. Y.P. Sood, learned Advocate, has referred to the following judgments:

1. Ashrafi & ors. vs. State of Haryana & ors., 2013 (5) SCC 527

2. Valliyammal & anr. vs. Special Tahsildar (Land Acquisition) & Ors. 2011 (8) SCC 91

31. However, I need not refer to the aforesaid judgments as majority of these have been considered by the Hon'ble Supreme Court in its latest decision in case titled as ***Maya Devi vs. State of Haryana (2018) 2 SCC 474***, wherein after taking into consideration the entire law on the subject, the Hon'ble Supreme Court held that 1/3rd deduction should normally be made towards development charges. It shall be apposite to refer to the relevant observations which read thus:

> *[6] So far as the first contention is concerned, the sale deed relied upon by the appellants/claimants dated 27.12.1988 is post notification. Sub-section (1) of Section 23 of the Act provides that the compensation to be awarded shall be determined by the reference court, based upon the market value of the acquired land at the date of thepublication of the notification under Section 4(1). In Kolkata Metropolitan Development Authority v. Gobinda Chandra Makal and Anr., 2011 9 SCC 207, it was held that the relevant date for determining the compensation is the date of publication of thenotification under Section 4(1) of the Act in the Gazette. In para (34), it was held as under:-*
>
> > *"34. One of the principles in regard to determination of the market value under Section 23(1) is that the rise in market value after the publication of the notification under Section 4(1) of the Act should not be taken into account for the purpose of determination of market value. If the deeming definition of "publication of the notification" in the amended Section 4(1) is imported as the meaning of the said words in the first clause of Section 23(1), it will lead to anomalous results. The owners of the lands which are the subject-matter of the notification and neighbouring lands will come to know about the proposed acquisition, on the date of publication in the Gazette or in the newspapers. If the giving of public notice of the substance of the notification is delayed by two or*

three months, there may be several sale transactions in regard to nearby lands in that period, showing a spurt or hike in value in view of the development contemplated on account of the acquisition itself."

Applying the ratio of the above decision, we are of the view that the post notification instances cannot be taken into consideration for determining the compensation of the acquired land.

[7] So far as the contention regarding deduction at the rate of 67.5% for development charges is concerned, the exemplar relied upon by the High Court dated 26.05.1983 was for a small extent of land of 9 marlas which was sold for Rs.25,500/-. The transaction relates to the period which is about 56 months prior to the notification under Section 4 of the Act and the High Court adopted the rate of escalation at 10% and calculated the value at Rs.6,64,887/-. Considering the fact that the acquired land required for development and that the property covered under the exemplar was for a small extent of 9 marlas of land, the High Court applied maximum deduction at 67.5% and calculated the compensation to be paid at Rs.2,19,413/- per acre.

[8] In Haryana State Agricultural Market Board and Anr. v. Krishan Kumar and Ors., 2011 15 SCC 297, this Court has held that "if the value of small developed plots should be the basis, appropriate deductions will have to be made therefrom towards the area to be used for roads, drains, and common facilities like park, open space, etc. Thereafter, further deduction will have to be made towards the cost of development, that is, the cost of leveling the land, cost of laying roads and drains, and the cost of drawing electrical, water and sewer lines."

[9] Observing that the development charges for development of particular plot of land could range from 20% to 75%, in Lal Chand v. Union of India and Another, 2009 15 SCC769, in paras (13), (14) and (20), this Court held as under:

"13. The percentage of 'deduction for development' to be made to arrive at the market value of large tracts of undeveloped agricultural land (with potential for development), with reference to the sale price of small developed plots, varies between 20% to 75% of the price of such developed plots, the percentage depending upon the nature of development of the layout in which the exemplar plots are situated.

14. The 'deduction for development' consists of two components. The first is with reference to the area required to be utilised for developmental works and the second is the cost of the development works. . .....

20. Therefore the deduction for the 'development factor' to be made with reference to the price of a small plot in a developed layout, to arrive at the cost of undeveloped land, will be for more than the deduction with reference to the price of a small plot in an unauthorised private layout or an industrial layout. It is also well known that the development cost incurred by statutory agencies is much higher than the cost incurred by private developers, having regard to higher overheads and expenditure."

The same principle was reiterated in Andhra Pradesh Housing Board v. K.Manohar Reddy and Ors., 2010 12 SCC 707.

[10] In a catena of judgments, this Court has taken the view to apply one-third deduction towards the development charges. After referring to various case laws on the question of deduction for development, in Major General Kapil Mehra and Ors. v. Union of India and Anr., 2015 2 SCC 262, this Court held as under:

"35. Reiterating the rule of one-third deduction towards development, in Sabhia Mohammed Yusuf Abdul Hamid Mulla v. Land Acquisition Officer, 2012 7 SCC 595, this Court in para 19 held as under: (SCC pp. 606-07)

"19. In fixing the market value of the acquired land, which is undeveloped or underdeveloped, the courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired. In Kasturi v. State of Haryana, 2003 1 SCC 354 the Court held: (SCC pp. 359-60, para 7)

"7. It is well settled that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation has to be deducted out of the amount of compensation payable on the acquired land subject to certain variations depending on its nature, location, extent of expenditure involved for development and the area required for road and other civic amenities to develop the land so as to make the plots for residential or commercial purposes. A land may be plain or uneven, the soil of the land may be soft or hard bearing on the foundation for the purpose of making construction; maybe the land is situated in the midst of a developed area all around but that land may have a hillock or may be low-lying or may be having deep ditches. So the amount of expenses that may be incurredin developing the area also varies.....There may be various factual factors which may have to be taken into consideration while applying the cut in payment of compensation towards developmental charges, maybe in some cases it is more than 1/3rd and in some cases less than 1/3rd. It must be remembered that there is difference between a developed area and an area having potential value, which is yet to be developed. The fact that an area is developed or adjacent to a developed area will not ipso facto make every land situated in the area also developed to be valued as a building site orplot, particularly when vast tracts are acquired, as in this case, for development purpose.'

The rule of 1/3rd deduction was reiterated in Tejumal Bhojwani v. State of U.P., 2003 10 SCC 525, V. Hanumantha Reddy v. Land Acquisition Officer, 2003 12 SCC 642, H.P. Housing Board v. Bharat S. Negi, 2004 2 SCC 184 and Kiran Tandon v. Allahabad Development Authority, 2004 10 SCC 745."

36. While determining the market value of the acquired land, normally one- third deduction i.e. 33 1/3% towards development charges is allowed. One- third deduction towards development was allowed in Tehsildar (LA) v. A.Mangala Gowri, 1991 4 SCC 218, Gulzara Singh v. State of Punjab, 1993 4 SCC 245, Santosh Kumari v. State of Haryana, 1996 10 SCC 631, Revenue Divl. Officer and LAO v. Sk. Azam Saheb, 2009 4 SCC 395, A.P. Housing Board v. K. Manohar Reddy, 2010 12 SCC 707, Ashrafi v. State of Haryana, 2013 5 SCC 527 and Kashmir Singh v. State of Haryana, 2014 2 SCC 165.

37. Depending on the nature and location of the acquired land, extent of land required to be set apart and expenses involved for development, 30% to 50% deduction towards development was allowed in Haryana State Agricultural Market Board v. Krishan Kumar, 2011 15 SCC 297, Director, Land Acquisition v. Malla Atchinaidu, 2006 12 SCC 87, Mummidi Apparao v. Nagarjuna Fertilizers & Chemicals Ltd., 2009 4 SCC 402 and Lal Chand v. Union of India, 2009 15 SCC 769.

38. In few other cases, deduction of more than 50% was upheld. In the facts and circumstances of the case in Basavva v. Land Acquisition Officer, 1996 9 SCC 640, this Court upheld the deduction of 65%. In Kanta Devi v. State of Haryana, 2008 15 SCC 201, deduction of 60% towards development charges was held to be legal. This Court in Subh Ram v. State of Haryana, 2010 1 SCC 444, held that deduction of 67% amount was not improper. Similarly, in Chandrashekar v. Land Acquisition Officer, 2012 1 SCC 390, deduction of 70% was upheld."

32. In view of the aforesaid exposition of law, I am of the considered view that in matters of undeveloped or under-developed plots, the deduction in this case should be 1/3rd towards the development cost, therefore, in such circumstances further question arises for consideration is that as to what, in fact, is the market value of the land.

33. As per the testimony of PW1, the market value of the acquired land is Rs. 3103.48 paise on the basis of one year average market value for the period 01.07.2004 to 31.10.2005 Ext.PW1/A.

34. It is also not in dispute that even though all the sale exemplars pertain to the same Mauja/Muhal i.e. Chhota Shimla, however, it is only the land involved in sale deed Ext. PW2/B that is, in fact, abutting the acquired land.

35. Even though Shri Bhupender Gupta, learned Senior Counsel, strenuously argued that this land has to be kept out of consideration for determining the market value as the same was purchased for commercial purpose i.e. for setting up of petrol pump. However, I find no merit in this submission for the simple reason that one of the principles for determining the compensation is the price on the basis of what the willing buyer will pay to willing seller.

36. Now in case the mean of Ex.PW1/A i.e. the average market price of land Mauja Chhota Shimla and Ext.PW2/B is taken into consideration, the average price of the land would work out to be Rs.2724/- and in case 1/3rd deductions are made out towards the development charges, even then the claimants would still be entitled to a compensation of Rs.1717/- per square metre. In this view of the matter, the award of the Reference Court whereby the claimants have been held entitled to Rs. 1800/- per square metre irrespective of the classification of land appears to be just and reasonable. Therefore, I find no merit in these appeals and accordingly the same are dismissed.

37. As regards the cross-objections, it would be noticed that the aforesaid amount of Rs. 1717/- has been worked out by this Court after making a deduction of 1/3rd from the compensation amount out of the market value of the land and taking into consideration that there is always an element of guess work in awarding compensation and the same cannot be by way of a mathematical precision, the amount of Rs.1800/- per square metre as awarded by the learned Reference Court cannot in any manner be said to be excessive.

38. In this view of the matter, the cross-objections are also dismissed. Consequently, all these appeals as also cross-objections are ordered to be dismissed, leaving the parties to bear their own costs. Registry to place the copy of the judgment in each of the appeal.

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

Mohar Singh .....Appellant.

Versus

State of H.P. .....Respondent

Cr. A. No. 386 of 2017
Reserved on: 27.03.2018
Decided on: 26.06.2018

Code of Criminal Procedure, 1973- Section 374- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Section 20- Appeal against conviction – Special Judge convicted and sentenced accused for offence under Section 20 of Act on proof that he was found possessing 1.700 kg. of charas in a carry bag concealed under a jacket worn by him near Samiti Guest House, Anni, District Kullu - Appeal against – Accused contending before High Court that

investigation was not fair as independent witnesses were not deliberately associated in it, and possibility that case property was tampered with could not be ruled out and official witnesses should not be relied upon - Held – Public witnesses are not available all times and at all places – Non-joining of independent witnesses is not fatal and conviction can be based on testimony of official witnesses, if found credible – Recovery was effected from accused at dead hours of night in winter month of November – Non- availability of public witnesses in a small bazaar like Anni at that time is understandable – Statements of official witnesses found reliable - Possibility of planting of huge quantity of contraband is extremely doubtful - Contradictions regarding 'shape' of recovered contraband, are minor – Conviction upheld and appeal dismissed.

(Paras- 13, 16, 19 and 20)

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 57- Directory in nature- Held – Provisions of Section 57 are directory in nature - Therefore, fact that special report sent to Authorized officer does not bear serial number of dispatch register is not of much significance, and no prejudice is shown to have been caused to accused for this reason. (Para-24)

Cases referred:

Makhan Singh V. State of Haryana, (2015) 12 SCC 247

Girija Prasad vs. State of M.P., (2007) 7 SCC 625

For the appellant: Mr. Y.P.S. Dhaulta, Advocate.

For the respondent: Mr. Narinder Guleria, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Appellant (hereinafter referred to as the 'accused') herein is a convict. He has been tried for the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act' in short) with the allegations that when on suspicion his search was conducted on 19.11.2015 around 11.40 p.m near parking of Samiti Guest House, Anni, District Kullu, charas weighing 1.700 Kg. was recovered from his exclusive and conscious possession. On finding the charge framed against him proved in view of the evidence produced during the course of trial, he has been convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay Rs. 1,00,000/- as fine vide impugned judgment dated 19.06.2017 passed by learned Special Judge, Kinnaur at Rampur Bushehar in Sessions Trial No. 4-R/3 of 2014/16.

2. On 19.11.2015, PW-6 Inspector/SHO Santosh Kumar accompanied by other police officials namely, HHC Chande Ram, Constable Vipin Kumar and HC Mohan Joshi was on routine patrol in Anni bazar. Rapat Ext. P-Y was entered in daily diary in this regard. Around 10.40 p.m when police party reached near Samiti Guest House parking, Anni, accused was spotted coming from Naldehra side towards Anni. On noticing the police party, he turned behind and tried to flee away towards Naldehra. On suspicion, he was apprehended and when asked to disclose his antecedents, he disclosed his name as Mohar Singh. It appears to the I.O. PW-6 that accused had concealed something in left side of blue coloured jacket of 'Puma' brand, he had worn at that time. On such suspicion having arisen, PW-6 the IO deputed Constable Vipin Kumar and HC Mohan Joshi in search of independent witnesses. They came back alone within 15-20 minutes, as no-one was available nearby being dead hours of the night. PW-6 had thus associated HHC Chande Ram and PW-4 Mohan Joshi to witness the search and seizure. It is in their presence, the accused was apprised about his legal right of being searched before a Magistrate or a Gazetted Officer vide memo Ext. PW-4/A. He, however, opted for his search by the police party present there. The I.O. and other members of the police party first gave their personal search to the accused vide memo Ext. PW-4/B, however, nothing incriminating could be recovered from them. It is thereafter the I.O. PW-6 has conducted the search of the accused and

recovered a white coloured carry bag (Ext. P-A1) allegedly concealed beneath the jacket in left side of his body, on which 'V2 KART' was written. On opening the knot of the bag, black coloured substance Ext. P-A2 in the shape of ball was found kept therein. The I.O. PW-6 on the basis of his experience found the recovered substance to be charas. The same was weighed and found 1.700 Kg. The contraband along with carry bag was put into a parcel of cloth and sealed with six seals of impression 'T'. The specimen of seal impression 'T' was obtained on a piece of cloth, which is Ext. PW-4/D. The relevant columns of NCB forms Ext. PW-5/C were filled in and the impression of seal 'T' also drawn thereon. The seal after its use was handed over to PW-4 HC Mohan Joshi. The recovered charas along with NCB forms was taken into possession vide memo Ext. PW-4/B. It is thereafter the rukka Ext. PW1/A reduced into writing and sent to police station, Anni through PW-4 HC Mohan Joshi. On the basis of rukka, FIR Ext. PW-1/B came to be registered in the police station. The I.O. also prepared the spot map Ext. PW-6/A and clicked the photographs Ext. PW-6/B-1 to Ext. PW-6/B-3. The accused was arrested and grounds of arrest disclosed to him vide memo Ext. PW-6/B. The statements of witnesses were recorded as per their version. PW-4 who had gone to police station along with rukka also returned to the spot in the meanwhile and handed over the case file to the I.O PW-6.

3. On completion of investigation on the spot, PW-6 handed over the case property along with seal and NCB forms to PW-5 Bal Krishan, the then MHC Police Station, Anni. PW-5 has filled in the relevant columns of NCB forms Ext. PW-5/C and the case property was handed over to PW-2 HHC Santosh Kumar with a direction to deposit the same in the State Forensic Science Laboratory, Junga vide RC No. 34/15. PW-5 accordingly deposited the case property in safe condition in the laboratory and returned the receipt over the copy of RC Ext. PW-5/B to malkhana Incharge in the police station.

4. On 22.11.2015, PW-6 has prepared the special report Ext. PW-3/A and the same was handed over to SDPO, Anni. The report Ext. P-X was received from the laboratory in police station.

5. On completion of investigation, PW-6 has prepared the challan and presented in the Court of learned Special Judge, Kinnaur Sessions Division, Rampur Bushehar with a prayer to try, convict and sentence the accused for the commission of offence punishable under Section 20 of the NDPS Act.

6. Learned Special Judge on consideration of challan and documents annexed thereto as well as hearing learned Public Prosecutor and learned defence counsel and finding *prima-facie* case having been made out against the accused has framed the charge under Section 20 of the NDPS Act against the accused. He, however, pleaded not guilty and claimed trial.

7. The prosecution in order to sustain the charge against the accused has examined six witnesses in all. The material prosecution witnesses are PW-4 ASI Mohan Joshi and I.O. PW-6 Inspector Santosh Kumar. The remaining prosecution witnesses are formal as PW-1 Mohan Singh had registered the FIR, whereas, PW-2 Santosh Kumar had taken the case property to the laboratory. PW-3 LHC Bhuvneshwari, the then Reader to SDPO, Anni has proved the special report Ext. PW-3/A and the entries in the dispatch register Ext. PW-3/B. PW-5 HC Bal Krishan was posted as MHC police station, Anni at the relevant time. He has proved the prosecution case qua deposit of case property along with sample seal and NCB forms in the malkhana register by PW-6. The entries Ext. PW-5/A qua it was made in the malkhana register. He has also proved the case property sent to laboratory vide RC No. 134/15 and the entries in column No. 12 of the NCB form Ext. PW5/C, he made in his hand. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C has denied the entire prosecution case being incorrect and in his defence pleaded that he has been implicated in this case falsely on account of his enemity with one Shadi Lal. He has also examined Davinder Verma, Nodal Officer, Bharti Air Tel Kasumpati, Shimla, who, however, could not produce the summoned record being already destroyed. DW-1 Keshav Ram was working as Chowkidar in the office of B.D.O. Anni, who has been examined to show that being on night duty, he was present in the office situated at a distance of 15-20 feet therefrom.

8. Learned trial Court on appreciation of the oral as well as documentary evidence available on record has arrived at a conclusion that the allegations against the accused stand proved beyond all reasonable doubt, hence convicted him. He was also sentenced as pointed out at the outset.

9. The legality and validity of the impugned judgment has been questioned on the grounds *inter-alia* that learned trial Court has gravely erred while recording the findings of conviction against the accused in the absence of independent witnesses. The official witnesses examined by the prosecution were neither dependable nor reliable and rather interested in the success of the prosecution case being police officials. Their testimony otherwise is also highly contradictory and inconsistent. The non-joining of independent witnesses, that too, when the place of recovery is Anni bazar, a thickly populated area has rendered the prosecution story highly doubtful. The testimony of DW-1, Chowkidar in the office of B.D.O. Anni has erroneously been discarded. The factum of one Shadi Lal was inimical to the accused and it is at his instance, the case planted on him has also erroneously been ignored. Therefore, the impugned judgment which allegedly has not been passed on proper appreciation of the evidence is stated to be not legally sustainable, hence sought to be quashed and set aside.

10. Mr. Y.P.S. Dhaulta, learned counsel representing the appellant-convict while drawing the attention of this Court to the evidence available on record and also that the I.O. has not joined the independent witnesses intentionally and deliberately contended that the prosecution has miserably failed to prove its case against the accused beyond all reasonable doubt. The delay as occurred in sending the case property to Forensic Science Laboratory has allegedly vitiated the proceedings in the trial. The charas as per prosecution story was in the shape of balls, whereas, according to PW-6 in the shape of sticks. The possibility of tampering of the case property, therefore, according to learned counsel, cannot be ruled-out.

11. On the other hand, Mr. Narinder Guleria, learned Additional Advocate General while repelling the arguments addressed on behalf of the appellant-convict has pointed out from the statements of the material prosecution witnesses PW-4 and PW-6 that their version is consistent and worthy of credence. Merely that they are official witnesses, their testimony, which otherwise is consistent and without any contradiction has rightly been relied upon by learned trial Court. Therefore, the impugned judgment, which according to learned Additional Advocate General, is well reasoned calls for no interference in this appeal.

12. Considering the rival submissions made on both sides, following points arise for determination in the present appeal:

i) Is, the present a case where irrespective of the place of search and seizure, being Anni Bazar comprising various residential houses/government offices, the independent witnesses were not associated by the IO deliberately and intentionally.

ii) Is, the evidence as has come on record by way of testimony of official witnesses i.e. PW-4 ASI Mohan Joshi and PW-6 Insp. Santosh Kumar not worth credence.

iii) Whether the inconsistencies, contradictions and other procedural irregularities in the prosecution evidence render the prosecution story qua recovery of the contraband, allegedly charas, from the conscious and exclusive possession of the accused, doubtful.

Points No. 1 & 2.

13. It is well settled at this stage that joining the independent persons to witness the search and seizure is in the interest of fair trial, however, one should not lose sight of the fact that independent persons are not available at all places and every time for being associated as witnesses by the investigating agency and that the testimony of official witnesses, if on close scrutiny inspires confidence, should be relied upon to bring guilt home to the accused. It is held so by a Division Bench of this Court in ***Criminal Appeal No. 165 of 2011 titled State of H.P.***

vs. Balkrishan, decided on 27th February, 2017, while placing reliance on the judgment of the Apex Court in ***Makhan Singh V. State of Haryana***, (2015) 12 SCC 247. The relevant extract of the same reads as follows:

> ".....In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places and at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid of 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....."

14. The Apex Court has also held in ***Girija Prasad vs. State of M.P., (2007) 7 SCC 625*** that the testimony of official witnesses is as much good as that of independent person, however, close scrutiny of such statement is required and the same needs examination with all circumspection and caution.

15. Now, if coming to the evidence available on record, no doubt the parking of Samiti Guest House, Anni is situated in the main market. There cannot also be any dispute qua the locality is thickly populated. No one has been associated as independent witness by the police in this case. The question, however, arises as to whether any person was available in the market for being associated as independent witness at the relevant time and that the I.O. did not associate such person to witness the search and seizure deliberately and intentionally. The answer to this poser in all fairness and in the ends of justice would be in negative for the reason that Anni is a small town, of course, headquarter of a Sub Division. This town is situated in the interior of District Kullu and the terrain is hilly.

16. Now, if coming to the time of recovery which stands proved from the rapat rojnamcha Ext. PW-5/A, it was dead hours being 10:40 PM and it was month of November. Usually, in November, there remains chill in that area, therefore, it cannot be believed by any stretch of imagination that the local residents were available for being associated as witnesses, however, I.O. failed to do so intentionally and deliberately. On the other hand, PW-4 ASI Mohan Joshi has categorically stated that he along with Const. Vipan Kumar was deputed to search out someone in the bazaar. They, however, returned alone and apprized the I.O. PW-6 SHO Santosh Kumar that no one was available in the market and the other people were sleeping at that time. In view of the time i.e. 10:40 PM and month of November, i.e. winter season, there is no reason to disbelieve the testimony of PW-4 ASI Mohan Joshi that despite efforts made, no one could be traced out in the bazaar and rather people were sleeping at that time. Merely that the area is thickly populated, is alone not sufficient to arrive at a conclusion that local residents were available for being associated as independent witnesses, however, the I.O. failed to do so intentionally and deliberately.

17. The photographs Ext. DY pressed into service on behalf of the accused, the same has been taken during day time and as such does not depict actual and factual position of night time. Learned trial Court has, therefore, rightly declined to place reliance thereon. DW-1 Keshav Ram Chowkidar in the office of BDO, Anni though has stated that being on night duty, he was available in the Samiti Guest House, however, he has nowhere stated that while the search of the accused was being conducted by the police, he was present on the spot and the police did not associate him deliberately and intentionally. Otherwise also, the availability of someone inside the Samiti Guest House makes no difference because being dead hours, the police officials deputed to trace out the independent witnesses have rightly chosen not to knock the door of any house, may be the Guest house.

18. The present is a case of chance recovery. Irrespective of it, the IO had made efforts to join independent witnesses. It was not expected either from him or the police officials accompanying him to have knocked the doors of the houses during night hours to associate the

independent witnesses. Therefore, he having not left with any alternative has rightly associated PW-4 ASI Mohan Joshi and HHC Chande Ram as witnesses to witness the search and seizure.

19. Now, if coming to the controversy that the evidence as has come on record by way of testimony of PW-4 ASI Mohan Joshi and PW-6 Inspector Santosh Kumar is worthy of credence or not, it would not be improper to conclude that they both have supported the manner in which the search and seizure has taken place on the spot. Their statements find corroboration from seizure memo Ext. PW-4/B and the rukka Ext. PW-1/A. They were subjected to lengthy cross-examination on behalf of the accused but nothing material lending support to the defence could be elicited therefrom.

20. The only contradiction that as per the testimony of PW-4 ASI Mohan Joshi the recovered charas was in the shape of balls and sticks whereas as per that of PW-6 Insp. Santosh Kumar, in the shape of balls is not of such a nature to render the prosecution story doubtful for the reason that as per the prosecution case the recovered charas was in the shape of balls and both witnesses have stated so while in the witness box. PW-6 Insp. Santosh Kumar has added word "sticks" also while in the witness-box, does not render search and seizure doubtful. No other and further contradiction was pointed out during the course of arguments. On the other hand, a close scrutiny of the statements of PW-4 ASI Mohan Joshi and PW-6 Insp. Santosh Kumar lead to the only conclusion that the same are cogent and trustworthy. Minor contradiction does not go to the roots of the prosecution case. The present, as such, is a case where the ratio of the judgment of the Apex Court in Makhan Singh's case and Girija Prashad case (supra) is squarely applicable and as such the testimony of the official witnesses which in the opinion of this Court is consistent and not contrary in nature has rightly been relied upon by learned trial Court while holding the accused guilty. It cannot also be said that the IO PW-6 Insp. Santosh Kumar had avoided to associate independent persons as witnesses intentionally and deliberately to implicate the accused in the case in hand falsely.

21. On the other hand, the present is a case of recovery of huge quantity of charas i.e. 1.700 kgs, it cannot be believed by any stretch of imagination that the same has been planted by the police to implicate the accused. The accused has failed to explain as to what he was doing at Anni bazaar during odd hours, had he not been carrying charas with him.

Point No. 3.

22. As pointed out in para supra, the inconsistencies and contradictions in the prosecution evidence are not of such a nature to render the prosecution story doubtful. Now, if coming to the procedural irregularities and other inconsistencies, no doubt seal used by the IO PW-6 Insp. Santosh Kumar was handed over to ASI Mohan Joshi, one of the members of raiding party. Said Mohan Joshi has not been examined and as such, the seal could not be produced. However, PW-6 Insp. Santosh Kumar has not been examined to show as to what prejudice has been caused to the accused due to non-production of the seal. It is held by this Court in Criminal appeal No. 305/2014 titled Sohan Lal Vs. State of H.P. decided on 02.11.2016 that failure on the part of the defence to show any prejudice caused to the accused on failure to produce the seal does not falsify prosecution story that too when the recovery of the contraband stood proved with the help of other evidence cogent and reliable.

23. Now, if coming to the so called delay, allegedly occurred in forwarding the recovered charas to Forensic Science Laboratory for analysis, again the plea raised by the defence in this regard is without any substance for the reason that the case property deposited with PW-5 HC Bal Krishan in the malkhana was duly entered in the relevant register and it was handed over to PW-2 HHC Santosh Kumar vide RC No. 134/2015 dated 22.11.2015 to deposit the same in the Forensic Science Laboratory at Junga. The recovery having been made during the night intervening 19/20-11-2015 and the case property deposited on 20.11.2015 in the police malkhana having been sent on 22.11.2015 after a day of the deposit thereof, it cannot be believed by any stretch of imagination that there is any delay in sending the same to the laboratory. PW-2 HHC Santosh Kumar tells us that he had deposited the parcel containing the case property, NCB-

I form in triplicate and sample seals on 22.11.2015 in the Forensic Science Laboratory, which while in the transit was not allowed to be tampered by him and remained in his safe custody.

24. It has also been argued that dispatch number of special report in this case entered in the register at Sr. No. 369 has not been given whereas as per the testimony of PW-3 LHC Bhuvenashwari, in her cross-examination, dispatch numbers used to be mentioned against each and every entry in this register. However, if it is believed to be so, again no prejudice is shown to have been caused to the accused. The provisions under Section 57 of the Act qua forwarding of special report to the superior police officer are not mandatory but directory in nature, hence does not render the prosecution case doubtful, particularly when recovery of charas from the accused is established satisfactorily. Therefore, present is neither a case where on account of so called contradictions and inconsistencies, the prosecution case is not proved nor there exist any procedural irregularity of such a nature which render the same doubtful.

25. On the other hand, the link evidence is satisfactorily proved because the rapat Ext. PYX reveals that police party headed by PW-6 Insp. Santosh Kumar was on patrol duty in Anni bazaar. The rukka and seizure memo Exts. PW-1/A and PW-4/F, respectively reveal that the charas was recovered from the conscious and exclusive possession of the accused. The same was duly sealed and when brought to the police station, it was handed over to PW-5 HC Bal Krishan for safe custody in the malkhana. The same was thereafter sent to Forensic Science Laboratory Junga for chemical analysis. The same was found to be Charas. The report to this effect is Ext. PX.

26. In view of the above, the prosecution has satisfactorily proved that charas weighing 1.700 kgs. has been recovered from the exclusive and conscious possession of the accused and thereby shifted the burden to prove otherwise upon him. The present, therefore, is a case where presumption as envisaged under Sections 35 and 54 of the Act has to be drawn against the accused. Since he has failed to prove his innocence, therefore, it would not be improper to conclude that the charas weighing 1.700 kgs. has been recovered from his conscious and exclusive possession.

27. The evidence in defence the accused examined is hardly of any help to his case for the reason that DW Keshav Ram has not stated that he was present on the spot or on duty outside the Samiti Guest House and was not associated by the police to witness search and seizure. Merely that he was on night duty being Chowkidar is not sufficient to arrive at a conclusion that he was available for being associated as a witness. On the other hand, the two police officials deputed by the I.O. in the search of the independent witnesses have rightly opted for not knocking the doors of the houses and for that matter, the other government buildings also situated there.

28. Now, if coming to the statement of the accused recorded under Section 313 Cr.P.C., he has denied the entire prosecution case being incorrect, however, while answering question No. 29, admitted that he was called to police station and arrested there. Since as per arrest memo Ext. PW-4/A, he has been arrested during the night intervening 19/20-11-2015 itself and as he belongs to village Buchehar in Anni Tehsil District Kullu, he failed to explain as to what he was doing at Anni bazaar during odd hours and what was the time when he was called to the police station. Therefore, there is no grain of truth in the plea the accused raised in his defence.

29. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the impugned judgment is upheld.

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

Chaman Singh ...Petitioner
Versus
UCO Bank & others ...Respondents

CWP No. 3082 of 2016
Date of decision: 27.06.2018.

UCO Bank (Employees') Pension Regulations, 1995- Regulations No. 14, 16 and 18- Qualifying service for pension - Computation of – Regulation requiring employee having rendered minimum ten years service for entitlement of pension – Petitioner had rendered service for nine years, ten months and five days – His pension claim declined by department – Petition against - Held - Regulation 18 clearly provides that broken period of service if more than six months, then it is to be taken as one complete year – Service of period rendered for ten months and five days, is to be rounded off to one year in view of Regulation No.18 – Petitioner thus rendered service for ten years and entitled for pension – Petition allowed. (Paras-7 and 9)

Case referred:
Indian Bank and another v. N. Venkatramani (2007) 10 SCC 609

For the Petitioner Mr. Suneel Awasthi, Advocate.
For the Respondents Mr. Sanjay Dalmia, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (Oral)

The moot question involved in this petition is whether the period of nine years, ten months and five days of service rendered by the petitioner can be rounded off to ten years so as to entitle him for the grant of pension?

2. However, before answering this question certain minimal facts need to be stated.

3. The petitioner initially served the Indian Army from 1973 to 1986 and was discharged from service on compassionate grounds. Thereafter, on 10.06.2006, the petitioner was appointed as armed guard with the respondents at its branch at Kihar, where he joined as such on 26.06.2006. The petitioner retired from the service of the bank on 30.04.2016 after rendering nine years, ten months and five days of service with the respondent bank. The request made by the petitioner for grant of pension was turned down by the respondents on the ground that he had not completed the minimum required service in the bank was, therefore, not eligible for pension.

4. Now adverting to the question posed in this petition, it would be noticed that respondent has framed UCO Bank (Employees') Pension Regulations, 1995 (for short 'Regulations') and Chapter IV deals with qualifying service. Regulation No. 14 defines qualifying service as under:-

> *"14. Qualifying service-Subject to the other conditions contained in these regulations, an employee who has rendered a minimum of 10 years of service in the Bank on the date of his retirement or the date on which he is deemed to have retired shall qualify for pension."*

5. Whereas broken period of service of less than one year is defined in Regulation 18 and reads thus:

> *"18. Broken period of service of less than one year. - If the period of service of an employee includes broken period of service less than one year, then if such broken period is more than six months, it shall be treated as one year and if such broken period is six months or less it shall be ignored."*

6. A bare perusal of the provisions as extracted above would reveal that in order to entitle an employee for pension, he is required to render minimum ten years of service in bank on the date of his retirement. However, if the period of service of an employee includes broken period of service less than one year, then if such broken period is more than six months, it has to be treated as one year and if such broken period is six months or less it has to be ignored.

7. Obviously, the petitioner has rendered more than six months i.e. ten months and five day of service, therefore, this period in terms of Regulation No. 18 is required to be rounded and treated as one year, thus, making the petitioner eligible for pension.

8. As a matter of fact, the issue in hand is otherwise no longer *res integra* in view of the authoritative pronouncement of the Hon'ble Supreme Court in ***Indian Bank and another*** *v.* ***N. Venkatramani (2007) 10 SCC 609***, wherein the qualifying service, as prescribed, was 15 years, whereas the respondent therein had sought voluntary retirement after rendering fourteen years, nine months and seventeen days of service. Similar provision of rounding off was contained in Regulation 18 of the Regulations, which is a *pari materia* with Regulation No. 18 of the instant case and while construing the said provision, it was observed in paras 9 and 13 as follows:-

> *"9. We may notice that although various provisions have been made providing for qualifying service to which our attention has been drawn by Mr. Raju Ramchandran, the manner in which the period of service is to be measured is contained in Regulation 18 of the Regulation which reads as under:-*
>
> > *"18. Broken period of service of less than one year. - If the period of service of an employee includes broken period of service less than one year, then if such broken period is more than six months, it shall be treated as one year and if such broken period is six months or less it shall be ignored."*
>
> 13. *It may be true that various provisions of the Regulations as for example Regulations 16, 17, 19, 23, etc. provided for qualifying service. Regulation 18 is not controlled by any of the said provisions. It does not brook any restrictive interpretation. It only provides for a rule of measurement. An employee, as noticed hereinbefore, was entitled to pension provided he has completed the specified period of service. How such a period of service would be computed is a matter which is governed by the statute. It is one thing to say that a statute provides for completion of fifteen years of minimum service, but if a provision provides for measurement of the period, the same cannot be lost sight of. Provision of the Regulations which are beneficial in nature, in our opinion, should be construed liberally.*

9. The learned counsel for the respondent is not in a position to cite any contrary judgment.

10. In view of the binding principles as quoted above, this Court has no alternate but to allow the petition. Accordingly, the petition is allowed and the petitioner is held entitle to pension in terms of the Regulations. The respondents are directed to work out the pensionary dues of the petitioner and release the same within a period of two months from the receipt of certified copy of this order, failing which the petitioner shall be entitled to interest at the rate of 9% per annum from the date the amount fell due till the date the same is actually paid to him.

11. The petition is disposed of in the aforesaid terms, leaving the parties to bear their costs. Pending application, if any, also stands disposed of.

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

Ms. Parwati Devi and another ...Petitioners.

Versus

State Bank of Patiala and others ...Respondents.

CWP No. 324 of 2011
Judgment reserved on: 20.06.2018
Date of decision: 27.06.2018.

Code of Civil Procedure, 1908- Order XXI Rule 66(2)- **Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act)**- Section 13(4)- Land of petitioners for recovery of alleged outstanding loan was sold by bank being a secured asset, without mentioning in proclamation for sale that a four slab structure was standing over it – Held – Proclamation of sale was vague and defective – Sale pursuant thereto was void – Order of Debt Recovery Appellate Tribunal upholding sale of land of petitioners, set aside. (Para-26)

Code of Civil Procedure, 1908- Order XXI Rule 66(2)(a)- Held - Only so much of land/property can be put to auction that would be sufficient to meet entire balance owed by debtor to creditor.

(Para- 15)

Code of Civil Procedure, 1908- Order XXI Rule 92- Auction purchaser has no right to get property unless same is confirmed by Court/Competent Authority by holding that property has fetched appropriate price and there was no collusion between bidders. (Para-17)

Cases referred:

Sardar Bhagwan Singh vs. Lala Barkat Ram and another AIR 1943 (30) Lahore 129

State of Orissa and others vs. Harinarayan Jaiswal and others (1972) 3 SCR 784 : (1972) 2 SCC 36

Union of India vs. Bombay Tyre International Ltd. (1984) 1 SCC 467

Gurbachan Singh vs. Shivalak Rubber Industries, (1996) 2 SCC 626

Haryana Financial Corporation vs.Jagdamba Oil Mills (2002) 1 SCR 621 : (2002) 3 SCC 496

Chairman and Managing Director, SIPCOT, Madras and others vs. Contromix (P) Ltd. and another, AIR 1995 SC 1632 : (1995) 4 SCC 595

Anil Kumar Srivastava vs. State of U.P. (2004) 8 SCC 671 :AIR 2004 SC 4299

Duncans Industries Ltd. vs. State of U.P. (2000) 1 SCC 633

Lachhman Dass vs. Jagat Ram and others (2007) 10 SCC 448

Chairman, Indore Vikas Pradhikaran vs. M/s Pure Industrial Cock & Chem. Ltd. and others, AIR 2007 SC 2458

Commissioner of Municipal Corporation, Shimla vs. Premlata Sood and others, (2007) 11 SCC, 40

Ram Kishun and others vs. State of Uttar Pradesh and others (2012) 11 SCC 511

State of Punjab vs. Bandeep Singh and others (2016) 1 SCC 724

For the Petitioners	Mr. G.D.Verma, Senior Advocate, with Mr. Romesh Verma, Advocate.
For the Respondents	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondents No. 1 and 2.
	Mr. Y.P. Sood, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This writ petition has been filed by the petitioners claiming therein the following substantive reliefs:

"(i) *That the respondents may be directed to produce total record of the case.*

(ii) That the impugned order dated 30.11.2010, Annexure P-6, being illegal, wrong and without jurisdiction may kindly be ordered to be set-aside and quashed.

(iii) That since the outstanding amount as per the claim of respondents No.1 and 2 was deposited by the petitioners in compliance with the orders of the learned trial Tribunal, Chandigarh on 14.07.2008, therefore, it may kindly be held that nothing is recoverable from the petitioners.

(iv) That the auction proceedings with respect to the property of the petitioners as carried out by the respondents No.1 and 2 may kindly be declared to be null and void and consequently it may be held that the sale deed in question may be held to be illegal and wrong."

2. The petitioners took housing loan of Rs.5,00,000/- from respondent No.1 for the construction of house jointly against land bearing Khata Khatauni No. 9/11, Khasra No. 668/348/4 (old) and new Khasra No.1146, measuring 0-01-70 hectares measuring 4 biswa at Mauza Chhakryal, Kamla Nagar, Tehsil and District Shimla, H.P. This loan was sanctioned on 21.11.2002 and was required to be paid within a period of 10 years. The petitioners paid some instalments of the loan. However, in the meanwhile, the respondent-Bank took recourse to the proceedings under Section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'Act'). This constrained the petitioners to issue a legal notice dated 11.6.2006 wherein it was pointed out that the petitioners had already made the following payments:

i)	24.05.2006	Rs. 19,500/-
ii)	15.04.2006	Rs. 25,000/-
iii)	18.04.2006	Rs. 50,000/-
iv)	30.05.2006	Rs. 20,000/-
v)	30.05.2006	Rs. 20,000/-
vi)	02.08.2006	Rs. 1,50,000/-

3. It was on the strength of these payments that the petitioners asked the bank to dissociate itself from continuing with such proceedings as they have already received the considerable amount. However, respondents No. 1 and 2 did not concede the demand of the petitioners and ultimately the petitioners resorted to the proceedings under Section 17(3) of the Act before the Debts Recovery Tribunal, Chandigarh (for short 'Tribunal'). The Tribunal passed an interim order on 22.08.2006 by directing the respondent-Bank not to dispossess the petitioners if not already dispossessed. However, in the meanwhile, the property was put to sale, but the said sale was set-aside by the Tribunal on the ground that the same had not been conducted in accordance with the provisions of the Act. It further directed the petitioners to deposit the entire outstanding dues of Rs.5,07,073/- and the property was ordered to be restored to them. Consequently, the sale deed dated 02.09.2006 was also declared to be invalid and directions were issued to the bank to return the title deed to the petitioners.

4. The order passed by the Debt Recovery Tribunal as regards the Bank, has attained finality as it was never assailed by it. However, the auction purchaser, who has been arrayed as respondent No.3 herein, assailed the same before the Debts Recovery Appellate Tribunal, Delhi (for short 'Appellate Tribunal') which was allowed vide judgment dated 30.11.2010

and the findings recorded by the learned Tribunal were ordered to be reversed. It is this order of the Appellate Tribunal that has been assailed by the petitioners before this Court on number of grounds as taken in the petition.

5. The respondents No. 1 and 2 have filed their reply wherein number of preliminary objections regarding the petition not being maintainable as the petitioners have not approached this Court with clean hands, suppression of material facts etc. have been raised. However, the main thrust in the reply regarding the maintainability is that the petitioners being defaulters can be shown no indulgence particularly when respondent No.3 auction purchaser after complying with the provisions of the Act had purchased the property in question.

6. As regards the respondent No.3, he has filed a separate reply wherein, he too, has raised number of preliminary objections regarding non-availing of alternate remedy, the writ not being maintainable on the ground of availability of alternate remedy. As regards the merits of the case, it is submitted that the order passed by the Appellate Tribunal is strictly in accordance with law as it has dealt with all the grounds as were taken and also considered the reasons so accorded by the Tribunal while allowing the application filed by the petitioners and it is only thereafter by giving proper reasons based on the record that it reversed the findings of the Tribunal.

I have heard learned counsel for the parties and have gone through the material placed on record.

7. At the outset, it needs to be noticed that the scope of judicial review in such like matters is extremely limited and the same has to be exercised with due care and circumspection. This Court in such like matters cannot act as an appellate authority.

8. As regards the petitioners being defaulters, there can be no quarrel with the same. However, what is a matter of concern for this Court is the manner in which the property of the petitioners has been put to sale. It is not in dispute that the property that was put to sale not only comprised of the land, but also comprised of built up structure. However, when the same was put to sale it was not mentioned that there was a four storied structure standing thereupon as is evident from the averments as contained in para 16 (xiv) wrongly typed as (xvi) which fact has not been denied by respondent No.3 in his reply, though its valuation of Rs.16,00,000/- as put-forth by the petitioners has been denied by this respondent.

9. Likewise, even the Bank has not disputed the existence of four storied structure over the disputed land and only the valuation of the property as put-forth by the petitioners has been disputed. Admittedly, no valuation report was produced by the bank before the Tribunal and the same for the first time came to be produced before the Appellate Tribunal during the course of arguments on 29.11.2010 as is evident from perusal of para-11 of the impugned judgment, which reads thus:

> *"11. The next submission made by the counsel for the appellants was that no valuation report was ever obtained by the bank. The counsel for the bank has submitted a valuer's report which goes to show that the value of the property in dispute was Rs.8,23,500/- as on 10.04.2006. That report was produced for the first time as per the order passed by this Court. It may be mentioned here that respondents No.1 and 2 have also filed valuation report dated 09.10.2006 which shows that the property was worth Rs.15,33,000/- only."*

10. No doubt, the public money should be recovered and such recovery should be effected expeditiously, but it does not mean that the financial institutions, which are concerned only with the recovery of their loans, can be permitted to act like property dealers and be further permitted to dispose of the secured assets in any unreasonable or arbitrary manner.

11. As observed earlier, even though, there was a four storied structure standing over the land in question, however, in none of the sale proclamations issued under Section 13(2) of the Act, was this fact mentioned. Such notices are available at pages 152 to 154 and the contents

thereof are virtually the same and this Court would proceed to reproduce the relevant portion of one such notice, which reads thus:

STATE BANK OF PATIALA

Regional Office, Near Timber House, Shimla.

SUB: NOTICE U/S 13(2) OF SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (HEREINAFTER CALLED THE ACT)

Dear Sir(s)

You and your guarantors are put to notice u/s 13(2) of the said Act by this Notice to discharge in full your liabilities stated hereunder to the Bank within 60 days from the date of publication of this notice. Your outstanding liabilities (in aggregate) due and owing to the Bank as under mentioned Details of Secured Assets. You are also liable to pay future interest at the contractual rate on the aforesaid amount together with incidental expenses, cost, charges etc.

If you fail to repay to the bank the aforesaid sum with further interest and incidental expenses, costs as stated above in terms of the notice u/s 13(2) of the Act, the Bank will exercise all or any of the rights detailed under sub-Section (4) of Section 13 and under other applicable provisions of the said Act.

You are also put on notice that in terms of Sub-section 13 of Section 13 you shall not transfer by sale, lease or otherwise the said secured assets detailed below without obtaining written consent of the Bank.

This Notice is without prejudice to the Bank's right to initiate such other actions or legal proceedings, as it deems necessary under any other applicable provisions of law.

DETAILS OF SECURED ASSETS

Sr. No.	Name of the Account and Branch	Name of Security	Amount secured.
1.	xxxx	xxxx	Xxxxx
2.	**BRANCH SANJAULI** Smt. Geeta Kaul W/o Sh. A.K. Kaul, Incharge State Home Khansiwala, Tehsil Nahan, Distt. Sirmour. Ms. Parvati D/o sh. Dhaniram Mehta Niwas, Bhatta Kuffer (Neri Dhar Kamla Nagar, Sanjauli, Shimla-6).	Khewat Khatouni No. 9/11, Khasra No. 668/348/4 (New 1146) measuring 0-1-70 Hectares (0.4) Biswa land in the joint names of Smt. Geeta Devi & Smt. Parvati Devi, situated in Mauja Chakkryal, Kamla Nagar, Shimla (Rural), Sanjauli.	571851.17 as on 30.11.05.
	Dated: 19.01.06	**Place: Shimla.**	**AUTHORISED OFFICER.**

12. Not only this, even the sale certificate which otherwise pertains to movable property issued in favour of respondent No.3 under Section 13 read with Rule 9 of the Security Interest (Enforcement) Rules, 2002, again only makes a mention of the land and not the built-up structure.

13. Likewise, even the proceedings of the auction that have been placed on record clearly reflects that the bidders therein had only offered their bid for auction of the land in question and not for the built- up structure. Obviously, in such circumstances a sale conducted

in pursuance of a proclamation containing vague, inaccurate and misleading description of the property or incomplete description of the property is nothing but a farce and seriously prejudice the judgment-debtor and cannot be allowed to stand. **(Refer: Sardar Bhagwan Singh vs. Lala Barkat Ram and another AIR 1943 (30) Lahore 129).**

13. Now that only the land has been put to sale and there is no reference of the structure standing thereupon, then obviously the bid so offered is only of the land and not of the structure. Therefore, in the given circumstances, the physical possession of the property could not have been handed over to respondent No.3.

14. That apart, in case a proclamation would had been issued clearly mentioning that the land was being sold alongwith four lintel standing thereupon, obviously, it would have fetched a much higher price than the one offered by respondent No.3.

15. Not only this, even the complete land alongwith four lintel could otherwise not have been put to auction as it is more than settled law that only that part of the property can be put to sale that would be sufficient to meet the entire balance owed by the petitioners to the banks.

16. That apart, the bank clearly acted in an unreasonable and arbitrary manner by putting only land to sale without disclosing that there was structure standing thereupon that too for a ridiculously of low price of Rs.8,80,000/-, whereas as per the valuation report submitted by the petitioners, this property was worth more than Rs. 15,00,000/- lacs.

17. In **State of Orissa and others vs. Harinarayan Jaiswal and others (1972) 3 SCR 784 : (1972) 2 SCC 36,** the Hon'ble Supreme Court held that a highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction-sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

18. The word "value" means intrinsic worth or cost or price for sale of a thing/ property (Refer: **Union of India vs. Bombay Tyre International Ltd. (1984) 1 SCC 467** and **Gurbachan Singh vs. Shivalak Rubber Industries, (1996) 2 SCC 626).**

19. In **Haryana Financial Corporation vs.Jagdamba Oil Mills (2002) 1 SCR 621 : (2002) 3 SCC 496**, the Hon'ble Supreme Court while dealing with the sale of property through public auction after placing reliance upon its earlier judgment in **Chairman and Managing Director, SIPCOT, Madras and others vs. Contromix (P) Ltd. and another, AIR 1995 SC 1632 : (1995) 4 SCC 595**, held as under:

> *"In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. But many times it may not be possible to secure the best price by public auction when the bidders join together so as to depress the bid or the nature of the property to be sold is such that suitable bid may not be received at a public auction. In that event, any other suitable mode for selling of property can be by inviting tenders. In order to ensure that such sale by calling tenders does not escape attention of an intending participant, it is essential that every endeavour should be made to give wide publicity so as to get the maximum price."*

20. In **Anil Kumar Srivastava vs. State of U.P. (2004) 8 SCC 671 :AIR 2004 SC 4299,** the Hon'ble Supreme Court while considering the scope of fixing the reserve price and placing reliance on its earlier judgment in **Duncans Industries Ltd. vs. State of U.P. (2000) 1 SCC 633** held that reserve price limits the authority of the auctioneer. The concept of the "reserve price" is not synonymous with "valuation of the property". These two terms operate in different

spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. It also held that the valuation is a question of fact and it should be fixed on relevant material. Thereafter, it was held the difference sbetween the "valuation" and "reserve price" is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price.

21. In **Lachhman Dass vs. Jagat Ram and others (2007) 10 SCC 448**, the Hon'ble Supreme Court held that a right to hold property as well as human right, a person cannot be deprived of his property except in accordance with the provisions of a statute.

22. Similar reiteration of law can be found in the decision of the Hon'ble Supreme Court in **Chairman, Indore Vikas Pradhikaran vs. M/s Pure Industrial Cock & Chem. Ltd. and others, AIR 2007 SC 2458** and **Commissioner of Municipal Corporation, Shimla vs. Premlata Sood and others, (2007) 11 SCC, 40.**

23. The legal position on the subject has been lucidly expounded by the Hon'ble Supreme Court in **Ram Kishun and others vs. State of Uttar Pradesh and others (2012) 11 SCC 511**, wherein it was observed as under:

> "**Recovery of public dues**
>
> 13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.
>
> 14. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. (Vide Lachhman Dass v. Jagat Ram 2007 10 SCC 448 and State of M.P v. Narmada Bachao Andolan 2011 7 SCC 639) Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions.
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> 15. In case the property is disposed of by private treaty without adopting any other mode provided under the statutory rules, etc. there may be a possibility of collusion/fraud and even when public auction is held, the possibility of collusion among the bidders cannot be ruled out. In State of Orissa v. Harinarayan Jaiswal AIR 1972 SC 1816 this Court held that a highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction-sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.
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> 16. In Haryana Financial Corpn. v. Jagdamba Oil Mills AIR 2002 SC 834 this Court considered this aspect and while placing reliance upon its earlier judgment in Sipcot v. Contromix (P) Ltd. 1995 4 SCC 595 held that: (Sipcot case, SCC p. 601, para 12)
>
> > "12. In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer." (emphasis supplied)
>
> 17. Therefore, it becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers

may not come forward treating the property as not worth purchase by them, as a moneyed person or a big businessman may not like to involve himself in small sales/deals.

Valuation and reserve price

18. The word "value" means intrinsic worth or cost or price for sale of a thing/property. (Vide Union of India v. Bombay Tyre International Ltd. 1984 1 SCC 467 and Gurbachan Singh v. Shivalak Rubber Industries AIR 1996 SC 3057.)

19. In State of U.P v. Shiv Charan Sharma AIR 1981 SC 1722 this Court explained the meaning of "reserve price" explaining that it is the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price i.e the minimum bid at auction.

20. In Anil Kumar Srivastava v. State of U.P 2004 8 SCC 671 this Court considered the scope of fixing the reserve price and placing reliance on its earlier judgment in Duncans Industries Ltd. v. State of U.P 2000 1 SCC 633, explained that reserve price limits the authority of the auctioneer. The concept of the reserve price is not synonymous with valuation of the property. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. The valuation is a question of fact, it should be fixed on relevant material. The difference between the "valuation" and "reserve price" is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price.

21. In Desh Bandhu Gupta v. N.L Anand 1994 1 SCC 131 this Court held that in an auction-sale and in execution of the civil court's decree, the Court has to apply its mind to the need for furnishing the relevant material particulars in the sale proclamation and the records must indicate that there has been application of mind and principle of natural justice had been complied with. (See also Gajadhar Prasad v. Babu Bhakta Ratan AIR 1973 SC 2593, S.S Dayananda v. K.S Nagesh Rao 1997 4 SCC 451, D.S Chohan v. State Bank of Patiala 1997 10 SCC 65 and Gajraj Jain v. State of Bihar 2004 7 SCC 151.)

22. In view of the above, it is evident that there must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings.

Decision to sell whole or part of the secured assets

23. In Ambati Narasayya v. M. Subba Rao AIR 1990 SC119 : 1989 Supp (2) SCC 693 (SCC p.696, para 9) this Court dealt with a case where in execution of a money decree for Rs. 2400 the land was sold for Rs.17,000. The Court set aside the sale observing that there is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. (See also Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma (1977) 3 SCC 337 and S.Mariyappa vs. Siddappa (2005) 10 SCC 235).

24. Thus, in view of the above, it is evident that law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking into consideration that there was no possibility of collusion of the bidders. The authority is duty-bound to decide as to whether sale of part of the

property would meet the outstanding demand. Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably.

Setting aside auction-sale—after confirmation

25. In Navalkha & Sons v. Ramanya Das AIR 1970 SC 2037 this Court while dealing with the confirmation of sale by court, held that there must be a proper valuation report, which should be communicated to the judgment-debtor and he should file his own valuation report and the sale should be conducted in accordance with law. After confirmation of sale, there should be issuance of sale certificate. The court cannot interfere unless it is found that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be a forced sale. A valuer's report should be as good as the actual offer and the variation should be within limit. Such estimate should be done carefully. The Court further held that unless the court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. [See also Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd. AIR 1974 SC 1331, Union Bank of India v. Official Liquidator AIR 2000 SC 3642, B. Arvind Kumar v. Govt. of India 2007 5 SCC 745 and Transcore v. Union of India 2008 1 SCC 125.]

26. In Divya Mfg. Co. (P) Ltd. v. Union Bank of India AIR 2000 SC 2346 this Court held that a confirmed sale can be set aside on the ground of material irregularity or fraud. The court does not become functus officio after the sale is confirmed. In Valji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. 2008 9 SCC 299, the Court held that auction-sale should be set aside only if there is a fundamental error in the procedure of auction e.g not giving wide publication or on evidence that property could have fetched more value or there is somebody to offer substantially increased amount and not only a little over the auction price. Involvement of any kind of fraud would vitiate the auction-sale.

27. In FCS Software Solutions Ltd. v. La Medical Devices Ltd. 2008 10 SCC 440 this Court considered a case where after the confirmation of auction-sale it was found that valuation of movable and immovable properties, fixation of reserve price, inventory of plant and machineries had not been made in the proclamation of sale, nor disclosed at the time of sale notice. Therefore, in such a fact situation, the sale was set aside after its confirmation.

28. In view of the above, the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is coextensive with that of the principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud."

24. Here it shall also be apposite to refer to a recent decision of the Hon'ble Supreme Court on the subject in **State of Punjab vs. Bandeep Singh and others (2016) 1 SCC 724** wherein the ratio laid down in **Anil Kumar Srivastava's** case (supra) has been reiterated and it was held that notwithstanding the fixation of upset price and notwithstanding the fact that a bidder has offered an amount higher than the reserve/upset price, sale even in case it is still open to challenge on the ground that the property has not fetched the proper price and the sale can be set-aside.

25. The upshot of the aforesaid discussion is that the proclamation of the sale which only discloses the vacant land and does not make a mention of four lintel standing thereupon and thereafter fixation of reserve price is a fundamental procedural error, therefore, the sale in the

given circumstances was rightly set-aside by the Debt Recovery Tribunal and the said findings could not have been disturbed by the Appellate Tribunal.

26. The net result of the aforesaid discussion is that I find merit in this petition and the same is allowed and the impugned judgment dated 30.11.2010, Annexure P-6, passed by the Debts Recovery Appellate Tribunal, Delhi is quashed and set-aside and resultantly the auction proceedings with respect to the property of the petitioners as carried out by respondents No. 1 and 2 are declared null and void and since the outstanding amount as per the claim of respondents No. 1 and 2 was already deposited by the petitioners in compliance to the orders passed by the Tribunal on 14.7.2008, therefore, nothing is recoverable or due from them. Accordingly, respondent No.3 is directed to hand-over the possession of the land alongwith structure to the petitioners within a period of four weeks. However, it is made clear that in case the said respondent has carried out any additions/alterations or improvements, in that event, he shall be entitled to recover the same from respondents No. 1 and 2.The parties are left to bear their own costs.

The petition is disposed of in the aforesaid terms so also the pending application(s) if any.

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

Ganesh Kumar .....Petitioner

Vs.

The State of Himachal Pradesh .....Respondent.

Cr. MPM No.: 756 of 2018
Date of Decision: 28.06.2018

Constitution of India, 1950- Article 227- Contents of FIR not clearly legible because of font size – High Court issued time bound directions to Union of India through Assistant Solicitor General to take up matter with National Crime Records Bureau so that font size of FIR proforma is reasonably modified to make contents legible to a naked eye. (Paras-3 and 4)

For the petitioner: Mr. Krishan Singh Dadwal, Advocate.

For the respondent: M/s Sanjeev Sood & Desh Raj Thakur, Additional Advocate Generals and Mr. Kamal Kant, Deputy Advocate General.
ASI Sultan Singh, Police Station Amb, District Una, is present alongwith case records.
Mr. Rajesh Sharma, Assistant Solicitor General of India, is present in the Court.
Mr. Asif Jalal, DIG (Southern Range), is present in person.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

When the matter was taken up for consideration, learned counsel for the petitioner, in the course of his submissions, referred to the copy of the First Information Report, appended with the petition as Annexure P-1. A perusal of Annexure P-1 appended with the petition demonstrates that the contents thereof are not ligible, for the reason that the font which has been used while preparing the said FIR is extremely small.

2. This Court instructed learned Additional Advocate General to call for some responsible officer of the State Police, so that this fact could be directly apprised to the officer concerned, so as to ensure that in future, remedial measures in this regard can be taken.

3. Mr. Asif Jalal, DIG (Southern Range) is accordingly present in the Court. He has very fairly shared the concern of the Court. However, he has submitted that format of such documents *per se* stands prepared by the National Crime Record Bureau (NCRB), therefore, it is at the level of the said Bureau that remedial measures have to be taken. He further submits that all that the State can do is to increase the present font from 8 to 10, though even as per the said officer, the desirable font is 12 and above.

4. Learned Assistant Solicitor General of India, who is present in the Court, is accordingly directed to forthwith take up the matter with the National Crime Record Bureau (NCRB) and ensure that necessary directions in this regard are issued as expeditiously as possible and not later than four weeks from today and the font size of the proforma is reasonably modified so that the same become legible to a naked eye.

5. Status report filed, which is perused and taken on record.

6. Heard for some time. At this stage, Mr. Krishan Singh Dadwal, learned counsel for the petitioner seeks permission to withdraw the present petition, with liberty to file a fresh petition on the same cause subsequently, if so advised. Permission granted. Accordingly, the petition is dismissed as withdrawn, with liberty as prayed for.

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

Shivam Sharma
Versus
State of H.P. & ors.

CWP No. 1353 of 2018 a/w others
Reserved on: 26.6.2018.
Date of order: 29.6.2018.

Constitution of India, 1950- Article 14- Admission(s) to Medical and Dental Colleges situated in State against 'state quota seats' – Earlier, children and wards of bonafide Himachalis working outside the State in private jobs, were exempted from requirement of having qualified atleast two of stipulated examinations from schools/colleges located within territory of State of H.P. – Govt. withdrawing this exemption for year 2018-2019 while continuing with similar exemption in favour of children/wards of bonafide Himachali employees/retired employees of State Government, Central Government, Public Sector Bodies etc. working outside State of H.P. – Petition against – Validity - State justifying such deletion on ground that there is no provision in prospectus for 2018-2019, which provides exemption for children and wards of bonafide Himachalis working outside the State in 'private concerns' – Held – Socio-economic conditions of persons residing outside the State are entirely different vis-à-vis Himachalis actually residing in State – Children of Himachalis residing in other States have better facilities for education– And if they are allowed to compete against 'State quota seats', that will prejudice the children/wards having studied in schools located in State - Classification sought to be made by Govt. by deletion of exemption clause, has reasonable nexus with objective sought to be achieved- Further held- Since, children and wards of retired/serving Hmachali employees working outside State are enjoying such exemption, High Court permitted petitioners purely as temporary measure to participate in counseling against State quota seats from their category, if eligible and in merit without claiming any right to admission- Petition disposed of with further directions. (Paras-2, 14 and 18)

Cases referred:
Gagandeep vs. State of H.P. and connected matters, (1996) 1 S.L.C. 242
Union of India and another vs. Narendra Singh, 2008 (2) SCC 750

For the petitioner:	M/S. K.B. Khajuria, Sunil Mohan Goel, Raman Jamalta, Vinod Chauhan, Pardeep K. Sharma, Vivek Singh Thakur, Rajiv Rai and Adarsh K. Vashisht, Advocates for the respective petitioners.
For the respondents:	Mr. Ashok Sharma, AG with Mr. Ajay Vaidya, Sr. Addl. AG, Mr. Narinder Guleria and Mr. Vikas Rathore, Addl. AGs for the respondent-State. Mr. Neel Kamal Sharma, Advocate for respondent-University.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

The petitioners in these writ petitions are the children/wards allegedly of bonafide Himachalies living outside the State of Himachal Pradesh on account of job of their parents in private sector/being in private occupation. In the recent past, the exemption to this category of the candidates for seeking admission to MBBS/BDS courses in medical/dental colleges situated in the State on the basis of their merit in All India National Eligibility-cum-entrance test (in short NEET-UG-2018) qua passing two out of the following four examinations i.e. "1) Middle or equivalent, 2) Matric or equivalent, 3) 10+1 or equivalent and 4) 10+2 or equivalent from the schools/colleges situated in the State, of course on furnishing the requisite certificates appended to the Prospectus was introduced. However, the respondents now deleted such provisions from the Prospectus (Annexure P-13 to one of the CWPs i.e CWP No. 1353 of 2018) published for admission to above courses for academic session 2018-19. They are aggrieved by such action on the part of the respondents deleting the provisions granting exemption to their category from the condition of passing at least two examinations out of four from the schools/colleges situated in this State.

2. The grouse of the petitioners, as brought to this Court, in a nut shell, is that they had to undertake their studies in the schools outside the State of Himachal Pradesh on account of their parents, though bonafide Himachalies, however, residing outside in connection with their job in private sector/they being in private occupation. Such exemption being provided to the students of their categories since long and even in the Prospectus Annexure P-11 published initially on 12.6.2018 for the academic session 2018-19 also and they having applied for admission under the State quota seats i.e. 85%, the deletion of the provisions granting exemption to them by way of two corrigendum(s) Annexures P-10 & P-12 left them high and dry and their right to seek admission is restricted to remaining 15% seats to be filled in at All India Level. They will not be able to get admission in any Government or private College either in the State or elsewhere. Such action on the part of the respondents has been sought to be quashed allegedly being irrational and illegal besides being arbitrary as the same has debarred the children of the bonafide Himachalies working in private sector and doing private business outside the State that too while continuing benefit of such exemption in favour of the children of serving/retired employees of the Central Government/UT/ Other State Governments and children of employees of the Autonomous Organizations/Semi-Government Bodies of Central Government/UT/Other State Governments, hence, in clear violation of Article 14 of the Constitution of India. It has also been emphasized that the respondents have considered the children of the bonafide-Himachalies serving in Central Government/other States/UTs and other organization/local bodies eligible for State quota seats and arbitrarily debarred the similarly situated children i.e. (the petitioners) of those persons who are either working in private sector or doing some private business outside the State and thereby created a separate class within the same class which allegedly is in clear violation of fundamental rights of the petitioners.

3. The response of the respondent-State, filed in one of the Writ Petitions i.e. CWP No. 1353 of 2018, in a nut shell, is that the exemption to the children of bonafide Himachalies residing outside the State in connection with their employment in private sector/occupation from the requirement of passing two examinations out of the four indicated in the Prospectus was given for the first time in the year 2013-14. This year, the respondent-State has constituted Prospectus Review Committee to finalize the Prospectus for conducting centralized counselling for admission to MBBS/BDS courses in Government Medical/Dental Colleges including Private Medical/Dental Colleges (State/Management Quota) situated in the State of Himachal Pradesh on the basis of their marks/ranks in NEET-UG-2018 for the academic session 2018-19. The Committee, on having considered various provisions in the Prospectus had decided to remove the provision from the Prospectus governing exemption to children of employees of private sector/private occupation from the condition of passing two examinations out of four from the schools situated in Himachal Pradesh.

4. The recommendations made by the Committee were considered and approved by the competent authority and thereafter the Prospectus Annexure P-11 was published. Although, exemption from the condition of passing two examinations to category of the petitioners came to be deleted from the prospectus yet, at certain places therein the same got reflected by way of an inadvertent mistake. On noticing such mistakes in the Prospectus, the Corrigendum Annexure P-10 and Corrigendum-II Annexure P-12 came to be issued on the very next day of the publication of the Prospectus i.e. 13.6.2018.

5. The specific stand of the respondent-State, therefore, is that there is no provision in the Prospectus published for the academic session 2018-19 providing exemption from the condition of passing two examinations out of four from the Schools situated in Himachal Pradesh in favour of the category of the petitioners being already stood deleted, therefore, they cannot be heard of any complaint of allegedly arbitrarily debarred from seeking admission against State Quota seats in MBBS/BDS courses from the Government/private colleges situated in the State of Himachal Pradesh.

6. The note below item No. XXIV in the Prospectus reserves the right in favour of respondent-State to make any change/amendment in the Prospectus and that the same shall be binding on the students. The two corrigendums issued by the respondent-State making corrections in the Prospectus, therefore, has been claimed to be legal and valid. When the substantial provision providing exemption to the employees of the private sector/the persons in private occupation outside the State stood withdrawn from the Prospectus, issued on 12.6.2018, therefore, issuance of the corrigendum on the very next date i.e. 13.6.2018 to correct certain inadvertent clerical errors is neither illegal nor un-constitutional. Even if the two corrigendums are withdrawn, in that event also the petitioners would not be eligible for admission because the Prospectus issued on 12.6.2018 did not contain any exemption clause in favour of their category which already stood deleted on the recommendation of the Prospectus Review Committee.

7. The respondent-State, while prescribing the eligibility criteria for seeking admission for MBBS/BDS courses in the State from 1995-96 onwards, had taken a conscious decision after taking into consideration various aspects like topography of the State, social status, financial and economic conditions of the people and educational facilities had ensured that the students from the State get a chance of seeking admission in such courses. An effort has been made to bring them to compete with the students having studied in better institutions outside the State with better facilities and exposure. The fact that the students of this State were not getting medical education outside the State and as regards medical/dental colleges situated in the State, it is the students belonging to and studied in other States/Universities and Colleges managed to get admissions in MBBS/BDS courses in the State, therefore, the condition of passing at least two examinations out of four at school level was prescribed long back in the year 1995-96. The decision so taken was held as legal and valid even by a Division Bench of this Court also in ***Gagandeep vs. State of H.P.*** and connected matters, (***1996) 1 S.L.C. 242.*** The exemption from

passing such two examinations from the schools situated in the State of Himachal Pradesh in favour of the category of the petitioners was for the first time introduced in the year 2013-14 and the same now stands withdrawn from this academic session being not giving a level playing field to the students who have done their schooling from the State of Himachal Pradesh.

8. The provisions qua prescribing the condition of passing two examinations out of four from the schools situated in the State of Himachal Pradesh except for in CWP No. 1414 of 2018 is not under challenge in these writ petitions and rightly so because such eligibility criteria has been held legal and valid by a Division Bench of this Court in Gagandeep's case (supra).

9. It is in this backdrop, we have heard Mr. Sunil Mohan Goel, Advocate assisted by S/Sh. K.B. Khajuria, Raman Jamalta, Vinod Chauhan, Pardeep K. Sharma, Vivek Singh Thakur, Rajiv Rai and Adarsh K. Vashisht, Advocates on behalf of the petitioners, whereas Sh. Ashok Sharma, learned Advocate General assisted by Mr. Ajay Vaidya, learned Sr. Addl. Advocate General, Sh. Vikas Rathore and Sh. Narinder Singh Guleria, learned Addl. Advocate Generals for the State and Sh. Neel Kamal Sharma, Advocate standing counsel for the Himachal Pradesh University at length to dispose of these writ petitions finally. However, as the another exempted category i.e. children of serving/retired employees of Central Government/UTs/Other State Governments and children of the employees of the Autonomous Organizations/semi-Government bodies of Central Government/UT/Other State Governments being allegedly similarly situated to the petitioners and as the candidates belonging to the above exempted category are not before us, hence without affording them due opportunity of being heard, the question of legality and validity of the exemption so granted to them cannot be decided judiciously and authoritatively, it is deemed appropriate not to dispose of these writ petitions finally and at this stage advert only to the eligibility of the petitioners herein and the students belonging to the abovesaid another category allegedly similarly situated to appear for counselling scheduled to be held from 29th June, 2018 onwards.

10 In order to decide the above question, it is deemed appropriate to refer the provisions in vogue providing exemption to the category of the petitioners from the academic session 2013-14 onwards till 2017-18. The Prospectus for the year 2013-14 is Annexure P-4. Item No. IV under the head "ELIGIBILITY AND QUALIFICATIONS" therein reads as follows:

> "
>
> **IV. ELIGIBILITY AND QUALIFICATIONS**
>
> (A) For State Quota Seats :
>
> 1. Children of Bonafide Himachali/Himachal Govt. employees and employees of autonomous bodies wholly or partially financed by the Himachal Pradesh Government will only be eligible to apply for admission to MBBS/BDS Courses through Counseling on the basis of State merit of NEET(UG)- 2013 in Government Medical/Dental Colleges including 50% State Quota seats in Private unaided Dental Colleges situated in Himachal Pradesh. They should have passed atleast two of the following examinations from the recognized schools or colleges situated in the State of Himachal Pradesh and affiliated to ICSE/CBSE/H.P. Board of School Education or equivalent Boards/ Universities established by law in India.
>
> (a) Middle or equivalent
>
> (b) Matric or equivalent
>
> (c) 10+1 or equivalent
>
> (d) 10+2 or equivalent
>
> 2. The Bonafide Himachali students who are admitted to Navodya Schools situated in Himachal Pradesh and who have passed matric or +2 examinations under the exchange programme from other Navodya Schools in the Country shall also be eligible for admission to the above courses.

3. Following categories of candidates are exempted from the condition of passing the examinations from recognized schools affiliated to ICSE/CBSE/HP Board of School Education and situated within Himachal Pradesh provided that the candidates of these categories should be Bonafide Himachali and their parents are living outside Himachal Pradesh on account of their service/posting /private occupation . In such cases, non-schooling in Himachal Pradesh shall not debar them from competing against any of the seats whether reserved or otherwise (except backward area seats):-

(i) Children of Defence Personnel/Ex-Servicemen

(ii) Children of serving /retired Employees of Central Government/U.T./Other State Governments and Children of Employees of the Autonomous Organizations/Semi Government Bodies of Central Government/U.T./Other State Governments.

(iii) Children of employees of Himachal Government/H.P. Govt. Undertaking/Autonomous Bodies wholly owned H.P. Govt.

(iv) Children of employees of Private Sector / Private occupation.

Note : (1) The candidates claiming exemption from passing two examination from the schools situated in Himachal Pradesh under the category (iv) mentioned above, should have passed their schooling from the schools situated in the place /station where their parents are residing .

(2) The Candidates claiming exemption from passing two exams from H.P School(s) under the categories as mentioned in sub clauses (ii) & (iv) above of Clause 3 shall also submit a certificate on the prescribed format as given in the prospectus at Appendix A-11, A-12, A- 13 & A-14 with the application form in original, as applicable."

11. As already pointed out, these provisions remained as it is in the Prospectus for admission to MBBS/BDS courses till the academic session 2017-18. It is in the current academic session, a decision was taken not to provide exemption to the children of the employees of private sector/the persons in private occupation outside the State, therefore, item No. IV (A) 3 (iv) i.e. **"children of employees of private sector/private occupation"** came to be deleted from the Prospectus Annexure P-11, however, the words **"private occupation"** figuring in Clause 3 supra and note (1) below it i.e.

> "The candidates claiming exemption for passing two examination from the schools situated in Himachal Pradesh under the category (iv) as mentioned above, should have passed their schooling from the schools situated in the place/station where their parents are residing.",

remained as it is therein. Consequently, the Corrigendum Annexure P-10 whereby Note (1) supra and Corrigendum II Annexure P-12 words "Private Occupation" stood deleted came to be issued on 13.6.2018. In view of such deletion in the Prospectus Annexure P-13 for the academic session 2018-19, now no provision exists qua providing exemption from the condition of passing two examinations out of four from the schools situated in the State of Himachal Pradesh in favour of the category of the petitioners. The modified provisions qua eligibility in the Prospectus Annexure P-13 now reads as follows:

"**IV. ELIGIBILITY AND QUALIFICATIONS**

(A) For State Quota Seats :

1. Children of Bonafide Himachali/Domicile/Himachal Govt. employees and employees of autonomous bodies wholly or partially financed by the Himachal Pradesh Government who qualified the NEET-UG-2018 will only be eligible to apply ONLINE for admission to MBBS/BDS Courses through counselling in

Government Medical/Dental Colleges including State Quota seats in Private un-aided Medical/Dental Colleges situated in Himachal Pradesh. They should have passed at least two exams out of the following examinations from the recognized schools or colleges situated in the State of Himachal Pradesh and affiliated to ICSE/CBSE/H.P. Board of School Education or equivalent Boards/Universities established by law in India.

(a) Middle or equivalent

(b) Matric or equivalent

(c) 10+1 or equivalent

(d) 10+2 or equivalent

2. The Bonafide Himachali students who are admitted to Navodya Schools situated in Himachal Pradesh and who have passed matric or +2 examinations under the exchange programme from other Navodya Schools in the Country shall also be eligible for admission to the above courses.

3. Following categories of candidates are exempted from the condition of passing the examinations from recognized schools affiliated to ICSE/CBSE/HP Board of School Education and situated within Himachal Pradesh, provided that the candidates of these categories should be Bonafide Himachali and their father/mother are living outside Himachal Pradesh on account of their service/posting /private occupation. In such cases, non-schooling in Himachal Pradesh shall not debar them from competing against any of the seats whether reserved or otherwise (except backward area seats):-

(i) Children of Defence Personnel/Ex-Servicemen.

(ii) Children of serving /retired employees of Central Government/U.T./Other State Governments and Children of employees of the Autonomous Organizations/Semi Government Bodies of Central Government/U.T./Other State Governments.

(iii) Children of employees of Himachal Government/H.P. Govt. Undertaking/ Autonomous Bodies wholly owned by H.P. Government.

Note : (1) Candidates claiming exemption for passing two exams from H.P School(s) under the categories as mentioned in sub-clauses (ii) & (iii) above of clause -3 shall also submit a 18 certificate on the prescribed format as given in the prospectus at Appendix A-12, A-13 with the application form in original, as applicable.

(2) The merit list of qualified candidates of NEET-UG-2018 who applied online to the University within stipulated period will only be drawn by the University and candidates those will not found qualified in NEET, their application forms will be rejected without any notice and names of such candidates shall not be included in the merit list. The application fee shall not be refunded in any case."

12. In this view of the matter, the provisions regarding exemption to the category of the petitioners ceased to exist on 12.6.2018 on deletion of the category of the petitioners i.e. Clause No. 3(iv) below item No. IV (A) in the Prospectus Annexure P-13, issued for the academic session 2018-19 published on 12.6.2018. The date, as per schedule for submission of online applications also commenced on 12.6.2018 itself, which had to continue up to 20.6.2018. On the very next day i.e. 13.6.2018, even words "private occupation" in Clause 3 of item No. IV(A) and also Note (1) below it in the Prospectus (Page 17) came to be omitted by way of Corrigendums Annexures P-10 and P-12. Meaning thereby that after 13.6.2018, there hardly remained any

provision in the Prospectus providing exemption to the category of the petitioners, hence, these writ petitions.

13. Prima-facie, we are satisfied that in the Prospectus Annexure P-11 initially issued for the academic session 2018-19, the category of the petitioners does not find mention on deletion of clause 3 (iv) of item No. IV (A) thereof. Being so, merely that in clause 3 words "private occupation" figured and note(1) also came to be reflected in the Prospectus Annexure P-11, the petitioners prima-facie are not justified in claiming that they have a right to avail the exemption which the students in their category had earlier been availing for the reason that their category has already been deleted from the Prospectus Annexure P-11 initially issued for the current academic session. The reflection of words "private occupation" and Note (1), to our mind, is the result of either clerical mistake or inadvertent mistake. Anyhow, such reflection in clause 3 and note (1) also came to be deleted vide Corrigendum Annexures P-10 and P-12. In view of the note below item No. XXIV of the Prospectus, Annexure P-13, the respondent-State and for that matter University, as the case may be, has the right to make any change/amendment in the Prospectus and that the same shall be binding on the students. In view of the deletion of the main provisions from the Prospectus, words "private occupation" and Note (1) supra came to be omitted in the Prospectus Annexure P-11 initially issued for the academic session 2018-19 by way of mistake. Such mistakes in view of the judgment of the Supreme Court in ***Union of India and another vs. Narendra Singh, 2008 (2) SCC 750,*** can be corrected and even if such correction may be harsh to a party.

14. Now, if coming to the records, the decision to delete the exemption from passing two school examinations out of four from the school situated in the State of Himachal Pradesh, was already taken on 9.6.2018 by the competent authority on the basis of the report of the Prospectus Review Committee. Therefore, on this score also, we are prima-facie satisfied that the petitioners were not taken to surprise because Prospectus forwarded for publication on 11.6.2018 was published on 12.6.2018, no doubt on that very day when submission of the online applications for seeking admission commenced. We are also satisfied prima-facie that providing such exemption to the category of the petitioners from the condition of passing two examinations from the schools situated in the State at the cost of socially and economically backward students of this State, where in the name of Coaching Centres etc. having no such facility and irrespective of adverse circumstances secure good ranking in the test is rather harsh and oppressive to them and not to the petitioners who in our opinion may take chance to seek admission in the States where their parents are residing in connection with their job in private sector or private occupation. Since number of bonafide Himachalies are residing outside the State in connection with their job in private sector/private occupation, therefore, providing exemption from passing two examinations out of four from the schools situated in the State of Himachal Pradesh would negate the same and oust the students of this State from competition because it is not possible to the students of this State to compete with the students having studied in the schools outside the State with better facilities and infrastructure. Above all, the condition of passing atleast two examinations out of the four from the schools/colleges situated in the State has nexus with the object sought to be achieved because hospitals in the State of Himachal Pradesh are situated in remote areas, including tribal belt where only the Himachali graduated doctors can render their services and as regards the outsiders, normally they run away from the State being not accustomed with the prevailing weather conditions in such areas.

15. In this view of the matter, though we may have finally decided the question qua admissibility of the relaxation to the category of the petitioners in the light of the arguments addressed and the case law cited at Bar, however, existence of clause 3(ii) under Item No. IV(A), which appears to have been introduced for the first time in the year 2012-13, providing exemption from the condition of passing two examinations out of four from the schools or colleges situated in the State of Himachal Pradesh to the children of serving/retired employees of the Central Government/UT/Other State Governments and children of employees of the Autonomous Organizations/Semi-Government Bodies of Central Government/UT/Other State Governments,

has engaged our attention and prima-facie this category is similar to that of the petitioners, therefore, to our mind allowing exemption to the students of this category may not amount to create a class within class itself, which perhaps is not legally permissible. As a matter of fact, children of such employees/workers and for that matter those who are in private occupation outside are better placed in the matter of their studies as compared to the students who are residing in the State and studying in the schools/colleges situated here for the reason that outside the State, there exist good coaching institutions and facilities of tuition available which, however, not available to the students of this State, particularly to those who hails from remote rural areas of this State.

16. The case pleaded before us on behalf of the petitioners that the persons allegedly similarly situated i.e. the children of serving/retired employees of the Central Government/UT/Other State Governments and children of employees of the Autonomous Organizations/Semi-Government Bodies of Central Government/UT/Other State Governments, are still enjoying the benefit of exemption from the condition of passing two examinations from the schools situated in the State of Himachal Pradesh., prima-facie, carry force and as students of this category if in merits are likely to participate in the counselling for admission to the course scheduled to be held on and w.e.f. 29.6.2018, the point so raised in these writ petitions and agitated during the course of arguments also need adjudication because in case ultimately the category of Central Government/other State Government employees is not held entitled to the concession, they also cannot occupy the seats in our Medical/Dental colleges at the cost of the students of this State.

17. Our difficulty at this stage, however, is that neither the candidates belonging to this category are before us nor the State has yet controverted the point that allowing exemption to the children of this category is discriminatory to the petitioners raised in the these petitions by them, hence cannot be adjudicated at this stage authoritatively. Therefore, it is not deemed appropriate to dispose of these writ petitions at this stage and rather keep the same alive for being considered further on the question of justification of providing exemption vide clause 3(ii) under item No. IV(A) to the children of serving/retired employees of the Central Government/UT/Other State Governments and children of employees of the Autonomous Organizations/Semi-Government Bodies of Central Government/UT/Other State Governments after taking on record the version of the respondents and also the impleadment of the candidates, if any, from this category, in merit and eligible to appear in the counselling.

18. Our anxiety, at this stage, however, is as to whether the petitioners should also be allowed to appear in the counselling, if otherwise eligible and in merit or not. When the eligible and qualified children, if any, belonging to the category of children of serving/retired employees of the Central Government/UT/Other State Governments and children of employees of the Autonomous Organizations/Semi-Government Bodies of Central Government/UT/Other State Governments, may appear in the counselling, allowing the petitioners also if otherwise in merit and qualified to appear in the counselling of course, without any right of claiming admission in the Course would serve the ends of justice. Being so, by way of purely as interim arrangement, we restrict the claim to appear in counseling in favour of the petitioners alone from their category and to allow only to those petitioners who have submitted their applications either online or in terms of the interim order passed in some of these writ petitions well within the time schedule i.e. during the period from 12.6.2018 to 20.6.2018 and otherwise is/are in merits which shall be provisional for all intents and purposes and will not create any right in their favour to get admitted in the Course. However, no candidates from the category of the petitioners and of exempted category under clause 3(ii) of item IV (A) i.e. serving/retired employees of the Central Govt./ UT/ other State Governments and children of employees of the autonomous organizations/Semi-Government bodies of Central Govt./UT/ other State Governments, shall be admitted to the course without the leave of the Court. The respondents/Counselling Committee are also directed to notify the pendency of these writ petitions along with the next date of hearing and to bring gist of this order to the notice of the candidates appearing in counseling from the

category of the petitioners and also from that of the exempted category in terms of clause 3(ii) of item No. IV (A) to the prospectus.

19. The respondents shall check up the records i.e. the applications for admission, if any, received online within the stipulated period from the candidates belonging to exempted category as per clause 3(ii) of Item No. IV (A) for appearance in counselling and supply their particulars i.e. names, parentage, roll numbers and complete addresses etc. in the Registry of this Court within three days so that they either at their own seek their impleadment or are impleaded as party-respondents in the main matter i.e. CWP No. 1353 of 2018 and heard before these writ petitions are finally disposed of. The respondent-State shall also file its response justifying such exemption granted in favour of the children of this category and the object sought to be achieved thereby.

20. The respondent-State shall also place on record by way of affidavit on the next date the data i.e. the numbers of students admitted in MBBS/BDS courses out of the category of the petitioners during the academic session 2013-14 onwards up to 2017-18 when the provision qua exemption to this category remained in force. Similarly, the information qua number of students admitted in these courses during the academic session 2012-13 up to 2017-18 from the exempted category under clause 3 (ii) of item No. IV (A) of the Prospectus be also indicated in the affidavit.

21. We make it clear that any observation made hereinabove shall remain confined to decide the admissibility of interim relief i.e. the grant of permission to the petitioners to appear in the counselling provisionally and shall have no bearing on the merits of the case to be determined after hearing the parties on both sides in the light of this order.

List on **3.7.2018.**

CWP No. 1414 of 2018 delinked. An authenticated copy of this order be supplied to the learned standing counsel for the University as also the learned Advocate General today itself.

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