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INDEX

Nominal table
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SUBJECT INDEX

'A'

Administrative Law – Quasi-judicial functions – Discharge of – Requirement of giving reasons – Held, when quasi judicial authority or Court of law decides application and grants interim relief, then it has to satisfy that prima facie case and balance of convenience exist in favour of party- And in case interim protection not granted, party shall suffer irreparable loss - Satisfaction is to be reflected by way of reasoned order by referring to material on record – Order of Divisional Commissioner granting stay till disposal of appeal, without assigning any reason whatsoever, set aside – Petition allowed – Matter remanded. (Paras-2 & 6) Title: Parkash Kumar and others Vs. Rajiv Shankar and others Page- 515.

Arbitration & Conciliation Act, 1996 (as Amended vide Arbitration and Conciliation (Amendment) Act, 2015)- Sections 9, 12(5) & 17- Interim orders & appointment of arbitrators- Neutrality Principle – Applicability - Petitioner(s) praying for interim orders for restraining respondents (Hindustan Petroleum Corporation Limited and others) from effecting recovery and also from blacklisting petitioner(s) – Petitioners undertaking to take steps for appointment of arbitrator for adjudication of disputes – Agreement however empowering Appointing Authority of HPCL only either to act herself as sole arbitrator or nominate some sitting or retired officer of Corporation or Retired Officer of Govt. Company in oil sector of rank of Chief Manager or above etc. as arbitrator – Contractors having no choice in matter of appointment of arbitrator – Held, main purposefor effecting amendments in Statute is to provide for neutrality of Arbitrators – Any person whose relationship with party or counsel or subject matter of disputes falls under any categories specified in Schedule, he is ineligible to be appointed as Arbitrator – Agreement executed inter se party found violative of neutrality principle – Stipulation regarding appointment of person nominated by HPCL as Arbitrator held, illegal - High Court appointed retired Hon'ble Judge of High Court as arbitrator – Also directed respondents as interim measure not to take coercive measures till application filed under Section 17 of Act decided by arbitrator. (Paras- 12, 13 & 15) Title:M/s Jalpa Mata HP Center Vs. Hindustan Petroleum Corporation Limited and others Page-697.

Arbitration and Conciliation Act, 1996- Section 11(6)- Appointment of arbitrator – Limitation – Delay – Consequences – Work awarded to petitioner on 2.11.2002 – Period to complete work expired on 20.11.2003 – Work not completed by petitioner – Department finally closing agreement on 29.9.2008 on account of deviation – Petitioner not praying for appointment of arbitrator even in legal notice dated 10.8.2009 sent by him to department- Petitioner merely pressed for payment of balance – Department even not replying notice – Petitioner filing petition for appointment of arbitrator only on 2.5.2017 –Held, when assertion for payment is made, and there is no payment by way of clearance of final bill, cause of action will arise from that date – Closure of agreement vide communication dated 29.9.2008 within knowledge of petitioner – He ought to have filed application for appointment of arbitrator within three years from 29.9.2008 – Petition filed on 2.5.2017 barred by limitation and not maintainable. (Para-5) Title: Devi Singh Vs. State of Himachal Pradesh and others Page- 44.

Arbitration and Conciliation Act, 1996- Section 12- Appointment of Arbitrator- Neutrality Principle- Held, notwithstanding any agreement, an impartial person is required to be appointed as arbitrator- Person having direct or indirect connections or relationship or interest in any of parties or subject matter in dispute cannot be appointed- Senior Advocate of High Court appointed as arbitrator. (Para 11) Title: M/s Devki Nandan Steel Works and Ors vs. HP State Electricity Board Ltd. and Ors, Page- 584.

Arbitration and Conciliation Act, 1996- Section 12(5)-Seventh schedule- Neutrality principle- Held, in view of Section 12(5) of Act and Seventh schedule, Arbitrator having official relationship with any of parties, cannot continue as Arbitrator with arbitration- Appointment of Superintending Engineer is substituted by Hon'ble retired Judge of High Court as Arbitrator. (Para 7) Title: Tilak Raj vs. Chief Engineer (MZ) H.P. P.W.D.,Mandi and Another, Page-616.

Arbitration and Conciliation Act, 1996- Section 14 & 15- Substitution of arbitrator- Arbitrator (Retd. Chief Engineer) refusing to entertain petition on account of non-communication of his appointment as Arbitrator- Thereafter, pleading inability to arbitrate and communicating Department also- Held, appointment of arbitrator shall terminate, if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay- And where his inordinate delay terminates, substitute arbitrator has to be appointed as per Rules applicable- Petition of petitioner for substibution of arbitrator allowed. (Para 7) Title: M/s Devki Nandan Steel Works and Ors vs. HP State Electricity Board Ltd. and Ors, Page- 584.

Arbitration and Conciliation Act, 1996- Section 29A (1)(3)and (4)-Arbitration-Extension of time-Termination- Held, each Arbitrator is required to pass award within one year from entering upon reference, and this period can be extended by six months if no award passed within time or extended time, proceedings shall terminate unless Court either prior or after expiry of period so specified further extends period. (Para 6) Title: Tilak Raj vs. Chief Engineer (MZ) H.P. P.W.D.,Mandi and Another, Page-616.

Arbitration & Conciliation Act, 1996- Section 34- Objections to award – Public policy of India- What is? – Held, term 'Public policy' connotes some matter which concerns public good and public interest- Award or judgment likely to adversely affect administration of justice can also termed to be against 'public policy'. (Para-7) Title: M/s Una-Himachal (Food Division) Ltd. and another Vs. State of Himachal Pradesh Page-759.

Arbitration & Conciliation Act, 1996- Section 34- Objections to award – Held, Award passed by arbitrator can be interfered with in case of fraud or bias or violation of principles of natural justice -Interference, if any, on ground of 'patent illegality' is only permissible, if same goes to root of case-Violation should be so unfair and unreasonable so as to shock conscience of Court. (Para-11) Title: M/s Una-Himachal (Food Division) Ltd. and another Vs. State of Himachal Pradesh Page-759.

Arbitration & Conciliation Act, 1996- Section 34- Objections to award – Public policy of India – State allotting industrial plots to company 'U' – Requiring it to set up industry and start production within specified period – Company failing to start production even during

extended period on ground of non-sanctioning of finances – State cancelling allotment and allocating same plots to company 'B' – Company 'U' taking recourse of arbitration proceedings and claiming money value of structures and machinery standing over said plots – State pleading before arbitrator of having given option to company 'U' to remove its structures from plots – State not opting to acquire said structures – Arbitrator denying claim of company 'U' in toto – Objections thereto – Held, under Clause 6(x) of agreement State was to give money equivalent of structures and machinery only if it opted to acquire them and not otherwise – State had given notice and required company 'U' to remove its structures – State never exercised option to acquire said structures – Structures aforesaid as per claim of company 'U' were demolished by company 'B' and not by State – Award not against public policy – Objections dismissed – Award upheld. (Paras-17 to 20) Title: M/s Una-Himancha (Food Division) Ltd. and another Vs. State of Himachal Pradesh Page-759.

'C'

Code of Civil Procedure, 1908- Order 1 Rule 10- Impleadment of additional defendant – Trial Court summoning 'P' as additional defendant - Suit filed for damages for causing defamation – 'P' having sent complaints against plaintiff to Vigilance &Anti Corruption Bureau, which were found to be false – Petition against – 'P' contending that suit against him on day he was summoned, was barred by limitation and praying of setting aside of summoning order – Held, Allegations against 'P' make out prima facie case against him – He can raise plea of limitation before trial Court – Petition dismissed - Order upheld. (Paras-7 & 8) Title: Parshotam Dutt Gautam Vs. Ashwani Gautam and others Page-834.

Code of Civil Procedure, 1908- Order V Rule 2- Order IX Rule 13- Ex-parte decree – Setting aside of – Due service – Meaning – Trial Court dismissing defendant's application for setting aside ex-parte decree on ground that he was duly served through Registered Letter and despite service did not contest suit – Appeal against – High Court found that registered letters sent to defendant though did contain 'Summons' but did not contain copy of plaint – Held, it is obligatory on part of court to have sent copy of plaint and other documents appended thereto in terms of Order V Rule 2 of Code to defendant – Order of Trial Court illegal – Appeal allowed – Order set aside – Ex-parte decree also set aside – Trial Court directed to restore suit and proceed from date when ex-parte proceedings were carried out. (Paras-2 to 7) Title: M/s Mona Enterprises Vs. M/s BanarsiDass& Sons Page- 279.

Code of Civil Procedure, 1908- Order VI Rule 4- Fraud and misrepresentation – Pleadings and proof - Requirement – Plaintiff filing suit and challenging sale deed purportedly executed by defendant No.1 (D1) in favour of his daughter-in-law, defendant No.2 (D2) , on strength of power of attorney executed by plaintiff - Plaintiff alleging of having executed said power of attorney in favour of (D1) to manage his (plaintiff's) land and never authorized him (D1) to alienate it – Suit decreed by trial court and appeal of (D1 & D2) dismissed by Addl. District Judge – Regular Second Appeal – Defendants contending before High Court that pleadings insufficient in plaint to raise plea of fraud and misrepresentation - And lower courts went wrong in deciding issue in absence of requisite pleadings – On facts, High Court found that (a) plaintiff was illiterate, rustic shepherd (Gaddi) who mostly remained out of his village

alongwith his herd (b) (D1) initially remained Patwari and thereafter Kananugo of that area (c) sale deed by (D1) in favour of his daughter-in-law and thus he himself a beneficiary (d) agreements to sell allegedly executed by plaintiff in favour of (D2) not proved by examining scribe and attesting witnesses (e) plaintiff had specifically pleaded in his plaint that power of attorney executed by him to enable (D1) to manage his land in his absence and he never authorized D1 to alienate the suit land and also that sale deed result of fraud and misrepresentation (f) plaintiff mentioning in plaint manner in which fraud practiced upon him (g) further, plaintiff orally cancelling power of attorney, day before sale deed was executed by (D1) in favour of his daughter-in-law (h) No proof of payment of consideration by (D2) to plaintiff- Held, no question that plaint lacks in better particulars or of non-appreciation of evidence available on record arises at all- Regular Second Appeal dismissed . (Paras-22 to 31) Title: Dalip Singh and another Vs. Shri Godham and others Page-630.

Code of Civil Procedure, 1908- Order VI Rule 17- Order VIII Rule 1- Amendment of Plaint – Written statement to amended plaint- Filing of – Whether can be denied? –Held-No- After remand, trial court fixing suit for final arguments – Defendant seeking to file written statement to amended plaint – Trial Court refusing prayer on ground that no such concession given to defendant in remand order of District Judge – Petition against – Held, when Court allows party to amend plaint, defendant has right to file written statement to amended plaint – Otherwise it would prejudice right of defendant – Petition allowed – Order set aside – Matter remanded – Defendant directed to file written statement to amended plaint within specific time. (Paras- 8 and 9) Title: Prem Singh through his LR Parsino Devi Vs. Kuldeep Singh Page- 111.

Code of Civil Procedure, 1908- Order VI Rule 17- Amendment – Held, amendment which would enable and empower trial Court to clinch entire gamut of controversy inter se parties at contest, can be allowed – Order of Trial Court granting leave to amend plaint and thereby incorporate events subsequent to filing of suit and relevant to the controversy upheld. (Paras- 2, 6 & 7) Title: Dinesh Ranta& another Vs. Pushpa Chauhan & others Page-483.

Code of Civil Procedure, 1908- Order VI Rule 17– Order VIII Rules 6A and 9- Counter claim – filing of - Stage - Defendant seeking to amend written statement and simultaneously intending to file counter claim - Plaintiff contending that counter-claim can only be laid when written statement is initially filed by defendant and it cannot be filed subsequently alongwith amended written statement – Held, Order VIII Rule 9 of Code vests discretion in Court to permit defendant to lay counter-claim at later stage even if it was not raised it in pre-instituted written statement –Leave can be granted to defendant provided no prejudice going to be caused to plaintiff by filing of counter-claim. (Para-4)Title: Gauri Vs. Karma K. Namgyal Page-326.

Code of Civil Procedure, 1908- Order VII Rule 11- Rejection of plaint- Grounds –Non pleading and effect- Defendant not alleging anything in written statement on ground of which plaint should be rejected - Plea also not raised during arguments of regular second appeal – Held, no substantial question of law regarding rejection of plaint arises. (Para-20) Title: Dalip Singh and another Vs. Shri Godham and others Page-630.

Code of Civil Procedure- Order VIII Rule 1- Held, provisions of Order VIII Rule 1 are not mandatory and in exceptional circumstances, Court can extend period beyond 90 days in filing written statement (Para 6) Title: Anil Sharma vs. Meenakshi Sharma, Page-885.

Code of Civil Procedure, 1908- Order XIV Rules 1 & 2- Non-framing of issues – Effect – Trial Court decreeing counter-claim without there being any such issue framed by it – First Appellate Court dismissing plaintiff's appeal- Regular Second Appeal- Held, plaintiff knew about defendants counter-claim filed against him- Also allowed them to adduce evidence qua counter-claim in shape of demarcation report – Plaintiff cannot be said to have been prejudiced or taken by surprise by non-striking of any issue qua counter-claim- RSA dismissed – Decree of lower court upheld. (Paras-10 to 12) Title: Rajesh Kumar and another Vs. Sita Ram (since deceased) through his legal heirs Shri Tek Chand and others Page-679.

Code of Civil Procedure, 1908- Order XVII Rules 1 & 3 - Closure of evidence – Rent Controller closing evidence of tenants on ground that several opportunities already granted to them- Petition against- Held- Petitioners had taken steps for summoning their witnesses, who either remained unserved or despite service omitted to record their presence – Rent Controller should have directed counsel to take fresh steps and also ordered issuance of notices under Order XVI Rule 12 of Code against absentee witnesses for ensuring their presence, instead ordering closure of evidence – Petition allowed – Order set aside – Rent Controller directed to permit tenants to take fresh steps for ensuring presence of their witnesses and record their evidence. (Paras-1 and 2) Title: NanheKhan & another Vs. Chattar Jeet Singh Page-247.

Code of Civil Procedure, 1908- Order XXI Rule 66(2)- Proclamation of sale – Requirements – Held, Provision of Order XXI Rule 66(2) of Code are peremptory in nature and must be adhered to. (Para-5) Title: M/s Naina Cold and Retreading Works, Darla Vs. H.P. Financial Corporation, Shimla and another Page-675.

Code of Civil Procedure, 1908- Order XXI Rule 66, Second proviso- Proclamation of sale – Requirements – Whether it is mandatory for Court to specify estimated value of property to be put to auction? – Held, Statutory obligation to specify estimated value of attached property in proclamation of sale arises only if estimates thereof are provided to Executing Court either by Decree Holder or Judgment Debtor – When no such estimates are given by parties, it is not obligatory for the Court to specify value of property in proclamation of sale. (Para-7) Title: M/s Naina Cold and Retreading Works, Darla Vs. H.P. Financial Corporation, Shimla and another Page-675.

Code of Civil Procedure, 1908- Order XXII Rules 3, 4 and 9 – Death of parties – Decree against dead party – Effect – Held, decision in favour or against dead person renders same nullity – Decree passed without taking note of death of party to lis or deciding question of abatement and substitution of legal representatives can be challenged at any time including at its execution stage. (Para-2) Title: Anwar Hussain and another Vs. Sher Mohd. and others Page-640.

Code of Civil Procedure, 1908- Order XXVI Rules 9 and 14(3)- Local investigation – Appointment of fresh commissioner – Procedure – Held, Court cannot appoint new commissioner without setting aside earlier report of local commissioner. (Para-8) (Para-8) Title: Ichhia Sharma and Ors. Vs. Khuddi Devi and Ors. Page- 276.

Code of Civil Procedure, 1908- Order XXXIX Rules 1 & 2- Temporary injunction – Grant of – Principles – Defendant leasing out his hotel to plaintiff for certain period subject to payment of Rs. One crore and deposit of electricity, water and garbage charges with authorities concerned –Plaintiff alleging forcible dispossession - Agreement however providing for automatic termination of lease in case of breach of terms – Plaintiff neither paying rent to lessor nor depositing charges of electricity, water etc. – Held, Plaintiff not entitled for temporary injunction against lessor – Order of lower Court upheld. (Paras-6 to 8) Title: Duni Chand Vs. Budhi Prakash and another Page-818.

Code of Civil Procedure, 1908- Order XXXIX Rule 2A- Disobedience of order – Proof - Trial Court holding plaintiffs guilty of contempt on finding that despite status quo order they raised construction over suit land – District Judge upholding finding and dismissing plaintiff's appeal – Revision – Held, No demarcation report indicating construction having been raised over suit land adduced by defendants – Report of Local Commissioner (Advocate) in absence of demarcation report not of much credence – Lower Courts went wrong in relying upon discardable material – Revision allowed – Contempt petition dismissed. (Paras-8 to 10) Title: Prakash Chand & others Vs. Hem Singh and others. Page 352.

Code of Civil Procedure, 1908- Order XXXIX Rules 3 & 4- Ex-parte injunction – Compliance of Rule 3(a) & (b) – Consequences of non-compliance – Held, object of Rules 3(a) and (b) is to ensure that matter is disposed of at the earliest within time frame- And opposite party should know purpose for which suit has been filed and what are documents being relied upon – Compliance of Rule 3 is mandatory – For non-compliance, ex-parte injunction vacated. (Paras- 6 and 8) Title: Rakesh Kumar and others Vs. Bhagwati Public AushadalyaChintpurni and others Page-162.

Code of Civil Procedure, 1908- Order XLI Rule 22- Cross-objection- Filing of – Limitation – Commencement – Held, This provision has dual purposes, First to grant time of one month or even such further time as Appellate Court may deem fit to allow and secondly, to put party or his pleader at notice that appeal has been admitted and fixed for hearing – Once such notice served, period of limitation will start running – Post-admission notice made returnable for 15.3.2018, clearly mentioning that case fixed for hearing for 15.3.2018 – Notice served upon cross-objector on 19.1.2018 – Cross objection filed on 2.5.2018 held barred by limitation – Ordered not to be taken on record. (Paras- 4, 7 and 10) Title: Santosh Devi and others Vs. Hari Singh Page- 256.

Code of Civil Procedure, 1908- Order XLI Rule 23 - Remand – Justifiability - Additional District Judge (ADJ) remanding suit to trial court with direction to appoint local commissioner and obtain demarcation report – Additional District Judge holding that demarcation report on record was obtained by plaintiff behind back of defendants – Appeal against – Held, Findings of ADJ contrary to facts on record – Defendants did not join demarcation proceedings despite notice – Their appeal against demarcation report also stood dismissed by Collector, wherein he admitted correctness of demarcation report given by

Kanungo – Impugned order being of wholesale remand not sustainable – Order of remand set aside – ADJ directed to decide appeal on merit. (Paras-2, 5 and 6) Title: Ichhia Sharma and Ors. Vs. Khuddi Devi and Ors. Page- 276

Code of Civil Procedure, 1908- Section 2(2)- Decree- Interpretation – Held, Executing Court cannot go behind decree- It is to execute decree as it stands – But when terms of decree are ambiguous, it is entitled to look into pleadings and judgment to construe decree – Decree granting sale of 1/4th undivided share of Judgment debtor (JD) in dwelling house in favour of Decree Holder (DH) - Meanwhile partition taking place between parties – D.H. obtaining possession of part of house falling in share – D.H. seeking to enforce decree of 1/4th share with respect to area which left with J.D. – Executing Court accepting plea of D.H. and incorporating necessary recitals in proposed sale deed – Petition against -On facts, held, Executing Court went wrong in going behind decree and granting relief which stood declined – Petition allowed – Order of Executing Court set aside. (Paras-5 and 6) Title: Saroj Bala Vs. Ishwar Chand (since deceased) through his legal heirs, Page- 215.

Code of Civil Procedure, 1908- Section 24- **Hindu Marriage Act, 1955**- Section 9- Transfer of case- wife seeking transfer of petition filed for restitution of conjugal rights by her husband from court of Senior Civil Judge, Kangra at Dharamshala, to court of Senior Civil Judge, Chamba, on ground that after being evicted from matrimonial house, she is residing with her parents at Chamba- Husband opposing transfer- Held, in matrimonial disputes, convenience of wife is of paramount consideration- Case instituted by wife against husband and others under Prevention of Domestic Violence Act, also pending in court of Senior Civil Judge, Chamba- Petition pending before Senior Civil Judge, Dharamshala, ordered to be transferred to Chamba- Petition allowed. (Para 3 & 4) Title: Smt. Priya &anr. Vs. AbdeshKondal&ors, Page- 608

Code of Civil Procedure, 1908- Section 100 – Regular Second Appeal- Concurrent findings- Interference with – Held, in regular second appeal, High Court normally should not interfere with concurrent findings of facts recorded by Lower Courts unless and until those have been recorded in complete misreading, misconstruction and misappreciation of evidence on record and thereby serious prejudice has been caused to aggrieved party. (Para-18) Title: Dalip Singh and another Vs. Shri Godham and others Page-630.

Code of Criminal Procedure, 1973- Section 145- Applicability – Requirements – Held, Before initiation of proceedings, Magistrate should be satisfied that dispute regarding immovable property exists and it is likely to cause breach of peace – If he is satisfied of aforesaid two conditions, he shall proceed to pass preliminary order under Section 145(1) of Code, followed by inquiry and passing of final order under Section 145(6) of Code. (Para-15) Title: Usha Rani Sood Vs. Bhola Ram and others Page-504.

Code of Criminal Procedure, 1973- Section 145- Civil dispute – Effect of – Held, Sub Divisional Magistrate can take note of fact while forming an opinion that dispute though of civil nature, may result in breach of peace in locality. (Para-24) Title: Usha Rani Sood Vs. Bhola Ram and others Page-504.

Code of Criminal Procedure, 1973- Section 145- Land dispute – Apprehension of breach of peace – Existence of – Held, at time of initiation of proceedings under Section 145 of Code,

Magistrate should be satisfied that there is likelihood of breach of peace on account of dispute between parties – Continuation of such apprehension till passing of final order, not necessary. (Para-9) Title: Usha Rani Sood Vs. Bhola Ram and others Page-504.

Code of Criminal Procedure, 1973- Section 145- Land dispute – Apprehension of breach of peace –Existence of - Sub Divisional Magistrate (SDM) after inquiry holding complainant to be in actual possession of land (khokha), granting police assistance in protecting her possession – Revision – Sessions Judge allowing revision by holding that SDM nowhere held that land dispute was likely to cause breach of peace – Petition against – On facts, SDM in his preliminary order while issuing notices to parties, specifically recorded finding regarding apprehension of breach of peace on account of land dispute – Both parties laying claim of possession over disputed land - Apprehension of breach of peace can be presumed to continue to exist till final order is passed – SDM not required to repeat what he had said in preliminary order unless there is clear evidence that dispute ceased to exist so as to bring case within ambit of Section 145(5) of Code – Order of Sessions Judge set aside and of SDM restored. (Paras-8 to 14 & 27) Title: Usha Rani Sood Vs. Bhola Ram and others Page-504.

Code of Criminal Procedure, 1973- Section 145- Land dispute – Nature of proceedings – Held, inquiry under Section 145 of Code is limited to question as who was in actual possession on date of passing of preliminary order, irrespective of rights of parties – Court exercising revisionary powers cannot go into question of sufficiency of material considered by Magistrate for basing his satisfaction. (Para-15).Title: Usha Rani Sood Vs. Bhola Ram and others Page-504.

Code of Civil Procedure, 1908- Section 146- Land Acquisition Act, 1894- Sections 18 & 28-A- Enhancement of compensation – Whether reference under Section 18 is necessary? – Held- No- Co-owners who did not avail reference under Section 18 of Act also entitled to enhanced compensation on pro-rata basis as per their shares without having recourse to Section 28-A. (Para- 10) Title: Collector Land Acquisition, National Hydroelectric Power Corporation Limited Vs. Pune Ram(since deceased) through LRs Purva Devi and others Page- 391

Code of Civil Procedure- Sections 148, 151- Order VIII Rule 1- Written statement- Filing of – Extension of time- Trial Court granting last opportunity in filing written statement and closing defence when written statement not filed on adjourned date- Petition- Defendant contending that his counsel wrongly noted date of hearing as such written statement could not be filed on said date- Held, though no illegality can be attributed to Trial Court's order yet in interest of justice, petition allowed- One more opportunity granted in filing written statement subject o costs. (Para 5) Title: Anil Sharma vs. Meenakshi Sharma, Page- 885.

Code of Civil Procedure, 1908- Section 148-Order XXXIX Rule 3- Time for compliance, whether can be extended by Court? – Held, under Section 148 of Code Court can enlarge time, if any, fixed or granted by it for doing any act prescribed or allowed by Court – However, time for compliance of provisions contained in Order XXXIX Rule 3 of Code is provided in Code itself and court cannot enlarge it. (Para-5) Title: Rakesh Kumar and others Vs. Bhagwati Public AushadalyaChintpurni and others Page-162.

Code of Civil Procedure, 1908- Section 151- Order XXI Rule 32- Decree of permanent prohibitory injunction – Execution- Death of Judgment Debtor (J.D) – Executing Court

dismissing application of Decree Holder (D.H) seeking substitution of his legal representatives (L.Rs) – Petition against – L.Rs contending that after demise of original J.D., decree becomes unexecutable and cannot be executed against them nor against his assets falling into their hands – Held, decree under execution held JD as 'Karta' and suit property ancestral in his hand - Further decree restrained him from alienating suit property without consent of D.H. –Therefore, property which stood transmitted to his legal representatives continues to retain its character after demise of J.D. – In view of allegations of willful disobedience of decree, LRs required to be impleaded – Petition allowed – Order of executing court set aside. (Paras- 4 and 5) Title: Babu Ram Vs. Achhru (deceased) through LRs Smt. Kanku Devi &others Page-642.

Code of Civil Procedure, 1908- Section 151- Order XVIII Rule 4(1)(c)- Evidence by way of affidavit – Amendment of affidavit – Whether permissible? –Held-No- Trial Court allowing application of defendant for effecting amendment in affidavit containing his examination-in-chief – Petition against – Held, aforesaid rule permits party to withdraw affidavit evidence before commencement of cross-examination – It does not empower Court to permit any amendments therein – Order set aside – Petition allowed. (Para-5) Title: Anita Beri Vs. Rakesh Mohindra&others Page- 234

Code of Criminal Procedure, 1973- Sections 82 & 482- Inherent power- Exercise of –Trial Court declaring accused as proclaimed offender- Accused Challenging order before High Court on ground that his address not correctly mentionted in charge sheet and non-bailable warrants remained un-executed- On facts, accused found having appeared before trial Court earlier in the said case- Held, order of trial Court does not suffer from any infirmity- Petition disposed of. (Para 4) Title: Anil Kumar Budhiraja vs. State of H.P. and Another, Page- 526.

Code of Criminal Procedure, 1973- Sections 164 and 439- Protection of Children from Sexual Offences Act, 2012 **–** Sections 4 and 12- Bail- Grant of – Status report of police revealing that prosecutrix though minor but having given statement under Section 164 of Code before Magistrate of going with accused of her own and accused doing nothing wrong with her – Prosecutrix also having refused to undergo medical examination – During trial, all material witnesses turned hostile – On facts, bail granted subject to conditions. (Paras-3, 8 & 14) Title: Parvesh Kumar @ Vikkey Vs. State of Himachal Pradesh Page-859.

Code of Criminal Procedure, 1973- Section 173- Cancellation report – Procedure- Held, On receiving cancellation report court has to issue notice to complainant inviting his objection thereto, and then either to accept or reject but only after evaluating material collected by investigating officer in course of investigation – Order of Court taking cognizance without evaluating material filed in support of cancellation report is illegal. (Para-4) Title: Janam Singh Vs. State of H.P. Page-686.

Code of Criminal Procedure, 1973- Sections 173(8) and 482- Further investigation-Direction for-Accused facing trial before Special Judge for offences under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act – Allegations against him being that he was driving vehicle from which 'Charas' recovered by police during search – Case at stage of

recording evidence of prosecution – Accused filing petition under Section 482 of Code for directing police to conduct 'further investigation' as vehicle was never intercepted by them during 'Naka' and it was lifted from garage – Petitioner relying upon 'Toll tax receipts' and 'job card' of garage – Held – Further investigation can be ordered by jurisdictional Magistrate under Section 173(8) of code when final report filed by Investigating Agency, and Magistrate is satisfied that further investigation necessary – Petition under Section 482 of Code not maintainable – Fair investigation though part of fair trial yet practice to conduct investigation in particular manner and fashion should not be encouraged as there will not only be possibility of multiplicity of litigation but administration of criminal justice system would also be paralyzed and proceedings stalled - On facts, material on record not found sufficient to direct further investigation – Petition dismissed. (Paras -6 to 10) Title: Sunit Kumar Vs. State of H.P. & others Page-625.

Code of Criminal Procedure, 1973- Section 179 - Place of trial- 'Act done' and 'consequences ensued' - Meaning – 'A' beaten up and thrown by accused as if he were dead at Brahmpukhar in Bilaspur – On being taken to IGMC, Shimla, A dying there – FIR registered at Shimla – Charge sheet also filed in Court at Shimla – Accused disputing territorial jurisdiction of Sessions Judge, Shimla– Sessions Judge negating plea of accused - Revision against - Held, 'consequence' is result or effect and 'ensue' is what happens or occurs afterwards or as a result – Section 179 of code applicable when an act and its consequences both of which have to be proved to constitute offence, have taken place in two different local areas– Alleged offence may be tried either where it took place or where its consequences ensued – As beatings given at Bilaspur resulted into death at Shimla, Court at Shimla has jurisdiction to try case- Petition dismissed. (Paras- 25 and 27) Title: Brij Lal & others Vs. State of Himachal Pradesh Page-462.

Code of Criminal Procedure, 1973- Sections 244 and 245 – Discharge – Circumstances – Held, where pre-charge evidence is intrinsically untrustworthy, same can not be made basis for proceeding against accused- In such circumstances, discharge of accused justified. (Para-12) Title: Sukh Dev alias Devi Ram Vs. Lata Kumari & others Page-726.

Code of Criminal Procedure, 1973– Section 256- Dismissal of complaint – Permissibility- Circumstances explained – Complaint transferred to court from another court – Transferee Court dismissing complaint by holding that complainant not present despite personal service of notice upon him of the said date of hearing and acquitting accused – Appeal against – High Court found observations made in impugned order factually wrong – No notice for date on which complaint dismissed was actually issued to complainant – Other observation of Judicial Magistrate that complainant is not interested in case, also found factually incorrect – Held, on facts, Magistrate not justified in dismissing complaint in default – Appeal allowed – Impugned order set aside – Complaint ordered to be restored for regular hearing. (Paras-19 to 21 and 28) Title: Hemant Kumar Vs. Sher Singh Page-644.

Code of Criminal Procedure, 1973- Section 319- Additional accused – Summoning of – Circumstances – Trial Court refusing prosecution request of summoning 'S' and 'V' as additional accused on ground that they were named as assailant(s) only by complainant and his father in their deposition – Petition against – Held, Chargesheet clearly mentioning that

involvement of aforesaid 'S' and 'V' did not come out during investigation – Other independent witnesses not naming them as assailant(s) in their deposition before Court – No other material to summon aforesaid persons as co-accused – Order of Trial Court upheld – Petition dismissed. (Paras- 6 to 9) Title: State of Himachal Pradesh Vs. Anil Kumar Page-159.

Code of Criminal Procedure, 1973 - Sections 320 & 482- Inherent power- Exercise of- Quashing of FIR- Accused seeking quashing of FIR pursuant to compromise with victim- State opposing petition- Held, in appropriate cases to meet out ends of justice FIR or complaint can be quashed even in non-compoundable cases- On facts, in view of compromise, FIR ordered to be quashed- Petition allowed. (Para 9 & 12) Title: Ravi Kumar and others vs. State of H.P. and another, Page- 610.

Code of Criminal Procedure, 1973- Section 372- Proviso- Forum of appeal- Held, against judgment of acquittal of trial Court remedy available to victim would be to file appeal in Sessions Court. (Para-1) Title: Dhani Ram Vs. Prabhu Ram and others Page-325.

Code of Criminal Procedure, 1973- Section 372- Proviso- Right of Appeal – Held, Victim of occurrence has right to file appeal against order of acquittal or conviction for lesser offence or inadequate compensation of trial Court. (Para-1) Title: Dhani Ram Vs. Prabhu Ram and others Page-325.

Code of Criminal Procedure, 1973- Sections 374, 381 and 386- Appeal against conviction- Whether can be dismissed in default?- Held- No - Addl. Sessions Judge dismissing appeal of accused in default for non-appearance of accused or his counsel on day it was fixed for hearing – Petition against – Held, criminal appeal cannot be dismissed in default –It is to be decided on merit even if accused or counsel representing him not present – Petition allowed – Order set aside – Matter remanded to Appellate Court for disposal in accordance with law. (Para-3) Title: Mukesh Kumar Vs. State of Himachal Pradesh Page- 315.

Code of Criminal Procedure, 1973- Section 438- Anticipatory Bail- Right to investigate – Police custody – Held, When person not in custody approaches police officer investigating offence and offers to give information leading to discovery of fact, having bearing on charge, he may appropriately be deemed to have surrendered himself to police –There is no warrant for proposition that where legitimate case for remand of offender to police custody can be made out by investigating agency, power under Section 438 of Code should not be exercised. (Para-19) Title: Ankit Vs. State of Himachal Pradesh Page-396.

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Grant of – Economic offences – Held, it is not proper to hold that in economic offences involving blatant corruption at higher rungs of executive and political power discretion under Section 438 of Code should not be exercised – It is not possible for Court to assess blatantness of corruption at stage of anticipatory bail. (Para-20) Title: Ankit Vs. State of Himachal Pradesh Page-396.

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Essential requirements – Held – Under Section 438 of Code applicant has to make out case for grant of anticipatory bail – But one cannot go further and say that he must make out 'special case' –(Para-22) Title: Ankit Vs. State of Himachal Pradesh Page-396.

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Custodial interrogation – What is? – Held, Custodial interrogation means custody of accused by police and interrogation by them – Accused released on bail is under nobody's custody – When bail granted, custody ceases-If there be any interrogation by police while on bail, it cannot be termed to be custodial interrogation – It is mere interrogation without police custody – Relying ***Hyderali vs. State of Kerala.*** (Para-35) Title: Ankit Vs. State of Himachal Pradesh Page-396.

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Custodial interrogation, whether can be denied? – Held, it may not be proper to deny investigator an opportunity for custodial interrogation in fit cases - Court shall not stand in way of police discharging their official duty sanctioned by law – Relying ***Hyderali vs. State of Kerala.*** (Para-35) Title: Ankit Vs. State of Himachal Pradesh Page-396.

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- Grant of – 'A' and 'C' allegedly printing fake currency and then purchasing 'charas' with it– Petitioners seeking pre-arrest bail – Applications resisted by State on ground that their custodial interrogation required for effective investigation – Held, Custodial interrogation of petitioners necessary for investigating agency to unearth all links of common intention – Case revolves around sale and purchase of huge quantity of narcotics, which if established and proved can entail serious consequences – Anticipatory bail declined – Custodial interrogation allowed but for specific period only – After that, petitioners ordered to be released on regular bail subject to conditions (Paras- 45 and 46) Title: Ankit Vs. State of Himachal Pradesh Page-396.

Code of Criminal Procedure, 1973- Section 439- Bail – Grant of – Circumstances – Accused alongwith his parents allegedly harassing and treating his wife 'S' with cruelty – 'S' committing suicide by consuming insecticide – Bail of accused resisted by State on ground of seriousness of offences – State contending that accused and his parents did not bring 'S' to hospital when she was suffocating rather brought her dead – On finding that (i) suicide took place on 5.6.2018 whereas FIR was registered only on 19.9.2018, (ii) No allegation in statement of mother of 'S' that accused or any member of his family raised demand of dowry or otherwise harassed 'S', (iii) Investigation was complete, (iv) Custody of accused not required by police and (iv) Accused public servant and there being no likelihood of his escape, bail granted subject to conditions. (Paras-6, 7 & 13) Title: Deepak Kumar Vs. State of Himachal Pradesh Page- 731.

Code of Criminal Procedure, 1973- Section 439- Protection of Children from Sexual Offences Act, 2012- Section 6- Bail- Entitlement – On facts, prosecutrix though minor found having acquaintances with accused for the last about year and a half, she voluntarily joining his company and developing physical relations with him – No complaint ever made by her to anyone – Matter revealed by prosecutrix to mother when mobile was recovered from her bed by her mother – Victim not appearing before trial court despite notice for recording her statement – Co-accused already on bail – Held, on account of delay in prosecution, accused cannot be allowed to incarcerate in jail for indefinite period – Accused ordered to be released on bail subject to conditions. (Paras-7 to 9 and 15). Title: Vinod Kumar Vs. State of Himachal Pradesh Page-310.

Code of Criminal Procedure, 1973- Section 439- Protection of Children from Sexual Offences Act, 2012-Sections 3, 4 and 29- Bail – Special Judge rejecting accused's payer for bail – Filing petition in High Court – Accused, truck driver, found to have given lift to one 'S', 'A' and victim in his truck and allowed 'S' to rape victim – Accused and 'A' kept lower inner wear and salwar of victim with them so as to compel her to have physical relations with them also – Victim jumping off from truck half naked and reaching police post in that condition – Police providing clothes to victim, a minor, Held, material prima facie shows involvement of accused in commission of said offences – Bail rejected. (Paras-7 to 12 and 17) Title: Deepak Singh Vs. State of H.P. Page- 475.

Code of Criminal Procedure, 1973- Section 439- Regular bail – Grant of - Rape case – On finding victim a married lady and unexplained delay (21 days) in lodging FIR as well as absence of injuries on person of victim or accused, accused ordered to be released on regular bail subject to conditions. (Paras-2 to 4) Title: Amar Singh Vs. State of H.P. Page-390.

Code of Criminal Procedure, 1973- Section 439(2)- Cancellation of bail- Grounds – Police arresting accused for not complying with conditions imposed by High Court while granting anticipatory bail- Special Judge granting regular bail unmindful of conditions imposed and non-compliance thereof by accused since order of High Court not produced before him – Special Judge cancelling bail on ground of accused not approaching court with clean hands – Petition against – Held, Order of Special Judge cannot be declared illegal – However, on undertaking of father of accused of mortgaging his land towards amount due from his son, High Court set aside cancellation order – Investigation also complete and nothing to be recovered from accused – Special Judge directed to consider grant of bail subject to verification of revenue record of land sought to be mortgaged. (Paras-4 to7) Title: Satinder Kumar Vs. State of Himachal Pradesh Page-89.

Code of Criminal Procedure, 1973- Section 468(2) and 469- **Indian Penal Code, 1860-** Sections 500 and 201– Defamation – Limitation for cognizance - Computation- Held, in offences punishable with imprisonment for terms exceeding one year but not exceeding three years, no Court shall take cognizance after three years – And limitation would commence in relation to offence from date of said offence – Alleged defamation caused by way of frivolous complaints occurred in 2002 – Complaints for defamation filed in 2011, held to be barred by limitation. (Paras-18 to 20) Title:Jeewan Lakshmi Vs. Dr. Shrikant Baldi Page-736.

Code of Criminal Procedure, 1973– Section 482- Inherent powers- Exercise of- Quashing of FIR – Held, exercise of jurisdiction to quash complaint or FIR pursuant to compromise between victim and accused depends upon facts and circumstances of each case – No exhaustive elaboration of principles can be formulated – Motor Accident taking place because of rash driving of both the drivers of vehicles – Motor accidents have serious impact upon society as a whole, pedestrian and other road users – Violation of traffic Rules and laws by drivers now common phenomenon and there is no traffic sense on roads – Quashing of FIR declined notwithstanding compromise between accused and victim of offence – Petition dismissed. (Para- 5 to 8) Title: Sanjay Kashyap &ors. Vs. State of H.P. &anr. Page-653.

Code of Criminal Procedure, 1973- Section 482- Inherent powers- Exercise of- Held, though in exercise of inherent jurisdiction High Court may quash proceedings pursuant to compromise of parties even in non-compoundable cases, yet power should be exercised sparingly and with great caution to further ends of justice and prevent abuse of process of Court- Such power should not be exercised in prosecutions involving heinous offences and offences which are not private in nature- FIR registered for offences under Sections 363, 366-A of Indin Penal Code ordered to be quashed pursuant to solemnizing of marriage between accused and victim. (Paras 7 & 11) Title: Kuldeep vs. State of Himachal Pradesh, Page-887.

Code of Criminal Procedure, 1973- Section 482-inherent powers- Exercise of - Quashing of FIR – Matrimonial dispute – FIR registered on allegations of cruelty against husband and husband's relatives – Allegations prima facie make out cognizable case against petitioner, an elder brother of husband of complainant – No malafide intention of complainant to launch proceedings against petitioner with ulterior motive – Held, FIR cannot be quashed – Petition dismissed. (Paras- 10 to 11) Title: Manoj Jamwal Vs. State of H.P and another Page-649.

Code of Criminal Procedure, 1973- Section 482- Inherent powers- Exercise of – Quashing of criminal proceedings – Scope – Held, power to quash criminal proceedings not to be exercised in cases which involve heinous and serious offences or offences involving mental depravity like murder, rape or dacoity – Such offences not private in nature and have serious impact on society – Offences committed under Special statutes like Prevention of Corruption Act or offences committed by public servants while working in that capacity not to be quashed merely on basis of compromise between victim and offender – Offences under Sections 279 and 304-A of Code not heinous or involve mental depravity – As such, pursuant to compromise, FIR registered for such offences quashed – Judgments of conviction and sentence recorded by Lower Courts set aside – Accused acquitted. (Paras- 9, 12 & 13) Title: Vijayant Pal alias Vijayant Kumar Vs. State of Himachal Pradesh Page- 382.

Code of Criminal Procedure, 1973- Section 482- Inherent Powers- Exercise of- Quashing of FIR pursuant to compromise- Held- In appropriate cases to meet out ends of justice, High Court in exercise of inherent jurisdiction may order quashing of FIR- On facts, FIR registered for offences under Sections 279, 337 & 338 Indian Penal Code, 1860, ordered to be quashed.(Para 11) Title: Anil Chauhan and Another vs. State of H.P., Page- 521.

Code of Criminal Procedure, 1973- Section 482- Inherent power- Exercise of- Quashing of FIR- **Indian Penal Code, 1860**- Section 420 and 120-B – Complainant registering FIR on allegations that accused fraudulently made him to deposit sum of Rs.6,00,000/- in their bank account by assuring that son of complainant would be provided with Work Visa- Neither Work Visa was provided by accused nor money refunded- Parties compromising matter and accused seeking quashing of FIR-On facts, held alleged offences do not involve mental depravity or are of heinous nature- Petition allowed- FIR quashed. (Para 16) Title: Faisel Babu Naduvil Parambil vs. State of Himachal Pradesh and Another, Page- 546.

Criminal Proceedings- Initiation of- Pendency of Civil Suit- Effect- Held, mere pendency of civil suit will not bar aggrieved party to avail remedies contemplated in relevant penal

statutes- Petitioner seeking indulgence of Court in initiating criminal proceedings against respondent for transferring property he had agreed to sell- Agreement executed in 2006- Petitioner filing suit for Specific performance in 2014- Further, held, on account of inordinate delay in filing suit, respondent perceived petitioner of having abandoned his rights under agreement- Petition dismissed. (Para 1 & 2) Title: M/s SanyaEnterprises vs. Shri Rangi Ram, Page- 599

Constitution of India, 1950- Articles 14, 15 and 226- Admission to MBBS and BDS Courses – 'Kashmiri Migrant' – Who is? – Petitioner seeking admission in MBBS/BDS course(s) in colleges situated in State against quota of 'Kashmiri Migrants' – Prospectus defining 'Kashmiri Migrant' as person forced to leave Jammu & Kashmir due to terrorism and forced to reside or rehabilitate in other parts of country – Prospectus requiring candidate to produce certificate on prescribed proforma, issued by District Magistrate of area where he is residing after migration – Petitioner not annexing such certificate - In his online application, petitioner seeking admission against General Category Seat(s) – Petition dismissed. (Paras-2 & 5) Title: Karan Mattoo Vs. Himachal Pradesh University and others (D.B.) Page-245.

Constitution of India, 1950- Articles 14, 15 and 226- Admission to Medical/Dental Colleges against State quota seats – Policy decision – Court's interference – Prospectus issued by University requiring candidates seeking admission against State quota seats of having qualified requisite examinations from Schools located in State – Exemption from having qualified such examinations as existing earlier, stood withdrawn with respect to children of bonafideHimachalis working outside in Private Sector/occupation – However, such exemption still available to children of bonafideHimachalis employed outside State with Central Govt./Other State Governments/Local bodies/Public Sector undertakings etc. – Challenge thereto – Divergence of opinion between Hon'ble Judges of Division Bench – Matter referred to Hon'ble third Judge – State arguing that stipulations contained in prospectus being policy matter, cannot be interfered with by Court – Also justifying retention of exemption clauses in favour of children of bonafideHimachalis retired from/or working in Government/Public Sector outside State on ground that their parents were compelled by circumstances to join such employment for want of job opportunities in State – Held, Grant of benefit of exemption is policy decision to be taken by Competent Authority but such decision cannot be arbitrary, irrational and without any basis and can be tested on touchstone of Article 14 of Constitution of India- Persons employed in private occupation cannot be said to have left State under any compulsion as they could have established their business in State – Their children not entitled for benefit of exemption of qualifying requisite examinations from Schools in State – Benefit of exemption is only on account of service rendered by bonafideHimachalis outside State and such exemption cannot be only made available to children of persons who work under Central/other State Governments/UTs etc., and not to persons who reside outside State of Himachal Pradesh on account of employment in Private Sector- Benefit of exemption to candidates is on account of service by their parents outside State and not on account of Government service – Decision of State to withdraw benefit of exemption otherwise earlier available to children of parents employed in private sector not based upon intelligible differentia and amounts to creation of class within a class , which is legally not permissible. (Paras-23, 31 and 58 to 60) Title: Shivam Sharma Vs. State of Himachal Pradesh and others Page-48.

Constitution of India, 1950- Articles 14, 15 and 226- Admission to MBBS/BDS Courses against state quota seats – Eligibility criterion – Court interference – Justifiability –

Prospectus for admission year 2018-19 deleting clauses providing exemption from having qualified requisite examinations from Schools situated in State for admission against State quota seats for candidates belonging to bonafideHimachali parents though residing outside State due to their service in private sector/private occupation – However such exemption available to candidates residing outside due to their parents being engaged/employed with Central Government/ other State Governments, UTs/Corporations etc. – Challenge thereto – Deletion of clauses alleged to be arbitrary and unreasonable vis-à-vis candidates whose parents working with Central Government Board/Corporation etc. – State justifying its stand on ground that deletion was made pursuant to recommendation of Prospectus Review Committee – And in absence of such exemption clauses, petitioner not entitled for admission against State quota seats – Held, as per Hon'ble Shri Justice Dharam Chand Chaudhary (J.) (i) making provisions for exemptions of having qualified requisite examinations from schools situated in State or withdrawal thereof is policy decision and in absence of proof of decision being arbitrary, policy cannot be interfered with (ii) children of retired/serving employees of Central Government/ Other State Governments/UTs/autonomous bodies etc. form distinct class vis-à-vis children of persons employed in private concern as their parents left State out of compulsion (iii) reasonable classification has nexus with object to train doctors well versed with geographical and climatic conditions to ensure medical facilities to people residing in remote areas (iv) doctrine of legitimate expectation not applicable against policy matters.

Hon'ble Shri Justice Vivek Singh Thakur partially dissenting – Held, Distinction has to be drawn between bonafideHimachalis working outside State in Private Sector vis-à-vis Himachalis working in private occupation like business – Himachalis serving outside in private sector cannot be said to have opted jobs outside Himachal of their own volition – They are living outside due to compulsion - Job opportunities in Himachal are less – They have instinct to come to their native place – Grounds for denial of exemption to them equally applicable to children of parents serving outside Himachal with Central/other State Governments/Public Sector undertakings etc., whose children availing such exemption(s) – Distinction between children of Himachali parents working outside with Centre Government/other State Governments/Public Sector undertakings vis-à-vis children of Himachalis parents working in 'private sector' outside Himachal, not based on any intelligible criterion – Discrimination of children of Himachalis employed in Private Sector outside State by giving preferential treatment to children of bonafideHimachalis working outside State in Government Department/Public Sector, constitutionally impermissible – In view of divergence of opinion between Hon'ble Judges on minor aspect i.e. deletion of exemption to children of bonafideHimachalis working outside State in 'Private Sector', matter referred to Hon'ble third Judge. (Paras- 5, 26, 27, 30, 31, 58, 60, 61 and 71) Title: Shivam Sharma Vs. State of H.P. &ors. (D.B.) Page- 1.

Constitution of India, 1950- Articles 14 & 16- Promotion – Absence of Statutory R&P Rules – Effect – Petitioner found discharging work of Senior Law Officer since December, 2010 when post fell vacant without being formally promoted to said post – No R&P Rules in existence in December, 2010-Promotion used to be made by Board as per administrative orders –R&P Rules notified in June, 2015 only – Petitioner claiming promotion to post of Senior Law Officer since December, 2010-Board contending that petitioner cannot be promoted by circumventing R&P Rules – Held, Board allowed status quo to continue as same was in its interest – Board continuously taking work from petitioner as Senior Law Officer for last many years, can not contend that he is not eligible for promotion for said post- Board directed to initiate proceedings for his promotion against post of senior Law

Office as per procedure as was in vogue as on 1.12.2010, and complete same within specified time. (Paras-7 to 9) Title: Ravinder Singh Vs. Bhakra Beas Management Board through its Chairman Page-622.

Constitution of India, 1950- Article 21- **Code of Criminal Procedure, 1973-** Section 482- Fair trial-Scope – Special Judge dismissing application of accused seeking comparison by expert of signatures appended on Sample Seal with his specimen signatures – Petition against – Held, Accused should get fair chance to prove his innocence –Accused simply seeking comparison of his signatures by an expert - Petition allowed – Order of Special Judge set aside. (Paras-8 and 9) Title: Duncan Glen Smith Vs. State of H.P. Page-816.

Constituion of India, 1950- Article 215 & 226- Nature of Powers- High Court being Court of Record has wide extraordinary writ jurisdiction – Such powers are to be exercised to advance cause of justice. (Para 37) Title: Court on its own Motion vs. State of H.P. and Others, Page- 528.

Constitution of India, 1950- Article 226- LPG distributorship – Allotment – Courts interference – Scope – Candidature of petitioner for LPG distributorship rejected by Corporation on ground that land offered during Field Verification of Credentials (FVC) by him could not be considered for Show-room since he was neither owner nor same taken by him by way of registered lease from its owner for 15 years as contemplated in Unified Guidelines– Challenge thereto- Petitioner contending that there is no difference between 'rent agreement' and 'lease agreement' – Held, Brochure on Unified Guidelines expressly contemplates that land over which Show-room is to be constructed should either be owned or should be on lease with incumbent for minimum period of 15 years by way of registered lease deed, then it is incumbent upon him to fulfill said conditions – Petitioner appended "unregistered rent agreement' with application– Petitioner not eligible as per criteria contained in Brochure – Decision of Corporation cannot be faulted with - Petition dismissed. (Paras-7, 8 and 10) Title: Bhupesh Sharma Vs. Bharat Petroleum Corporation Limited and others Page- 268.

Constitution of India, 1950- Article 226- **National Highways Act, 1956-** Section 3D- Four laning of Parwanoo-Shimla National Highway – Writ petition - Courts interference in Survey Plan- Justiciability – Petitioners seeking either complete realignment of proposed four laning of Parwano-Shimla National Highway or substantial changes therein to save some built up constructions at Kandaghat and falling between Kaithlighat-Dhalli-Byepass road – Also challenging order of competent Authority dismissing their objections and representation with respect to Kandaghat-Byepass – Petitioners alleging widening work as illegal for want of permission/clearance from Local Panchayats, Department of Wild Life/ Forest, State Pollution Control Board etc. and also on ground that work would adversely affect ecology and tourism – High Court found (i) Project Proponent obtaining clearances from State Pollution Control Board and Ministry of Environment and Forest, Govt. of India – Notification under Section 3D of Act issued after hearing objections of petitioners - Alignment of road done after considering facts so as to minimize loss and damage to environment, cost of constructions, location and local topography etc. - Latest alignment of road based on objective assessment of material collected by experts – Courts neither experts nor do they have expertise to adjudge suitability of alignment of road - Petition dismissed.

(Paras-16 to 23 & 37) Title: Prem Chand Sharma & others Vs. Union of India & others D.B. Page-248.

Constitution of India, 1950- Article 226- **National Highways Act, 1956-** Section 3D- Acquisition of land for public purpose – Challenge thereto – Courts interference – Scope- Held, exercise of power under Article 226 of Constitution of India being discretionary must be exercised only in furtherance of interest of justice and not merely for making out legal point- Public interest must outweigh private interest- Wherever Court finds acquisition vitiated on account of non-compliance with some legal requirement, it can award damages on lump sum basis instead of quashing acquisition proceedings. (Para-31) Title: Prem Chand Sharma & others Vs. Union of India & others D.B. Page-248.

Constituion fo India, 1950- Article 226-**Public Interest Litigation-** High Court taking suo moto cognizance on news item regarding rape and murder of school going girl- One of accused dying in lock up during investigation by SIT of State Police- High Court then entrusting investigation to CBI and directing police officials of SIT to file their personal affidavits in sealed covers- CBI filing application before High Court and praying for release of said affidavits to them- Police Officers of SIT objecting release on ground of being violative of their Constitutional right against self incrimination –Held, said police officers at no point of time remained accused nor affidavits filed by them in contemplation of any investigation- To bring statement within provisions of Article 20(3) of Constitution, person must have stood in character of an accused at time he made such statement - It is not enough that subsequent to such statement he becomes an accused- There is no violation of right against self incrimination-Copies of affidavits ordered to be released. (Para 28) Title: Court on its own Motion vs. State of H.P. and Others, Page- 528.

Constitution of India, 1950- Article 227- Supervisory jurisdiction – Nature – Held, in exercise of Supervisory jurisdiction conferred by Article 227 of Constitution of India, High Court not to act as Appellate Court – Findings returned by Lower Court if palpable and within its jurisdiction then High Court in exercise of Supervisory jurisdiction not to interfere with said findings. (Para-7) Title: Oriental Insurance Company, Divisional Office, Shimla Vs. Anju Kumari and others Page-458.

Constitution of India, 1950- Article 226- Writ petition- Petitioner challenging decision of Government withdrawing Essentiality-cum-Feasibility certificate granted earlier to it for starting GNM/B.Sc. (N) Institute in State- Petitioner permitted to withdraw petition in view of pendency of similar matter before Hon'ble Apex Court. (Para 2) Title: M/s Northern International Educational and Research Centre vs. State of Himachal Pradesh and others, Page- 597

'D'

Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972 (Rules)- **CCS (Pension) Rules, 1972 (Pension Rules)**- Rule 19(2)- Re-employment of Retired Armed Personnel - Pay fixation – Benefit of service rendered in Army – Hon'ble Single Bench directing State to work out pay due to petitioner engaged and subsequently regularized as Surveyor on and w.e.f. 7.1.2003 from day of his regularization by giving him benefit of Pension Rule 19 – LPA – State arguing

that petitioner not appointed against post reserved for armed personnel being so, Rules had no applicability in his case - Held, under Pension Rule 19 (2) Authority issuing order of substantive appointment to civil service or post shall along with such order require in writing, re-employed armed personnel to exercise option either to continue to draw military pension or get previous military service counted as qualifying service towards Pension –Rule 19 does not talk about method of appointment and it is not necessary that ex-serviceman has been appointed against post/category reserved for ex-servicemen – LPA dismissed. (Paras-4 to 8) Title: State of HP and Ors. Vs. Hakam Ram (D.B.) Page-750.

Drugs and Cosmetics Act, 1940 (Act)- Section 27(d)- **Drugs and Cosmetics Rules, 1945-** Rule 85- Suspension of licence – Effect – Whether complaint for offence under Section 27(d) of Act thereafter would be maintainable?– Held – No - Sample of formaldehyde solution manufactured by petitioner found not of standard quality – Assistant Drugs Controller and Licensing Authority after hearing manufacturer, suspending licence for one month – Order attaining finality – Drugs Inspector, thereafter also filing complaint against manufacturer for offence under Section 27(d) before Court – Challenge thereto – Held, manufacturer stood punished by authorities by way of suspension of licence and order attaining finality – Complaint before Magistrate not maintainable- Petition allowed complaint quashed (Paras- 2 to 4 and 24) Title: M/s Arora Pharmaceuticals Pvt. Ltd &Anr. Vs. State of Himachal Pradesh Page- 149.

Drugs and Cosmetics Act, 1940- Section 27(d)- **Code of Criminal Procedure, 1973-** Section 468- Limitation – Computation - Quashing of complaint – Sample of drug taken on 7.7.2007 – Found not of prescribed standard by Government analyst vide report dated 7.3.2009 – Complaint for offence filed before Magistrate on 6.3.2012- Complainant not seeking condonation of delay – Held, complaint barred by limitation – Petition allowed – Complaint quashed. (Paras-14, 28 and 29) Title: M/s Arora Pharmaceuticals Pvt. Ltd &Anr. Vs. State of Himachal Pradesh Page- 149.

'E'

Employees Compensation Act, 1923- Section 3- Monthly income – Determination - Widow of deceased driver stating on oath that her husband was drawing salary of Rs.10,000/- per month – Commissioner however assessing monthly income at Rs.6,000/- and granting compensation accordingly – Appeal by claimants – On facts found (i) widow had stated on oath about monthly income of deceased at Rs.10,000/-, (ii) she was not cross-examined by Insurer on this point (iii) Owner-employer not confronted with any record, he was statutorily required to maintain qua salary of deceased, (iv) Employer -Owner of vehicle, admitting that wages of deceased were Rs.10,000/- per month – Held, Commissioner went wrong in determining income of deceased at Rs.6,000/- per month- Monthly income assessed at Rs.10,000/- Appeal allowed – Compensation enhanced – Award modified. (Paras-3 to 5) Title: Krishna Devi & Others Vs. Harjit Singh and another Page- 198.

Equal Remuneration Act, 1976- Section 10(2)- **Code of Criminal Procedure, 1973-** Section 482- **Indian Penal Code, 1860-** Sections 500 and 201- Quashing of proceedings – Principles – Accused (employee) earlier filed two complaints against department with allegations that she was intentionally not paid salary and other maternity benefits– Complaints of employee dismissed on merit by CJM and judgments attained finality –

Thereafter, present complainant, a Senior Bureaucrat filing complaints against employee for defamation by alleging that he was defamed in earlier proceedings on account of baseless allegations leveled by employee – CJM taking cognizance on complaints and summoning employee for offences under Sections 500 and 201 of I.P.C. – Petition against summoning order – Held, in complaints filed earlier by employee, complainant was not arrayed as accused – There was no specific allegation against complainant in complaints of employee – Complainant was never summoned as an accused in those complaints – He was not Managing Director of Corporation at relevant point of time – No allegation in complaints of employee either against the then M.D. of Corporation- Present complainant remained M.D. of Corporation during 2006-07 whereas complaints were filed by employee in 2002 – Not clear as to how present complainant personally aggrieved of allegations, if any, contained in complaints filed by employees in 2002–Complaints filed by complainant bureaucrat quashed - Summoning orders Set aside – Petitions allowed. (Paras- 15, 16, 23 & 24) Title: Jeewan Lakshmi Vs. Dr. Shrikant Baldi Page-736.

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Himachal Pradesh Co-operative Societies Act, 1968 (Act) - Sections 37(1) and 37(1-A)- Whether Section 37(1-A) is subject to Section 37(1) of Act? – Held- No - Language of Sub-section (1-A) is plain, simple and unambiguously clear - It uses expression "while proceeding to take action under Sub-section (1)" Registrar is of the opinion that suspension of Committee or any Member is necessary he may take action of suspending Committee or such Member and thereafter make proper arrangements for management and affairs of Society till proceedings are completed (Para-40) Title: Jagdish Chand Sapehia Vs. State of Himachal Pradesh & others (D.B.) Page- 836.

Himachal Pradesh Co-operative Societies Act, 1968 (Act)- Section 37(1) and 37(5) – Suspension of committee – Procedure – Whether prior consultation with Institution financing Society, is mandatory before issuing show cause notice?- Held - No - On basis of reports regarding financial irregularities, Registrar issuing show cause notice to Chairman and other members of the Board of Governors to explain irregularities, and simultaneously suspending Board of Governors during pendency of enquiry – Registrar also directing Deputy Commissioner to take charge of management of Bank as a interim measure – Challenge thereto - Petitioner, Chairman assailing said notice on ground that prior consultation with Institution financing Bank as required under Section 37(5) of Act, not done and suspension of Board of Directors being bad in law – Held, Sub-section (5) does not refer to Sub section (1-A) – It only refers to Sub-section (1) of section 37 – Expression "any action" stipulated therein necessarily means consequential action of removal of Committee, which is to be after issuance of show cause notice calling upon noticee to show cause and state his objection- Registrar may after affording opportunity, himself come to conclusion that no action for removal required to be taken in view of justification furnished by noticee - For formation of opinion in issuance of notice, no prior consultation is required - Sub-section (1) of Section 37 provides for (a) formation of an opinion in issuance of show cause notice; and (b) passing written order in removing Committee - It is only when Registrar

deems it appropriate to remove Committee, he has to necessarily consult Financial Institution to which a Cooperative Society is indebted. (Paras- 27 & 38) Title: Title: Jagdish Chand Sapehia Vs. State of Himachal Pradesh & others (D.B.) Page-836.

Himachal Pradesh Co-Operative Societies Rules, 1971 (Rules)- Rules 43, 45 and 48- Complaint against office bearers of Society- Writ against – Maintainability – On complaint of irregularities done by President and other office bearers of Society, Assistant Registrar, directing its Secretary to convene special meeting of Managing Committee to discuss complaint or hold fresh elections – Petitioner, President of Society challenging such direction on ground that he could not be removed before completion of tenure of two years – Held, Rules provide for removal of office bearers of Co-operative Society in constitutional and democratic manner – Special meeting of Executive Committee can be convened in terms of Rule 48- Removal of office bearers is subject to compliance of procedure prescribed in Rules 43 and 45 – Only meeting of Society has been sought to be convened to discuss contents of complaint –Writ petition pre-mature – Assistant Registrar, directed to proceed with complaint in accordance with statutory provisions – Petition disposed of with liberty to Petitioner to approach High Court if he felt dis-satisfied. (Paras-6, 9 and 11) Title: Ramesh Chand Vs. State of Himachal Pradesh &ors. (D.B.) Page-157.

Himachal Pradesh Land Revenue Act, 1954- Section 45- Entries in periodical record- Presumption – Held, entries recorded in periodical records carry presumption of truth till rebutted- Continuous entries standing in favour of "D" showing him non-occupancy since not rebutted are valid- Conferment of Proprietary rights of said land on "M" wrong- Regular second appeal allowed- Decree of First Appellate Court set aside- Suit decreed. (Para 17) Title: Ludar Mani vs. Hem Dutt& another, Page- 579.

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 118- Sanction – Absence of - Vestment of property in Government for want of sanction – Propriety – On complaint, Competent Authority conducting inquiry and ordering vestment of land owned by petitioner "R" alongwith double storey building in State Government free from all encumbrances- Competent Authority observing that land though recorded in ownership and possession of "R" but it being in actual possession of respondent No.3, who found raising construction over it without obtaining sanction - Challenge thereto – On facts, High Court found that though land recorded in ownership and possession of 'R', but 'R' admitting before Competent Authority of his not spending money on said construction – Also acquiescing that money spent on construction by R3 – Agreement to sell though in favour of R3 – But his request for sanction to purchase, still pending with Government – Held, orders of Competent Authority not illegal – Petition dismissed. (Para-4 to 7). Title: Roshan Lal (deceased) through LRs. Vs. State of H.P. & others Page-132.

Himachal Pradesh Transfer of Land (Regulation) Act, 1968- Sections 3 and 5-Quasi-Judicial functions- Breach of principles of natural justice – Effect- Held- Even when there is infraction of principles of natural justice, still Court is required to see whether any purpose would be served by remitting matter to administrative authority to decide afresh after giving opportunity of being heard to parties – As per Govt. permission, lease of land in favour of petitioner was for five years and it stood lapsed– No further agreement between parties – No permission of State Govt. to extend lease was obtained – Divisional Commissioner was justified in holding that there was no lease of land on and after 31.12.2010 and dismissing petitioner's appeal-Petition Dismissed though order of Deputy Commissioner appealed

against held to be in breach of principles of natural justice. (Paras-23 to 25 & 30).Title: M/s Banjara Camps and Retreats Private Limited Vs. Shiv Lal and another Page- 417.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- **Code of Civil Procedure, 1908-** Order VII Rule 14(3)- **Indian Evidence Act, 1872 (Act)-** Section 45- Expert report – Whether can be filed at subsequent stage with leave of Court? – Held, opinion of an expert may emanate even during course of progress of suit or rent petition – It falls within ambit of Section 45 of Act – There is no proviso engrafted in Order VII Rule 14 of Code which bars tendering of such report prepared at subsequent stage into evidence, but with leave of court. (Para-3) Title: Suman Bala Vs. Rakesh Sood, Page- 683.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(3)(d) (as amended vide Amendment Act, 2009)- Eviction suit – Ground – Bona fide requirement for commercial purposes –Landlord filing eviction suit on ground that premises required for commercial purposes for his unemployed sons –No such ground existed in Act when eviction suit filed before Rent Controller – Act enabling eviction of tenant on said ground amended only during pendency of proceedings – Rent Controller allowing eviction and Appellate Authority dismissing appeal of tenant- Revision - Tenant arguing that in absence of express retrospectivity of amended provisions, Rent Controller had no jurisdiction to entertain eviction petition on said ground on the day it was filed – And order of eviction as upheld by Appellate Authority was without jurisdiction – Held, Provisions as amended nowhere provide with rigidity that these would not be applicable to pending eviction suits – Plea of tenant not tenable. Revision dismissed. (Para 14) Title:Jhompi Ram Sharma Vs. Gopal Krishan (since deceased) through his legal heirs Page- 169.

Hindu Law- Ancestral property- Alienation – Legal necessity – Proof- Held, Purchaser not leading any evidence of legal necessity compelling holder to dispose of ancestral land – Mere recitals in sale deed of existence of legal necessity not sufficient. (Para-12) Title: Chuni Lal Sharma Vs. Ashok Kumar Page- 468.

Hindu Law- Ancestral property- Held, suit land transmitted into hands of holder from his predecessor-in-interest is ancestral in his hands. (Para-12) Title: Chuni Lal Sharma Vs. Ashok Kumar Page- 468.

Hindu Marriage Act, 1955- Section 13(1) (i-a)- Divorce – Cruelty – What is? – Held, acts of wife in slapping husband in presence of respectable persons of biradari, tearing his clothes, lodging false FIR of cruelty against husband and in case arising therefrom, filing application under Section 319 of Code of Criminal Procedure for impleading her parents-in-law, undergoing surgery without intimating husband, refusing to attend guests of husband etc. caused immense trauma to him – Findings of Additional District Judge of petitioner having been met with cruelty by wife and ordering dissolution of marriage on ground of cruelty upheld. (Para-7) Title: Seema Devi Vs. Dinesh Kumar Page-355.

Hindu Marriage Act, 1955- Section 28 Divorce decree- Appeal- Re-marriage - Despite stay – Effect – On facts, re-marriage of husband during pendency of appeal though disapproved yet not invalidated – However, husband directed to pay Rs. One Lac as compensation to his erstwhile wife – Appeal dismissed (Paras-9 to 11) Title: Seema Devi Vs. Dinesh Kumar Page-355.

Hindu Succession Act, 1956- Section 30- Ancestral property – Alienation- Held, Section 30 of Act empowers a Hindu to make testamentary disposition of his property including his share in Mitakshara coparcenary – Notwithstanding any custom or usage to the contrary – Said provision has no applicability to non-testamentary dispositions like alienation by way of sale. (Paras- 14 and 15) Title: Chuni Lal Sharma Vs. Ashok Kumar Page- 468.

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Indian Easements Act, 1882- Section 13- Right of way –Easement of necessity – Alternative Path – Existence of – Plaintiff claiming right of passage for himself and others through Panchayat land as easement of necessity – Trial Court dismissing suit and District Judge affirming decree in appeal – RSA– Field Kanungo, plaintiff's own witness clearly admitting existence of alternative path for plaintiff's hotel through road – Held, Necessary declaration qua easement by way of necessity cannot be given – Order of Collector directing recording of passage through disputed land since passed behind back of Panchayat not relevant – Concurrent findings of fact not being perverse cannot be interfered in second appeal. (Paras-12, 13 & 26) Title: Shiv Kumar Sood Vs. Gram Panchayat Dadahu and another Page-93.

Indian Evidence Act, 1872- Section 3- **Indian Penal Code, 1860-** Section 302- Murder – Proof –Circumstantial evidence – Appreciation – Accused convicted and sentenced by Sessions Court – Trial Court relying upon his extra judicial confession made to complainant, taking of axe (weapon of offence) by accused from complainant's wife and incriminatory recoveries effected pursuant to his disclosure statement – Appeal against – On facts, no evidence as to when axe taken by accused from complainant's wife and deceased killed - Extra judicial confession since not made by him before close relative, trusted person or well wisher, found unreliable - Statement of complainant given during trial found contradictory vis-à-vis statements recorded under Sections 154 and 164 of Cr.P.C. qua extra-judicial confession, making of disclosure statement, and recovery of weapon of offence and other incriminatory articles – Held, conviction based on wrong appreciation of evidence available on record – Appeal allowed – Conviction set aside – Accused acquitted. (Paras-18 to 35) Title: Kanhakru Ram Vs. State of H.P. (D.B.) Page178.

Indian Evidence Act, 1872- Section 3- Circumstantial evidence- Appreciation- Held, in case based on circumstantial evidence each and every circumstance must be proved by prosecution and circumstances as a whole should make out chain leading to only conclusion that accused committed offences alleged by prosecution. (Para 27) Title: Hari Ram Bahadur vs. The State of H.P., Page- 554.

Indian Evidence Act, 1872- Section 3- Appreciation of evidence – DNA report – Held, DNA profiling being accurate is conclusive proof of fact that DNA derived from vaginal swab of victim was that of accused. (Para-25) Title: Ramesh Chand Vs. State of Himachal Pradesh (D.B.) Page-864.

Indian Evidence Act, 1872- Section 6- Res gestae- What is? – Held, Section 6 of Act is an exception to general rule whereunder heresay evidence becomes admissible – But, what is required to be established is that it must be almost contemporaneous with acts and there should not be an interval which would allow fabrication.-Statements sought to be admitted

must have been made contemporaneously with acts or immediately thereafter – Rationale in making certain statement or fact admissible under Section 6 of Act is on account of spontaneity and immediacy of such statement or fact in relation to fact in issue -It is necessary that such fact or statement must be part of same transaction - (Paras- 31 to 36) Title: Himanshu alias Shammi Vs. State of Himachal Pradesh (D.B.) Page-873.

Indian Evidence Act, 1872- Section 8- **Indian Penal Code, 1860-** Section 302- Murder – Circumstantial evidence – Motive – Absence of – Held, where case is based on circumstantial evidence, motive to commit crime becomes relevant – Accused, if, had motive to cause death eyewitness account of occurrence may not be required- But where motive is missing, prosecution is required to prove its case with help of testimony of eye-witnesses. (Paras- 15 & 22) Title: Kanhakru Ram Vs. State of H.P. (D.B.) Page-178.

Indian Evidence Act, 1872- Section 45- **Code of Criminal Procedure, 1973-** Section 125- Expert opinion – Paternity dispute – Direction for giving blood samples for DNA tests – Justification – Wife and son filing maintenance proceedings against respondent – Respondent disputing paternity of child and alleging that one 'D' was biological father of son – Court allowing his application and directing parties to give blood samples for conducting DNA tests to determine paternity of son – Petition against – Held, when there is apparent conflict between right to privacy of person and duty of Court to reach truth, Court must exercise its discretion only after balancing interests of parties and on due consideration whether for just decision DNA test is eminently needed – Further held, intention of respondent not to establish illegitimacy of child but to demonstrate infidelity of wife - Prayer made in application for conducting DNA tests of parties aimed at alleged adulterous behaviour of wife though in determination of said fact, factum of legitimacy of child would also be incidentally involved – Petition disposed of without interfering impugned order by giving liberty to petitioners either to comply order and go for DNA tests or disregard it, enabling Court in that eventuality to draw presumption contemplated under Section 114 of Act. (Paras-9, 11 & 12) Title: Sunita Devi and another Vs. Makhan Lal Page-516.

Indian Evidence Act, 1872- Section 114- Marriage – Presumption – Held, Long cohabitation and birth of children will raise presumption of valid marriage. (Para-9) Title: Sukh Dev alias Devi Ram Vs. Lata Kumari &others Page- 726.

Indian Evidence Act, 1872- Section 118- Indian Penal Code, 1860- Sections 376 and 506- Protection of Children from Sexual Offences Act, 2012- Section 4- Child witness –Evidentiary value – Child witness whether examined on oath or otherwise if found competent to depose to facts and reliable one, such evidence could be basis of conviction – Credibility of evidence of child witness depends upon circumstances of each case – Only precaution which Court should bear in mind is that witness must be reliable and his/her demeanour must be like any other competent witness and there is no likelihood of witness being tutored - DattuRamraoSakhare v. State of Maharashtra, (1997 (5) SCC 341 referred to and relied upon. (Paras-47) Title: Himanshu alias Shammi Vs. State of Himachal Pradesh (D.B.) Page-873.

Indian Evidence Act, 1872- Section 118- Indian Penal Code, 1860- Sections 376 and 506- Protection of Children from Sexual Offences Act, 2012- Section 4- Child witnesses clearly deposing before Court that accused sexually assaulted them in his room where he had taken them on pretext of giving toffees – Accused son of landlady in part of whose building, Aganwadi, was being run by State Govt.-Victims on rolls of Aganwadi -Accused had access to children- Medical evidence of some of victims revealing hymens absent and redness of their private parts – Held, child witnesses were competent and reliable – Conviction and order of sentence recorded by Special Judge upheld. (Paras-18 & 53 to 60) Title: Himanshu alias Shammi Vs. State of Himachal Pradesh (D.B.) Page-873.

Indian Penal Code, 1860- Sections 186, 353, 332 read with 34 – Assault on public servant – Meaning – Held, in order to constitute offence assault must have taken place when complainant was acting as such a public servant. (Para-7) Title: State of H.P. Vs. Vinay Chandla and Anr. , Page-813.

Indian Penal Code, 1860- Sections 186, 353, 332 read with 34- Assault on police officer by accused when he asked them not to park their vehicle in No Parking Zone – Acquittal by Trial Court – Appeal against– State raising plea of non-appreciation of evidence by trial court – On facts, High Court found that (a) name of complainant police officer inserted in between two entries in duty register, (b) other police officers on patrol and traffic duty alongwith complainant, not associated in investigation, (c) complaint of accused made against complainant never investigated and (d) no investigation carried out whether accused had a permit to take their vehicle to Sealed Area – Acquittal recorded by Trial Court upheld – Appeal dismissed. (Paras- 9 to 10) Title: State of H.P. Vs. Vinay Chandla and Anr. Page-813.

Indian Penal Code, 1860- Sections 279, 304-A, 337 and 338- **Motor Vehicles Act, 1988-** Section 184- Rash and negligent driving – Proof – Trial Court convicting and sentencing accused for rash driving and causing death of as well as injuries to persons working or moving on road – Sessions Judge upholding conviction – Revision against – Accused not denying occurrence of accident but submitting that it happened because of mechanical failure of vehicle –Eye-witnesses 'S', 'V', 'P' and 'A' clearly stating before trial Court of rashly driven offending vehicle hitting victims laying cables by side of road – Accused admitting of his driving offending vehicle at time of accident in statement recorded under Section 313 of Cr.P.C - Mechanical examination revealing vehicle in fit condition for plying – Held, accident was result of rash driving on part of accused – Conviction for aforesaid offences upheld. (Paras-6 to 17) Title: Dev Raj Vs. State of Himachal Pradesh Page- 37.

Indian Penal Code, 1860- Sections 279, 337 & 338- Rash and negligent driving- Trial Court convicting accused on allegations that accused negligently reversed his vehicle and hit against factory wall which collapsed and fell on labourers resulting in injuries to them- On appeal, Sessions Judge acquitting accused of offences under Section 279 of Code on ground that vehicle was not being plied on public highway but maintaining conviction for offences under Sections 337 and 338 of Code- Revision- Evidence not revealing specifically that collapse of wall was on account of strike of vehicle- Complainant and his wife, another injured not telling about cause of collapse of wall- Held, in absence of clear evidence, no findings of rash or negligent act on part of accused could have been rendered- Revision

allowed- Conviction set aside. (Paras 5 to 7) Title: Sirat Sood vs. State of Himachal Pradesh, Page- 894.

Indian Penal Code, 1860- Sections 279 and 337- Rash and negligent driving – Proof – Trial Court convicting and sentencing accused on finding that he was rash and negligent in driving Ambassador car and as result thereof, injuries were caused to wife and daughter of complainant who was driving Fiat car – Appeal of accused also dismissed by Addl. Sessions Judge- Revision – Evidence showing that wife and daughter of complainant not even cited as witnesses – Spot map revealing that complainant himself had gone toward his wrong side of road – Road at relevant point too wide – Held, probability of accident having taken place on account of rashness of complainant, cannot be ruled out – Lower Courts fell in grave error while appreciating evidence on record – Revision allowed – Conviction and sentence set aside. (Paras- 8 to 10 & 17) Title: Virender Singh Vs. State of Himachal Pradesh Page-852.

Indian Penal Code, 1860- Sections 279, 337 and 338- **Motor Vehicles Act, 1988**- Section 187- Rash and Negligent Driving and grievous injuries to victim –Proof- Acquittal by Trial Court – Appeal against – Offending tanker went to extreme right side of road and hit injured sitting on motorcycle parked 30 feet away from National Highway – Tanker also hitting another truck parked in court-yard – Injured and other witnesses clearly stating about rash driving of accused – Accused taking plea that accident took place because of brake failure – Accused relying upon report of auto mechanic that brake pressure found nil – No evidence that brake pressure nil before accident – It could have occurred after accident also – Held, evidence on record clearly proves rash driving on part of accused – Appeal allowed – Acquittal set aside – Accused convicted of offences under Sections 279, 337, 338 I.P.C. and 187 of Motor Vehicles Act. (Paras-8 to 15) Title: State of H.P. Vs. Gurcharan Singh Page-721.

Indian Penal Code, 1860- Sections 279, 337 and 304-A- Rash and negligent driving and death – Proof – Accused allegedly by his rash driving of bus hitting boy crossing road and causing his death – Trial Court acquitting accused – State in appeal and contending gross misappreciation of evidence by trial Court –Site of occurrence visible from both sides – Skid marks resulting on account of application of brakes existing upto 10-15 feet on road – Accused in position to see sudden arrival of boy on road – No cross-examination on Investigating Officer and photographer qua site plan and photographs showing skid marks on road – Held, Evidence on record clearly showing negligent driving on part of accused – Findings of trial Court perverse – Appeal allowed – Acquittal set aside – Accused convicted of offences under Sections 279, 304-A and 337 of Code. (Paras-9 to 13) Title: State of H.P. Vs. Hari Chand Page- 316.

Indian Penal Code, 1860- Sections 302 & 201- Murder and destruction of evidence- Proof- Trial Court convicting accused and sentencing them for murdering “NB” and destroying evidence of said offence- Appeal- On facts, (i) deceased “NB” having illicit relationship with wife (A3) of accused No. 1 (ii) A1 complaining about it to employer of deceased (iii) Accused No. 2 found missing from his room on night of incident (iv) deceased last seen in company of accused as he and A3 had gone to market for purchases and on next day his body was recovered (v) A3 getting recovered jute sack used for cleaning blood soiled floor and walls of

their room (vi) A3 identifying places of offence and from where dead body was recovered (vii) A1 had motive to kill deceased as he found deceased having illicit relationship with his wife (viii) Witnesses deposing qua blood spots on road, stairs leading to room of accused 1 and 3, as well as on walls (ix) Said blood tallied with blood of deceased- Held, chain of circumstances being complete clearly establishes involvement of accused in commission of aforesaid offences- Appeal(s) dismissed- Conviction upheld. (Para 27 & 28) Title: Hari Ram Bahadur vs. The State of H.P., Page- 554.

Indian Penal Code, 1860- Sections, 307, 324 and 326 read with 34- Arms Act, 1959- Section 25- Indian Evidence Act, 1872- Section 9 - Identification of assailants – Victims assaulted by culprits at midnight while sleeping outside liquor vend – Trial Court acquitting accused by holding that identity of accused as assailants not established beyond doubts – Appeal by State – High Court found (i) incident having taken place at midnight (ii) Assault happened only for about two minutes (iv) accused not named as assailants in FIR, though complainant claims to be knowing them by nicknames (v) Accused also not named as assailants in MLCs (vi) one victim clearly admitting that when assaulted, he was not able to identify assailants – Held, identity of accused as assailants not established – Appeal dismissed – Acquittal upheld. (Paras-15 to 17) Title: State of Himachal Pradesh Vs. Arvind alias Shambhoo&anr. (D.B.) Page-223.

Indian Penal Code, 1860- Sections 323, 325 and 506 read with 34- Grievous hurt and criminal intimidation-Proof- Accused tried on complaint that they made assault on complainant and uprooted his two incisors – Incident alleged to have been seen by 'G' and 'R' – Trial Court acquitting accused of all charges – Appeal against – High Court found that (i) there was unexplained delay in filing complaint, (ii) though incisors of complainant were missing but there was no corresponding injury on lips or gums, (iii) Medical Officer clearly reporting that oral hygiene of complainant was very poor and loss of teeth could be on account of gross corrosion, (iv) complainant himself admitting loss of some other teeth due to disease, (v) case against complainant and others instituted by accused party already pending in Court, (vi) 'R' appeared to be a procured witness – Held, complainant miserably failed in establishing his case against accused – Trial Court justified in acquitting accused – Appeal dismissed. (Paras- 8 to 15 & 18) Title: Kuldeep Singh Vs. Milap Chand &another Page-693.

Indian Penal Code, 1860- Sections 323, 325 and 506 read with 34 - Grievous hurt and criminal intimidation - Proof – Informant alleging that accused made an assault and caused grievous injuries and his teeth were uprooted – Further alleging that accused also intimidated him and threatened to do away with his life – Accused acquitted by trial court – Appeal by State on ground that trial court did not appreciate evidence correctly – On facts, High Court found (1) complainant never alleged in his information to police that his teeth were uprooted (2) broken teeth were not produced before police or medical officer, (3) Injury on lips of complainant missing, (4) 'P', mother of complainant falsely stating qua knife injury on back of complainant, (5) Medical Officer deposing about possibility of removal of incisors earlier, (6) statements of other witnesses having serious flaws – Held, Trial Court rightly acquitted accused – Appeal dismissed – Judgment of trial court upheld. (Paras-10 to 16) Title: The State of Himachal Pradesh Vs. Kuldeep Singh & others Page-708.

Indian Penal Code, 1860- Sections 323, 354 & 506 –Hurt, Outraging of Modesty and Criminal Intimidation – Proof - Accused allegedly caught complainant when she was returning from fields, touched her breast and asked her to let him do wrongful act – Also snatched sickle from her and caused injuries to her besides intimidating her – 'R' and 'S' alleged to have reached spot on hearing cries of complainant – Trial Court convicting and sentencing accused of said offences – Addl. Sessions Judge however allowing his appeal and acquitting accused – Appeal by State – State raising plea of wrong appreciation of evidence by Addl. Sessions Judge – On facts, High Court found (i) improvements in statement of complainant given during trial vis-à-vis statement made in FIR (ii) complainant not making reference of genesis of occurrence leading to injuries on her person in her MLC. (iii) 'R' and 'S' not corroborating prosecution case (iv) weapon of offence not shown to medical officer for proving that injuries could be caused with it (v) recovery of sickle, dhatu and Kilta made belatedly and at instance of complainant (vi) enmity between families of complainant and accused on account of land dispute – Held, appreciation of evidence as done by Addl. Sessions Judge not perverse – Appeal dismissed – Acquittal upheld. (Paras-9 to 17) Title: State of H.P. Vs. Gian Chand @ Penu Page-219.

Indian Penal Code, 1860- Sections 363, 366, 375 and 376 (before Amendment) – Kidnapping and rape – Age of victim- Determination – Trial Court convicting and sentencing accused of kidnapping and rape – Appeal against – On facts (i) record of school where victim initially admitted not produced to prove her date of birth, (ii) Her mother stating on oath victim's age at 16 ½ years on date of occurrence (iii) Radiological age of prosecutrix found to be between 17-18 years, (iv) Pariwar Register showing different date of birth of victim than what recorded in school certificate, (v) Love letters showing victim being in love with accused and interested in marrying him, (vi) on date of occurrence while going to school, she had taken extra clothes in her bag – Held, being case of elopement and sexual act not being against her will or without consent, offences of kidnapping and rape not made out – Appeal allowed – Conviction and sentence set aside – Accused acquitted (Paras-22 to 33)Title: Amit Kumar Vs. State of Himachal Pradesh Page-101.

Indian Penal Code, 1860- Sections 376, 494 and 495- Rape and Bigamy- Whether marrying and developing physical relations with lady who knew about prior subsisting marriage of accused, will amount to rape? –Held-Yes- Accused already married and having spouse living again marrying victim – Accused developing physical relations with her – Victim filing FIR for rape against him allegedly on coming to know of his prior marriage – Trial Court convicting & sentencing accused for offence of rape - Appeal against – Evidence revealing that victim and her relatives knew about prior marriage of accused before he solemnized second marriage with victim – Accused contending that victim knew about his earlier subsisting marriage and voluntarily consented for sexual relationship and act does not amount to rape – Held, this knowledge of victim will not improve situation because he was already married and subsequent marriage, if any, had no sanctity in law - In any event, accused could not have lawfully married complainant - Accused after having solemnized marriage with complainant committed sexual intercourse with her, and it falls within provision of clause "fourthly" of Section 375 Indian Penal Code, 1860 – Accused rightly convicted of having committed rape – However in circumstances, sentence reduced to period already undergone (4 years) and payment of compensation of Rs.one lac to victim. (Paras-7, 12 to 14, 17 & 23). Title: Atam Singh Vs. State of H.P. Page- 364.

Indian Penal Code, 1860- Sections 376 & 506(II)- Protection of Children from Sexual Offences Act, 2012 **–** Section 6 - Aggravated penetrative sexual assault and criminal intimidation –Trial court convicting and sentencing accused on finding accused being on management staff of hospital and having raped victim a minor, in premises of hospital itself- Appeal – Accused assailing judgment of trial court on grounds inter alia, there is no evidence of his being on management staff of hospital, material collected during investigation of another case could not have been used against him, sampling of DNA not done as per procedure etc. – Evidence revealing that victim had initially lodged FIR against one 'K' of sexual assault and during medical examination, her vaginal swabs were taken – Vaginal swabs however linking accused – Victim during her interrogation revealing sexual assault by accused, and loading FIR against him – Accused admittedly working as driver in hospital – Blood sample of accused also taken before medical officer – No tampering with samples till examination in FSL – Documentary and medical evidence proving victim to be below 18 years on date of offences – Held, accused rightly convicted and sentenced by Special Judge – Appeal dismissed. (Paras- 15 & 26 to 28) Title: Ramesh Chand Vs. State of Himachal Pradesh (D.B.) Page-864.

Indian Penal Code, 1860- Sections 380 and 454 – House breaking and theft – Proof– Complainant alleging theft of trunk containing currency when he was away from home – Case based on disclosure statement of accused and recoveries of trunk and receipt etc. from jungle- Recovery of currency made during personal search of Accused – Trial Court convicting accused but Sessions Court acquitting him in appeal – Appeal by State – On facts, (i) statement of witness 'B' having seen accused wandering around house of complainant on day of theft, found doubtful, (ii) 'P', 'M' and 'S' stating on oath of having caught accused and then bringing him to police post belying prosecution case of police having spotted accused per chance while on patrol and making recovery of currency during his personal search, (iii) accused, complainant and 'P' having business dealings and complainant party claiming Rs.10,000/- as due from accused (iv) making of disclosure statement and recovery of trunk from jungle extremely doubtful – Held, on evidence, prosecution miserably failed to connect accused with commission of offences – Appeal dismissed – Judgment of Sessions Court upheld. (Paras-11 to 17) Title: State of Himachal Pradesh Vs. Jagmohan (D.B.) Page- 304.

Indian Penal Code, 1860- Sections 380, 411, 457 and 201- Theft and receiving stolen property – Proof – Accused convicted by Trial Court for offences under Section 380 and 457 of Code by holding that he committed theft of ornaments and currency in house of complainant 'S' –But acquitted co-accused of receiving said stolen property for want of evidence – Case entirely based on disclosure statement of accused and recoveries effected thereon- In appeal, Addl. Sessions Judge acquitting accused also – Appeal by State – Held, evidence regarding recoveries allegedly made on basis of disclosure statement not worth credence – Acquittal did not suffer from any gross perversity or mis-appreciation of evidence – Appeal dismissed- Acquittal upheld. (Paras-9 to 13) Title: State of H.P. Vs. Sunder Lal Page-490.

Indian Penal Code, 1860- Sections 406-Criminal misappropriation- Proof- Trial Court convicting accused "GH" of misappropriating huge money of complainant in US Dollars and other articles- Appeal- Evidence showing vast improvements in statement of complainant given before Court vis-à-vis her previous statement qua money and articles given to "GH"-

Held, complainant not credible witness- Accused "GH" wrongly convicted of offence of criminal misappropriation. (Para 13) Title: Peer Mohammad Azad vs. State of H.P., Page- 600.

Indian Penal Code, 1860- Sections 420, 468 & 471- Deception, forgery and use of forged document- Proof- Trial Court convicting accused "GH" "GA" and "GM" of getting nikahnama between accused "GH" and victim executed by deceiving that "GH" was single- But "GH" was already married on date of its execution- Defence evidence however revealing that first marriage between "GH" and his wife stood dissolved by way of local custom- Held, accused were wrongly convicted of said offences by trial Court. (Para 11 & 12) Title: Peer Mohammad Azad vs. State of H.P., Page- 600.

Indian Penal Code, 1860- Sections 467 & 468- Forgery- Proof- Trial court convicting accused "GH" of putting false signatures of complainant "JM" on document- Report of Handwriting Expert not attributing forged signature to be in hand of accused- Held, accused "GH" wrongly convicted for forgery. (Para 10) Title: Peer Mohammad Azad vs. State of H.P., Page- 600.

Industrial Disputes Act, 1947- Section 25(f)- Disengagement – Reinstatement, when impermissible- Circumstances – Petitioner seeking reinstatement – Labour Court deciding reference in negative by holding that petitioner had not completed continuous service of 240 days – Petition against – Though petitioner had not completed 240 days of continuous service yet department found to have not issued any notice to petitioner to join his duties – Held, workman totally dependent upon daily wages cannot be inferred to have abandoned his job – However, in circumstances, reinstatement not permissible-Compensation in sum of Rs. 2 Lacs awarded – Petition allowed – Award set aside. (Paras-4 and 5) Title: Kamal Kumar Vs. The HPSEB limited & another Page-669.

Indian Succession Act, 1925- Section 63- Will- Proof – Trial Court upholding Will through which deceased alienated land and excluded his wife and children – And dismissing their suit challenging aforesaid Will - First Appellate Court allowing appeal and decreeing suit – Regular Second Appeal – Plaintiffs arguing that execution of Will was surrounded by suspicious circumstances – Held, due execution of Will stood proved from statements of scribe and marginal witnesses – Exclusion of natural heirs, participation of one of beneficiary in execution of Will or registration of Will at place other than native place of executant or association of persons of other village as marginal witnesses, per se not suspicious circumstances - RSA allowed –Decree of First Appellate Court set aside and that of trial court restored. (Paras-8 to 13) Title: Karam Singh & others Vs. Bauhanu alias Baleshru and others Page- 345.

Interpretation of Statute – Principles – Held, statute is an edit of legislature and conventional way of interpreting or construing statute is to seek 'intention' of its maker - Statute must be read as a whole and one provision of Act should be construed with respect to other provisions in same Act, so as to make a consistent construction of whole statute. This is elementary rule of interpretation (Paras-28 & 31) Title: Jagdish Chand Sapehia Vs. State of Himachal Pradesh & others (D.B.) Page-836.

Interpretation of statutes - Words suspension and supersession- Meaning – Held, "supersession" is replacement whereas "suspension" is stop gap temporary measure. (Para-42) Title: Jagdish Chand Sapehia Vs. State of Himachal Pradesh & others (D.B.) Page-836.

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Land Acquisition Act, 1894 -Financial Commissioner's Standing Orders – Standing Orders No.12- Acquisition of Land for public purpose- Market value- Assessment- Held, Standing Orders provide that Kanungos should not be called upon to give their opinion on market value of land and Tehsildar/Circle Revenue Officer concerned should personally visit spot, closely scrutinize data and ensure that all relevant information is supplied in proforma prescribed for purpose before making his recommendation. (Para-66) Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894 - Further held, Annual average value is to be determined with reference to date(s) of execution of sale deed(s) and not with reference to date of attestation of mutation. (Para-64) Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894- Section 4- Date of Notification, What is? Held, last date of publication and giving of Public Notice is date of publication of notification. (Para-47) Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of Land for public purpose- Reference- Market Value-Assessment- Exemplar sale deed(s)- Evidentiary value- Held market value of acquired land when calculated as per exemplar sale deeds is less than highest value assessed by Collector, then such sale deeds are not relevant, even though they pertain to period within one year from date of notification issued under Section 4 of Act. (Para-69) Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Financial Commissioner's Standing Orders – Standing Order No.28- Acquisition of land – Market value – Procedure- Held, As per Standing Orders rates of land will be worked out by District Collector after taking into account average rate determined from sale transactions in revenue estate concerned for period of one year preceding date of notification under Section 4 of Act. (Para-46). Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference - Market value – Determination – Sale transactions between close relations and

involving no exchange of consideration are sham and cannot be relied upon. (Para- 14) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference - Market value – Determination – Previous award – Held, Award of Reference Court relating to same village of similar land with same quality and potentiality offers base for determination of compensation. (Para- 15) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference- Market value – Determination – Exemplar sale deeds of adjoining villages – Relevance- Held, in absence of sale transactions of same village, exemplar sale deeds of adjoining villages can be taken into consideration if there is similarity of nature, utility and potentiality of land, then same value of land can be taken as market price – If there is no evidence with regard to similarity of nature, utility and potentiality, exemplar transactions of adjoining villages can be taken into consideration and value of land can be determined after making appropriate deductions. (Para-16) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference-Market Value – Determination - Land acquired by State for ACC for mining – High Court setting aside Award of Reference Court and remitting matter with direction to determine market value of land on basis of potentiality and not its nature – District Judge ignoring previous awards though pertaining to same village on ground of those awards being based on nature of land – Held, Reference Court justified in ignoring those awards for determining market value. (Para-17) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Land acquired for public purpose – Reference - Market value of land – Determination – Exemplar sale deed – Held, sale transaction having no proximity in time with notification under Section 4 of Act has no relevance. (Para-13) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 4, 18 & 23- Land acquired for public purpose – Reference– Market value – Determination – Exemplar sale of small area – Held, while determining market value of large chunk of land when sale deeds of larger parcels not available, value of smaller piece of land can be taken into consideration after making proper deductions – Exemplar sale deed not shown to be sham – Land acquired for extraction of lime stone – No development charges involved – Land having great potentiality in view of purpose of acquisition – 15% increase allowed on established income towards potentiality of land – However, in view of exemplar sale deed being of small area and no development charges involved, High court permitted deductions of 25% on market value assessed on basis of such sale deed. (Paras-23 & 27 to 29) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894(Act)- Sections 4 and 48- Withdrawal from acquisition – Procedure – Necessity of publication of Notification –Hon'ble Single Bench directing State to

acquire petitioner's land found in their possession – Review also dismissed –In compliance, State issuing Notification Under section 4 of Act and also filing Letters Patent Appeal – Hon'ble Division Bench setting aside judgment of Hon'ble Single Bench by observing on basis of demarcation report that State might not be in possession of petitioner's land and remanding matter to Hon'ble Single Bench –State issuing notification under Section 48 of Act – Notification contested by petitioner on ground that it was never published in official gazette – Held, provisions of Section 48 of Act are sparked by holistic purpose- Persons whose lands contemplated to be brought to acquisition for public purpose, have to be afforded reasonable opportunity to make representation to Authorities against de-acquisition-Withdrawal from acquisition can be done only by issuing notification in official gazette – Notification issued under Section 48 of Act without publication in official gazette set aside – State directed to elicit participation of aggrieved public and then make fresh decision. (Paras-5 to 7) Title: Ravinder Kumar Vs. State of H.P. and others Page- 128.

Land Acquisition Act, 1894- Sections 11 and 18- Compensation - Enhancement – Procedure - Collector assessing market value of acquired land as per classification mentioned in revenue record – Petitioner accepting compensation of his land recorded as 'Banjar Kadeem' – However, subsequently on his application, revenue entries changed from 'Banjar Kadeem' to 'KayarAbbal' – Petitioner filing writ and claiming compensation for 'KayarAbbal' land – Held, if petitioner was aggrieved by determination of market value of acquired land and compensation awarded, remedy available to him was under Section 18 of Act – Relief prayed cannot be granted in exercise of writ jurisdiction – Petition dismissed. (Paras-6 and 7) Title: Attru Vs. The Principal Secretary (Power) & ors. Page-628.

Land Acquisition Act, 1894- Section 18- Reference – Market value – Determination – Exemplar sale deed – Appreciation- Held, sale deed can be taken into consideration only when (i) it is contemporaneous to date of notification and (ii) pertains to area or area close to that where land is acquired. (Para-2) Title: Jaswant Singh & Ors. Vs. State of H.P. & Ors. Page-664.

Land Acquisition Act, 1894- Section 18- Reference – Market value– Determination – Exemplar sale - Deductions therefrom – Permissibility – District Judge making 50% deduction from sale amount mentioned in exemplar sale deed and assessing market value on amount so assessed, on ground that exemplar sale pertains to small area- Appeal against – Held, it is not an absolute proposition that large area of land cannot fetch price at same time at which small plots are sold – If large tract of land because of advantageous position capable of being used for purpose for which smaller plots used and also situated in developed area with little or no requirement of further development, principle of deduction of value not warranted – Land acquired for construction of road – No development charges involved – Acquiring authority not to get any profit by construction of road – Further held- deduction of 50% of value specified in exemplar sale unwarranted – Appeal partly allowed – Market value at uniform rate irrespective of classification of land given (Paras-4 and 5) Title: Jaswant Singh & Ors. Vs. State of H.P. &Ors. Page-664.

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Compensation – Market value – Determination- Held, In absence of sale transaction of village where land is acquired, sales made in neighbouring villages can be considered provided lands involved have similar potentiality or fertility or other advantageous factors. (Para-43) Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Market value – Determination- Held, for determining market value of land for acquisition, purpose for which land is acquired is relevant and not its nature and classification - Where nature and classification of land has no relevance for purpose of acquisition, market value of land is to be determined as single unit irrespective of its nature and classification - In such case, uniform rate to all kinds of land under acquisition as single unit is to be awarded. (Para-49) Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Reference- Market value – Determination – Held, Section 23 of Act provides for determination of compensation on basis of market value of land and not on basis of average value or circle rate of land- Average rates/circle rates may not depict fair and just market value of land under acquisition –In absence of any other relevant evidence on record, circle rates can be taken into consideration but after making suitable deductions (Para-72) Title: The Himachal Pradesh Power Corporation Limited and another Vs. Narayan Singh and others Page-781.

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Reference – Market value– Determination – Held, when land is acquired for purpose of single use having no relevance with nature and classification of land vis-s-vis its agricultural potentiality, its value not to be determined on basis of nature and classification, but to be assessed on basis of purpose for which it is to be put in utilization after acquisition- Entire land to be taken as single unit, resulting in awarding uniform rate to all kind of lands acquired. (Para- 9) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Reference- Market value – Determination - Deductions towards development charges – Permissibility – Held- Deductions from determined market value of acquired land towards development charges, not warranted when no development required to be made for implementation of public purpose, for which land acquired. (Para- 22) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 18 & 23-Acquistion of Land alongwith structures-Compensation of structures etc. –Reference – Determination - Land and built-up structures acquired for public purpose – Supplementary awards passed by Collector with respect to buildings on basis of assessment done by Public Works Department (PWD) –Reference Court enhancing compensation by giving increase of 25% towards hike in cost of construction on

valuation of structures assessed by PWD- RFA- PWD determining value of structures by making deductions towards depreciation on actual assessment but without considering inflation in cost of construction- Held -After calculating cost of construction at rates prevalent at time of notification or working out present value of material, there is no scope of further deductions- valuation of structures done by PWD by making deduction towards depreciation on actual assessment, is wrong – Award of reference court set aside – High Court allowed compensation on basis of assessment of valuation done by District Rural Development Authority. (DRDA) (Paras 16 & 17) Title: LAC Parvati Hydro Electric Project Vs. Jeet Ram and others Page-117.

Land Acquisition Act, 1894- Sections 18, 23 & 25- Acquisition of land for public purpose – Reference – Market value– Determination – Held, Reference Court cannot determine value of acquired land at rate lesser than rate awarded by Land Acquisition Collector –Sale deeds relied upon by beneficiary by which value of acquired land becomes lesser than highest value determined by collector, have no relevance. (Paras-8, 11 & 12) Title: Ranjeet Singh (since deceased) through LRs. Vs. The Land Acquisition Collector & Another Page-140.

Land Acquisition Act, 1894- Sections 18 and 30- Reference-Dispute as to apportionment – Petitioner praying compensation of acquired land by claiming its ownership by way of oral sale and in alternative by adverse position – Disputing revenue entries showing respondent as owner of land – Reference Court declining plea of petitioner – RFA – In his evidence, petitioner taking stand of sale of land by way of written document contrary to his pleaded case - Pleadings found insufficient to raise plea of adverse possession- RFA dismissed– Award of District Judge upheld. (Paras-7 and 13 to 19) Title: Lachhmi Singh Vs. Sohan Singh and others Page-821.

Limitation Act, 1963- Section 5- Condonation of delay- Conduct of party – Held, condonation of delay is matter of discretion which has to be exercised diligently – When there is no sufficient explanation for delay application for condonation liable to be dismissed – Conduct of party approaching court is one of relevant factors which Court must consider while allowing or disallowing application for condonation of delay – Party which does not approach Court with clean hands, cannot expect it to exercise discretion in his favour – Application for condonation of delay, found to have been filed on incorrect allegations against Presiding Officer and functioning of Court – Held, applicant has not approached Court with clean hands – Application dismissed with costs assessed at Rs.20,000/- (Paras-7 to 9) Title: United India Insurance Company Limited Vs. H.P. State Electricity Board and others Page -164.

Limitation Act, 1963- Section 5- Condonation of delay- False plea – Effect – Applicant seeking condonation of delay in filing appeal – Averring in application that Reader of Court informed him of case listed on 25.6.2011 having been adjourned without any date and next date would be intimated later on – Also alleging that in January 2012, he came to know that case stood disposed of on 25.6.2011 itself and no arguments ever heard – Application accompanied with affidavit of counsel who represented applicant before Claims Tribunal – High Court directing inquiry into allegations by Registrar General – During enquiry allegations found false – Said Advocate also admitting contents of his affidavit as false- When asked to appear in person, Advocate stating that arguments had taken place on that date – But he tendering unqualified and unconditional apology – High Court accepting

apology in view of long standing practice of advocate and closing issues qua him. (Paras-4 and 5) Title: United India Insurance Company Limited Vs. H.P. State Electricity Board and others Page -164.

Limitation Act, 1963- Section 5- Delay- Condonation – Grounds – Financial Commissioner condoning delay of 30 years in filing revision – Petition against – Order of Financial Commissioner condoning inordinate delay unreasoned – Petition allowed – Matter remanded with direction to Financial Commissioner to consider averments, documents and other material on record afresh and dispose it of by reasoned order. (Paras-8 and 9) Title: Bimla Devi and others Vs. Financial Commissioner (Appeals) and another Page-109.

Limitation Act, 1963- Section 14- Exclusion of time - Civil proceedings- Court – Meaning and requisites – Held, Benefit of Section 14 of Act would be available only when prior proceeding was (i) of civil nature, (ii) those being prosecuted in good faith in Court of first instance or appeal or revision (iii) said Court not holding jurisdictional competence to entertain or conclude it – 'Court' means Court construable as part of judicial branch of State and not quasi judicial authority – Cause of action accrued to plaintiff in 2002 and continued till 2004, whereas suit for damages filed in 2008 – Suit on face of it barred by limitation – Time spent by plaintiff in pursuing remedies before Statutory Authorities created under the Electricity Act, not being before Court, cannot be excluded from computation. (Paras-7 & 8) Title: Himalya International Limited Vs. Himachal Pradesh State Electricity Board Limited and others Page-333.

Limitation Act, 1963- Articles 64 & 65- Adverse Possession - Proof– Held, who pleads adverse possession should be very clear about origin of title over property – Burden of proof on person who alleges his adverse possession particularly when opposite party has proved its title – Claimant must acknowledge and attorn to title of other party and thereafter lay foundation for his plea of adverse possession. (Paras-15 to 18) Title: Lachhmi Singh Vs. Sohan Singh and others Page-821.

Limitation Act, 1963- Articles 64 & 65- Adverse possession – Pleadings and proof- Petitioner simply averring that his possession is continuous peaceful in denial of title of respondents – However, no exact date of such possession set out in pleadings – Held, plea of adverse possession is of stereo-type – Mere long possession not enough to prove plea of adverse possession and it does not result in conversion of peaceful possession into adverse possession. (Para-10) Title: Lachhmi Singh Vs. Sohan Singh and others Page-821.

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Malice in Law- What is? – Held, Malice in law can be inferred when Authority concerned had acted without jurisdiction – But petitioner must plead and prove that Authority had acted without jurisdiction. (Para- 10) Title: Jagdish Chand Sapehia Vs. State of Himachal Pradesh & others (D.B.) Page-836.

Motor Vehicles Act, 1988- Sections 10, 149 and 166- Motor Accident- Claim application – Defences – Validity of driving licence (DL) - DL of 'Light Motor Category"- Held, Section 10 of

Act requires driver to hold driving licence with respect to 'Class' of vehicle and not with respect of 'Type' of vehicle –Driver holding LMV driving licence authorized to drive light transport vehicle. (Para-11) Title: National Insurance Company Limited Vs. Mani Ram and others Page-294.

Motor Vehicles Act, 1988- Sections 147 and 149- Insurance – Payment of premium through cheque – Dishonour of cheque – Cancellation of contract of insurance - Intimation of cancellation to insured, whether necessary ? – Cover note clearly indicating that in event of dishonour of premium cheque, Insurance contract would stand automatically cancelled 'abinitio' – Claims Tribunal fixing liability on owner and driver to indemnify award and absolving Insurance Company from liability – RFA – Owner contending before High Court that no intimation qua cancellation of insurance contract given to him therefore, insurer cannot avoid its liability – Held, As evident from cover note, ipso facto, upon dishonour of premium cheque, contract of insurance automatically suffered cancellation or rescission – Insurance contract rendered void abinitio – No intimation required to be given to insured – Award of Tribunal upheld – Appeals dismissed - ***Deddappa and Ors. v. The Branch Manager, National Insurance Co. Ltd.***, reported in ***2007 AIR SCW 7948 (*** distinguished). (Paras-3 and 4) Title: Keshav Kapil Vs. Santosh Kumar & Others Page-672.

Motor Vehicles Act, 1988- Sections 149 and 166- Motor Accident – Claim application – Defences of insurer - Claims Tribunal granting compensation to injured and burdening liability on insurer – Appeal by Insurance Company – Insurer arguing that driver of offending vehicle was possessing 'Learner licence" only and at time of accident, no instructor was accompanying him – Insurer however not leading any evidence whatsoever to prove plea – Held, onus to prove breach of conditions regarding driving licence was on insurer – And in absence of any evidence, it can not be held that vehicle was being plied in breach of conditions- Appeal dismissed – Award upheld. (Paras-9 & 10) Title: Oriental Insurance Company Limited Vs. Vinod Kumar and others Page-810.

Motor Vehicles Act, 1988- Sections 149 & 166 - Motor Accident- Claim application – Driving licence – Validity and effect – Claims Tribunal holding accident to have occurred on account of rash and negligent driving of scooter by its driver – Tribunal granting compensation to claimant and fastening liability on insurer in toto – Appeal against – Driver of scooter however authorized to drive 'Light Motor Vehicle' only – Not authorized to drive two wheeler – Held, driver of offending vehicle had no valid and effective driving licence to drive it at time of accident – Vehicle being plied in breach of terms of policy – Appeal partly allowed with direction to Insurance Company to first satisfy award and then recover same from insured. (Paras-2 to 4)Title: New India Assurance Company Ltd. Vs. Dharam Singh and others, Page-201.

Motor Vehicles Act, 1988- Sections 149 & 166- Claim Application – Defences – Drunken driving – Held- Drunken driving not statutorily available defence to insurer – It cannot exculpate its liability on ground that driver of offending vehicle was in an inebriated condition at time of accident. (Para-2) Title: Oriental Insurance Company Ltd. Vs. Ranjeet Singh & Others Page-124.

Motor Vehicles Act, 1988- Sections 149 & 166- Motor accident – Claim application – Defences – Gratuitous passenger – Proof – Insurance Company relying upon report of police investigation that deceased had taken lift in transport vehicle and he was travelling as Gratuitous passenger – However, investigating officer not examined by insurer to prove such report – Held, Insurance Company failed in proving that deceased was travelling as gratuitous passenger. (Para-15) Title: National Insurance Company Limited Vs. Mani Ram and others Page- 294.

Motor Vehicles Act, 1988- Section 149 & 166 – Motor accident- Claim application- Defences- Driving licence- Validity- Claims Tribunal allowing application and fastening liability on Insurer- Appeal- Insurer contending that driving licence of deceased driver was not valid- Also seeking to adduce verification report by way of additional evidence- Held, Factum of genuineness of driving licence was in notice of insurer- It failed to get driving licences verified from Competent Authority- No case of permitting insurer to lead additional evidence made out- Driving licence on face of it valid- Insurance company cannot refuse to discharge its liability. (Para 8 & 9) Title: ICICI Lombard General Insurance Company Limited vs. Roop Lal and others, Page- 569.

Motor Vehicles Act, 1988- Section 163-A- Motor accident – Death of driver – Compensation – No fault liability – Deceased dying while driving bus– Legal representatives filing claim application under Section 163-A of Act –Claims Tribunal fastening liability on Insurer - Appeal against-Insurance Company resisting claim on ground that he was negligent in his driving – Held, Plea of negligence cannot be raised by insurer in proceedings under Section 163-A of Act – Reliance on FIR and mechanical report indicating that there was no mechanical defect in vehicle is misplaced – However, award of compensation under 'loss of estate' reduced to Rs.2,500/- as per Second Schedule of Act – Appeal partly allowed – Award modified. (Paras- 10 to 12 and 16) Title: Shriram General Insurance Company Limited Vs. Preeto Devi and others Page- 262.

Motor Vehicles Act, 1988 (Act) - Section 163-A- 2nd Schedule – Compensation on structural formula – Whether claimants entitled for enhancement towards future prospects ? – Held – No- Legal representatives of deceased driver filing claim application under Section 163-A of Act – Claims Tribunal assessing income of deceased at Rs.3,000/- p.m. and then giving 30% increase towards future prospects on it – Also granting Rs.25,000/- towards funeral expenses – Appeal by insurer – Held, 2nd schedule of Act nowhere provides for grant of any increase on account of future prospects – Tribunal erred in granting 30% increase towards future prospects – Compensation toward funeral charges under 2nd schedule of Act can only be of sum of Rs.2,000/- Appeal partly allowed – Award modified. (Paras-10, 11 & 16) Title: National Insurance Company Limited (Himland) Vs. Vinay Kumar and others Page-830.

Motor Vehicles Act, 1988 - Section 166-Motor Accident- Claim application – Assessment - Future prospects – Medical evidence – Claimant filing appeal and praying for enhancement of compensation towards loss of future prospects contending that he suffered permanent disability in Motor Accident – Medical certificate requiring re-examination of injured after two years for assessing disability – No disability certificate after re-examination filed in evidence – Medical Officer not deposing that injuries permanent in nature – Held, Claimant not entitled for any enhancement of compensation on this ground. (Para-3). Title: Master

Chaman Bahadur (minor), through his father Sh. Prem Kumar Vs. Bhim Singh Panwar & another Page-485.

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Order XVIII Rule 17- Re-examination/further cross-examination of witnesses – Permissibility – Claims Tribunal permitting insurer to place on record report of Investigator indicating cause of accident - Insurer also examining investigator to prove report – Insurer filing application for recall of earlier order and praying for further cross-examination of witnesses already examined vis-à-vis report of Investigator and also for examining witnesses examined by investigator during his investigation – Tribunal dismissing application by holding that application not disclosing purpose or object behind it – Petition against – Held- In guise of application filed for recalling order, Insurer cannot be permitted to fill up lacunae in its case – Order not perverse – Petition dismissed. (Paras- 8 & 9) Title: Oriental Insurance Company, Divisional Office, Shimla Vs. Anju Kumari and others Page-458.

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Order XIV Rules 1 and 2- Non-framing of issues – Claims Tribunal allowing application of legal representatives of deceased and fastening liability on insurer – Appeal against – Insurance Company contending that despite pleadings, no issue qua composite negligence framed by Tribunal – Non-framing of issue prejudiced it as for want of issue, it could not lead evidence to prove factum of composite negligence - Held, order of Tribunal not framing issue of composite negligence not assailed by Insurer, nor cross-examination conducted on claimants' witnesses qua composite negligence - Evidence revealing that victim's vehicle was being driven on proper side of road and offending vehicle had gone to wrong side of road at time of accident - No prejudice proved to have been caused to insurer by non-framing of such issue – Appeal dismissed. (Paras- 3 to 5) Title: National Insurance Company Ltd. Vs. Mamta Devi &others Page-487.

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Pleadings generally – Held, Strict rules of pleadings cannot be made applicable to claim proceedings filed under Act. (Para-13) Title: National Insurance Company Limited Vs. Mani Ram and others Page-294.

Motor Vehicles Act, 1988- Section 166- Motor accident – Claim application- Compensation – Housewife – Assessment – On facts, monthly income of deceased at time of accident (2011) taken at Rs.4500/- p.m. (Para-21) Title: National Insurance Company Limited Vs. Mani Ram and others Page-294.

Motor Vehicles Act, 1988- Section 166- Motor Accident- Claim application - Compensation - Future medical expenses – Assessment – Medical evidence – Medical Officer not deposing that claimant requires treatment for injuries in future also – Held, Claimant not entitled for compensation towards future medical expenses – Appeal dismissed. (Para-4) Title: Master Chaman Bahadur (minor), through his father Sh. Prem Kumar Vs. Bhim Singh Panwar & another Page-485.

Motor Vehicles Act, 1988- Section 166- Motor Accident- Claim application – Compensation – Assessment – Tribunal allowing application of legal representatives of deceased and granting Rs. One Lakh to wife towards loss of consortium, Rs. One Lakh towards loss of love and affection and Rs, 25,000/- towards funeral expenses – Appeal by insurer – Appeal partly

allowed – Award modified in consonance with dictum of National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700. (Paras- 3 to 5) Title: United India Insurance Company Ltd. Vs. Meena Devi &others Page- 360.

Motor Vehicles Act, 1988- Section 166- Motor Accident- Claim application – Compensation – Assessment – Deduction towards income tax – Held, deduction towards income tax from established income bound to be in variant figures depending upon income –No inflexible rule of making 30% deduction from established income towards income tax in every case. (Para-5) Title: Oriental Insurance Company Ltd. Vs. Ranjeet Singh & Others Page-124.

Motor Vehicles Act, 1988- Section 166- Motor Accident – Death – Application- Compensation – Assessment - Claims tribunal assessing monthly income of deceased at Rs.6,000/- per month and granting increase of 50% towards future prospects – Tribunal also awarding Rs.1 lac for loss of consortium, and Rs.25,000/- towards funeral expenses – Accident taking place in 2011 – Liability imposed on insurer – Insurer in appeal and challenging award – Held, Claims Tribunal in absence of any evidence, went wrong in assessing monthly income of deceased at Rs.6,000/- and also in awarding 50% increase towards future prospects and compensation under conventional heads – Monthly income of deceased assessed at Rs.4,600 per month @ Rs.151 per day, 40% increase given towards future prospects – Compensation under conventional heads i.e. loss of consortium, funeral expenses etc. also modified in tune with ***National Insurance Co. Ltd. Vs. Pranay Sethi, AIR 2017 SC 5157*** – Appeal partly allowed – Award modified. (Paras- 8, 11, 13 and 22) Title: ICICI Lombard General Insurance Company Limited Vs. Reena Devi and others Page-236.

Motor Vehicles Act- Accident 1988- Section 166- Motor Accident – Claim Application - Compensation – Permanent disability - Determination — Victim an Advocate suffering permanent disability of 22% in motor accident– Tribunal assessing monthly income of victim at Rs. 15,000/ and functional disability at 50%, and granting compensation accordingly – Appeal against by insurer – Held, loss of income as assessed by Tribunal is on higher side – Loss of income assessed at 35%- Award modified – Appeal partly allowed (Para- 9) Title: Shriram General Insurance Company Limited Vs. Dinesh Kumar and others Page-712.

Motor Vehicles Act, 1988- Section 166 – Motor Accident – Claim application - Compensation for pain & suffering – Determination – Petitioner remained hospitalized for months together and had to undertake lengthy medical treatment – Tribunal awarding Rs.1,00,000/- towards pain & suffering – High Court reassessed compensation for pain and suffering at Rs. 2 lac. (Para- 14) Title: Shriram General Insurance Company Limited Vs. Dinesh Kumar and others Page-712.

Motor Vehicles Act, 1988- Section 166- Motor Accident – Claim application - Compensation – Determination – Future income – Victim an advocate – Tribunal granting increase of 50% on established income towards future prospects – Appeal against – Held, Claimant not in permanent employment – Being self employed addition of 40% on established income allowed towards future prospects. (Paras-10 & 11) Title: Shriram General Insurance Company Limited Vs. Dinesh Kumar and others Page-712.

Motor Vehicles Act, 1988- Section 166- Motor Accident – Claim application Compensation – Future discomfort and loss of amenities –Determination- Tribunal granting Rs.1,50,000/- as compensation towards future discomfort and loss of amenities – Appeal by insurer – On facts, High Court enhancing amount to Rs, 2 Lac towards future discomfort and loss of amenities. (Para-15) Title: Shriram General Insurance Company Limited Vs. Dinesh Kumar and others Page-712.

Motor Vehicles Act, 1988- Section 166- Motor Accident – Claim application by wife, children and mother of deceased - Compensation – Determination – Tribunal granting 50% increase on established income of deceased engaged in self employment towards future prospects – Also allowing Rs. 1 lac towards loss of love and affection each to wife, children and mother besides granting Rs. 1 lac to wife towards loss of consortium – Appeal by insurer – Appeal partly allowed – 40% increase towards future prospects allowed – Compensation under conventional heads also scaled down in terms of National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157. Award modified (Paras-9 to 14) Title: Oriental Insurance Company Ltd. Vs. Neelam and others Page-745.

Motor Vehicles Act, 1988- Section 166- Motor accident- Death- Claim application- Contributory negligence- Insurer challenging award of Claims Tribunal on ground that deceased while driving scooty was negligent and accident was result of her contributory negligence and entire liability cannot be imposed upon it- Evidence revealing scooty having been hit from rear by offending vehicle- Held, contributory negligence on part of deceased not proved- Appeal dismissed- Award upheld. (Para 4) Title: United India Insurance Company Ltd. vs. Shri Sanjeev Kumar & Others, Page- 618.

Motor Vehicles Act, 1988- Section 166- Motor accident- Death- Claim application- Compensation- Deduction towards Income tax- Held, there is no inflexible rule that while computing monthly income 30% of deceased is to be deducted towards income tax in every case- Rate of income tax being in variant figures depends upon income. (Para 5) Title: United India Insurance Company Ltd. vs. Shri Sanjeev Kumar & Others, Page- 618.

Motor Vehicles Act, 1988- Sections 166 and 173- Motor Accident- Award - Appeal by insurer – Maintainability – Insurer not filing appeal against award of Tribunal passed in another claim application but arising out of same accident – Insurance Company choosing to file appeal only in one case and denying liability in toto on ground that driver of offending vehicle had no valid driving licence – Held, when one award arising out of same accident not challenged by Insurance Company on ground that driver of offending vehicle not having valid licence, then same insurer cannot be permitted to assail award passed by Tribunal in other Claim applications by way of appeal – Insurance Company is estopped from challenging award by its own act and conduct. (Para-8)Title: National Insurance Company Ltd. Through its Sr. Divisional Manager Vs. Om Parkash and others Page-85.

Motor Vehicles Act, 1988- Section 166 – Motor accident- Claim application- Compensation- Transport charges- Assessment- Claims Tribunal granting transportation charges on basis of bills adduced before it in toto- Bills however were raised even for those days during which claimant remained hospitalized for undertaking journey to places

unconnected with his treatment- Transportation charges granted by Tribunal scaled down. (Para 17 to 19) Title: ICICI Lombard General Insurance Company Limited vs. Roop Lal and others, Page- 569.

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of 'charas' – Non-joining of independent witnesses in investigation - Effect – Trial Court convicting accused for his being found in conscious and exclusive possession of 2.100 kg. charas– Appeal against - Case based on chance recovery – Defence discrediting prosecution story on account of non-joining of independent witnesses despite availability, non-production of seal, contradictions in prosecution evidence and enmity of investigating officer with accused, defective recording of statement under Section 313 of Cr.P.C etc. – Held, Independent persons not available at all places and at every time for being associated as witnesses by Investigating Officer to witness search and seizure – Crime scene totally uninhabited – Houses of persons located nearby spot as suggested by defence not examined as defence witnesses – Case based on chance recovery – Non-joining of independent person in search proceedings inconsequential. (Paras-18 to 20) Title: Khem Chand Vs. State of H.P. (D.B.) Page- 189.

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of 'charas' –Police witnesses – Value of – Held, evidence of police witnesses if inspires confidence and found trustworthy, it can form basis for conviction against accused – Statements of Investigating Officer 'T' and another police official, Constable 'D' consistent – Contradictions minor in nature and not fatal to prosecution case – Accused not giving any explanation about his presence at that place – Planting of huge contraband improbable – No reason to disbelieve statements of police witnesses – Evidence showing conscious exclusive possession of accused over contraband – Accused rightly convicted for said offence – Appeal dismissed. (Paras- 37 and 38) Title: Khem Chand Vs. State of H.P. (D.B.) Page- 189.

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of charas – Link evidence – Non-production of seal – Effect – Held, in absence of proof of prejudice to accused non-production of seal used for sealing incriminatory article, not fatal to prosecution case (Paras- 36) Title: Khem Chand Vs. State of H.P. (D.B.) Page- 189.

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 29 and 37- Default bail- Computation of period – Police apprehending applicant and one 'S' -Recovering 862 grams charas from him and 1 kg 23 grams charas from 'S'- Applicant filing application for default bail on not filing chargesheet within 90 days – Special Judge rejecting bail on ground that applicant and 'S' apprehended together at one place, and recovery being of commercial quantity limitation in filing charge sheet was 180 days – Petition against – High Court found that at time of filing of application for default bail, Section 29 of Act was not invoked and recoveries from applicant and 'S' shown separate –Recovery from applicant falls in category of less than commercial quantity – However interregnum, chargesheet filed by investigating agency – Matter remanded to Special Judge with direction to decide application afresh in view of allegations alleged in chargesheet. (Paras-8 to 11) Title: Gopal Singh Vs. State of Himachal Pradesh Page- 494.

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Sections 20 and 35- Presumption, When can be raised? – Held, Presumption stipulated under Section 45 of Act would arise and arise only if prosecution has been able to establish genesis of prosecution story of recovery of contraband from conscious possession of accused. (Para-3) Title: Latif Mohd. Vs. State of Himachal Pradesh (D.B.) Page-753.

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Sections 20 and 45- Recovery of charas – Statements of police witnesses revealing interception of accused – Also showing that one lady accompanying accused was also allegedly searched by female constable – No reference to that lady either in charge sheet or about recovery effected from her –She also not made accused or witness – Lady constable who searched her also not examined – Evidence of recovery of charas from accused doubtful – No occasion to raise presumption under 45 of Act - Appeal allowed – Conviction recorded by Special Judge singly by raising presumption set aside. (Paras- 20 to 28 and 34) Title: Latif Mohd. Vs. State of Himachal Pradesh (D.B.) Page-753.

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 37, 42(2) and 50- Bail- Commercial quantity – Accused seeking bail on ground that alleged recovery effected from shop on basis of prior information yet provisions of Section 42(2) and 50 not complied with – Provisions being mandatory and violation thereof evident on record – On facts, police having sent information in writing to Authorized Officer just after receiving secret information – Consent memo given to accused – Recovery effected from counter of shop and not from person of accused – Allegations ex-facie not unbelievable – Bail rejected. (Paras-7, 8 & 20) Title: Ujagar Singh Vs. State of Himachal Pradesh Page-496.

National Council for Teacher Education Act, 1993- Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2012-Delegated legislation – Challenge thereto – Scope-Held, Scope for challenging legislation be it delegated or primary is restricted and limited in nature unlike an administrative order. (Para-13) Title: Pawan Chauhan and others Vs. State of Himachal Pradesh and others (D.B.) Page-767.

National Council for Teacher Education Act, 1993- Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2012- Teacher Eligibility Test (TET) **–** Minimum qualification – Requirement –Justifiability- Held, Rationale for including TET as minimum qualification for person to be eligible for appointment as teacher is to bring national standards of teacher quality in recruitment process. (Para- 24) Title: Pawan Chauhan and others Vs. State of Himachal Pradesh and others (D.B.) Page-767.

National Council for Teacher Education Act, 1993- Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2012-Rule 2 providing for drawing of merit list on basis of marks obtained by candidates in T.E.T. – Administrative Tribunal setting aside Rule as arbitrary by holding that marks obtained by candidate in T.E.T. alone could not be

eligibility criteria – Petition against – Held, TET is an examination conducted by reputed centralized agency of State - It is open for all - All can participate, regardless of scores obtained by them in their various qualifying examinations - Criterion is uniformly applied across State for filling up all posts of teachers and there is nothing discriminatory about same - Making marks obtained in TET to be sole eligibility criterion is an endeavour to enhance excellence in field of education, for after all the best and only the best must be engaged in imparting education for fulfilling constitutional goals and obligations - Future of country lies in hands of children who must be educated and groomed by the best. (Paras- 7, 16, 23, 24, 30 and 32) Title: Pawan Chauhan and others Vs. State of Himachal Pradesh and others (D.B.) Page-767.

National Highways Act, 1956- Section 3D- **Land Acquisition Act, 1894**- Section 4- Acquisition of land for public purpose- Objections to acquisition – Nature and scope under two Acts – Held, right of filing objections under Highways Act restricted and limited to right of claimant whose land stands acquired – This right is restricted to use of land for public purpose unlike general right conferred under Land Acquisition Act. (Para-35) Title: Prem Chand Sharma & others Vs. Union of India & others D.B. Page-248.

Negotiable Instruments Act, 1881 (Act) - Sections 138 and 142- **Partnership Act, 1932-** Section 69- Dishonour of cheque – Complaint by unregistered firm – Maintainability – Accused arguing before High Court that complainant being unregistered firm can not maintain complaint under section 138 of Act – Held, Unregistered firm cannot approach Court for enforcement of any right arising from Contract – Civil proceedings for recovery of money would be barred by virtue of sub Section 2 of Section 69 of Partnership Act – But proceedings under Section 138 of Act cannot be treated as Civil Suit for recovery of cheque amount – Complaint not hit by Section 69 of Partnership Act. (Paras-20 to 30) Title: M/s Uttam Traders Ranghri Vs. Tule Ram alias Tula Ram Page-280

Negotiable Instruments Act, 1881- Section 138- **Code of Criminal Procedure, 1973-** Section311- Dishonour of cheque – Complaint –Trial Court dismissing complaint by holding that cheques in question obtained by him from accused at gun point –Trial court relying upon fact that FIR was registered against complainant for forcibly obtaining accused's signatures on cheques – Appeal against – Before High Court complainant seeking to adduce copy of judgment of Add. C.J.M. acquitting him in that case – On facts, High Court setting aside acquittal and remanding matter with direction to trial court to decide it afresh after taking into consideration judgment of acquittal of Add. C.J.M. and after affording opportunity to accused to lead evidence in rebuttal, if any. (Paras-6 to 8) Title: Rajeev Sharma Vs. Sanjeev Kumar Jain and another Page-91

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Complaint – Cheque, whether for consideration?- Accused issuing dishonoured cheque towards loan of his son for repayment- Accused also stood guarantor in said loan case – Trial Court convicting accused for offence under Section 138 of Act and Sessions Judge upholding his conviction and sentence – Revision – Accused contending that he was merely 'guarantor' of his son and cheque was merely guarantee towards payment of loan – Held, accused guarantor of his Son with respect to loan taken from complainant - Son did not discharge his loan liability – Cheque issued by accused to discharge that liability and same recoverable from him also – Cheque issued for consideration – Accused rightly convicted and sentenced– Revision dismissed – Judgments of Lower Courts upheld – (paras-5 to 11) Title: Hari Chand Vs. H.P. State Co-Operative Bank Limited and another Page-273

Negotiable Instruments Act, 1881- Section 138- **Indian Evidence Act, 1872-** Section 73- Dishonour of cheque – Handwriting on cheque – Comparison with specimen/admitted handwriting of accused – Refusal of prayer of accused by Trial Court – Revision against – Held, 'Fair trial' encapsulates valuable right of fair and proper opportunities to adduce evidence in support of defence – By not sending cheque for opinion of handwriting expert, valuable right of accused to rebut case stood diminished – Petition allowed – Order of Trial Court set aside – Application allowed. (Paras- 3 and 4) Title: Bhoop Ram Vs. Parminder Singh Page- 266

Negotiable Instruments Act, 1881- Sections 138 and 139- Dishonour of cheque – Complaint –Presumption of consideration- Trial Court acquitting accused solely on ground that business concern with whom complainant had dealings was owned by someone else and not by accused – Appeal against – Complainant specifically stating of having delivered electrical goods to accused – Complainant also deposing in having made necessary entries in his register and of accused signing and handing over cheques to him– Statement of complainant not disputed in cross-examination – Cheques pertain to account of accused – Accused also not denying his signatures on said cheques – Held, Cheques in question given by accused for consideration – Reasons given by trial Court for acquittal fallacious – Appeal allowed – Accused convicted of offence under Section 138 of Act. (Paras- 8 to 13) Title: M/s Sudeep Trading Company Vs. Deepak Aukta and others Page- 349

Negotiable Instruments Act, 1881- Sections 138 and 142- Dishonour of cheque – Complaint by firm –Proper representation-Proof- Additional evidence- Trial Court dismissing complaint of firm on ground that 'A' failed to prove that he was partner of firm and duly authorized to file complaint on its behalf – Appeal against – In appeal, complainant filing application for leading additional evidence to prove copy of partnership deed – Held, curable procedural defects and irregularities should not be allowed to defeat substantive rights or to cause injustice, procedure hand maiden of justice, should never be made tool to deny justice or perpetuate injustice by any oppressive or punitive use – Trial Court, if not satisfied with authorization of 'A', ought to have granted an opportunity to him to produce authorization – Application for adduction of additional evidence allowed – Appeal allowed – Judgment of lower court set aside – Matter remanded with direction to afford opportunity to complainant to lead additional evidence. (Para-14 and 31) Title: M/s Uttam Traders Ranghri Vs. Tule Ram alias Tula Ram Page-280.

'P'

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 467, 468 & 120-B- **Indian Forest Act, 1927-** Section 33- Forgery and illicit felling under criminal conspiracy- Proof- Prosecution alleging illicit felling of trees in Government forest by Forest Labour Supply Mate in conspiracy with forest officials- And also that accused forged documents to commit such offences and caused loss to Government property to extent of Rs.12,67,609/- -Illicit felling said to be by way of overmarking of trees by forest officials and also by way of cutting of unmarked trees- Special Judge acquitting accused- Appeal by State on ground that Special judge did not appreciate evidence correctly- On facts, found that (i) Road construction was in progress through lots allocated to Forest Labour Supply Mate "R" (ii) Dmage was caused to trees during construction of road also (iii) People of area having TD rights in that forest/ lots (iv) Witnesses not telling as to number of stumps of recently cut trees vis-à-vis old fellings (v) Some of stumps very old (vi) No evidence qua identity of

persons who illicitly cut trees (viii)Unmarked felled trees were near under-construction road- Held, evidence on record does not reveal illicit felling of trees by accused under some conspiracy- Appeal dismissed- Acquittal upheld. (Paras 16 to 22) Title: State of H.P. vs. Mast Ram Kashyap and Others, Page-901.

Probation of Offenders Act, 1958- Section 4- Release on probation – Rash and negligent driving – Accused aged 55 years and found settled in life – Fourteen years passed since accident - Accused suffered trauma on account of pendency of case – Held, accused entitled for benefit of probation. (Paras- 22 and 26) Title: Dev Raj Vs. State of Himachal Pradesh Page-37.

Punjab Excise Act, 1914 as applicable to State of H.P.- Section 61(1)(a)- Recovery of country made liquor without licence – Proof – Accused tried for offence on allegations of carrying three cartons (36 bottles) of country liquor without permit at mid night – Trial Court acquitting accused on ground that cartons as produced before Court not bearing any seal and case property thus not linked with him – Appeal against – Held, seizure memo clearly indicating separating, seizing and sealing of three bottles of liquor by Investigating Officer and sending of same to CTL – Report of expert not disputed – Non-joining of independent witnesses understandable as occurrence took place at midnight – Evidence on record proves conscious and exclusive possession of accused qua three liquor bottles (sample bottles) – Appeal allowed – Acquittal set aside – Accused convicted of said offence. (Paras- 10 to 12) Title: State of H.P. Vs. Hem Raj Page-259.

'S'

Service Law- Shri Naina Devi Ji Employees Service Bye Laws, 1994 (Bye Laws)- Second Schedule - Appointment of Electrician – Bye Laws prescribing appointment to post of Electrician by way of selection i.e. direct recruitment – Trust however making appointment by promotion on basis of report of Departmental Promotion Committee - Held appointment wrong being contrary to bye Laws. (Para-14).Title: Shyam Lal Vs. Rattan Lal through LRs and another Page-113.

Service Law- Shri Naina Devi Ji Employees Service Bye Laws, 1994 (Bye Laws)- Second Schedule- Plaintiff not fulfilling eligibility criteria for appointment as Electrician - Whether can challenge appointment of promoted candidate? – Held- Yes – Bye Laws provide for direct recruitment to post of electrician, but when Trust promoted junior official in relaxation of bye laws, plaintiff has right to challenge such appointment particularly when he was working as Electrician Helper since decade. (Para-15). Title: Shyam Lal Vs. Rattan Lal through LRs and another Page-113.

Specific Relief Act, 1963- Section 6 – Suit for possession on strength of previous possession – Proof- Plaintiff filing suit for possession of premises allegedly given by him to his erstwhile employee 'S' (D4) for running workshop – Plaintiff claiming to have been dispossessed from suit premises by defendants illegally without recourse to law – Defendants denying previous possession of plaintiff and claiming its possession initially with 'S', and thereafter delivery of same to defendants 1to3 on purchase- Trial Court dismissing suit – Revision against – On facts, no evidence showing payment of any remuneration to 'S' by plaintiff- 'S' found to be in exclusive possession of suit premises in his individual capacity – Rent receipts not revealing that payment aforesaid included rent of suit premises also – 'S'

not proved to be servant or caretaker of plaintiff – Held, Previous possession and illegal dispossession of plaintiff not proved – Suit rightly dismissed by Trial Court – Revision dismissed. (Paras- 8 to 10) Title: Anil Sood Vs. Pawan Sahani and others Page- 319.

Specific Relief Act, 1963- Section 6- Suit for possession on strength of previous possession– Dismissal of suit – Remedies – Held, Remedy of aggrieved plaintiff is neither review nor appeal – His remedy comprised in instituting regular suit for establishing his title qua suit property – However an exceptional remedy of revision available to aggrieved plaintiff exercisable within parameters of Section 115 of Code of Civil Procedure. (Para-8) Title: Anil Sood Vs. Pawan Sahani and others Page- 319.

Specific Relief Act, 1963- Sections 8 and 39- Suit for possession and mandatory injunction – On basis of report of local commissioner, trial court decreeing suit for possession by demolition of construction of defendant – District Judge finding said demarcation not in accordance with law and allowing appeal – Setting aside decree of trial court and dismissing suit – RSA– Held, Report of Local Commissioner though was rightly ignored but District Judge himself ought to have appointed fresh Local Commissioner or remitted matter to trial court for fresh report and fresh decision – District Judge allowed dispute to simmer – Appeal allowed – Decree of District Judge set aside – Matter remanded with direction to appoint Local Commissioner and decide appeal afresh in view of his report after calling objections of parties to it. (Paras- 8 to 10) Title: Jiwan Ram (since deceased) through his legal heirs Vs. Madho Ram (since deceased) through his legal heirs Page- 342.

Specific Relief Act, 1963- Section 10 - Contract - Specific Performance – Whether specific performance of contract stipulating payment of damages in lieu of specific performance can be denied? – Held - No - Plaintiff seeking specific performance of agreement to sell – Defendant denying valid execution of agreement – Trial Court holding agreement to be valid and decreeing suit – District Judge though affirming finding of due execution of agreement but modifying decree to one for refund of earnest money and compensation, on ground that agreement provided for payment of refund of earnest money and compensation in lieu of specific performance – RSA by plaintiff- On facts, High Court found (i) agreement to sell not signed by vendor 'J', (ii) No evidence that money was deposited in sub-Treasury for purchase of non-judicial papers for scribing sale deed, as recited in agreement – Held, though mere mentioning of amount payable as damages, on breach of agreement will not prevent Court from granting its specific performance but plaintiff not found ready and willing to perform his part of agreement – Thus, not entitled for specific performance of agreement – Decree of First Appellate Court upheld – RSA dismissed. (Paras-9 to 12) Title: Prem Chand Vs. Jai Singh (since deceased) Page-207.

Specific Relief Act, 1963- Sections 14 and 23- Specific performance of contract – Grant of- Principles, discussed – Agreement to sell in question also providing for refund of double of earnest money – Plaintiff filing suit for specific performance and in alternative also seeking recovery of double of earnest money with interest – Trial court granting primary relief of specific performance – Appellate court dismissing appeal of defendant – RSA- Defendant submitting that plaintiff had prayed for refund of earnest money with interest, as such, he could not have been granted decree of specific performance of agreement – Held, Grant of decree of specific performance of agreement is in discretionary jurisdiction of Court – It cannot be curtailed by merely fixing payment of pecuniary sums as liquidated damages-

Regular Second Appeal dismissed. (Para- 11) Title: Dildar Singh Vs. Jagdev Singh & others Page-655.

Specific Relief Act, 1963- Section 20- Suit for recovery – Corporation entering into agreement with 'JR' for extraction of resin from blazes – Filing suit for recovery on account of short fall in extraction of resin and other charges – Trial Court partly decreeing suit but District Judge allowing appeal and dismissing suit in toto- RSA – Evidence revealing of forest fire having taken place in allocated area and destroying some blazes in it – As per practice, Corporation had been doing resetting of blazes after fire so as to enable contractor to extract resin – No resetting was done in this case – Money value of blazes destroyed in fire exceeded amount decreed by Trial Court – Held, Judgment of District Judge based on correct appreciation of evidence – RSA dismissed. (Paras-8 to 10) Title: The Himachal Pradesh State Financial Corporation Limited Vs. Vidya Devi and others Page- 827.

Specific Relief Act, 1963- Section 38 - Permanent prohibitory injunction – Private partition (khangitakseem) – Held, Factum of separate exclusive possession over specific Khasra numbers by co-sharers, merely evidence of family arrangement, and not of private partition. (Para-8)Title: Nirmal Singh Vs. Bhajan Singh Page- 203.

Suit for Recovery- Plaintiff agreeing to sell their share in joint land through their General Power of Attorney (GPA)-GPA holder receiving earnest amount on behalf of plaintiffs- Earlier suit of vendee for specific performance decreed by High Court subject to payment of balance price- Liberty also reserved to plaintiffs to proceed against GPA holder for recovering earnest amount from him- Plaintiffs filing suit for recovery of earnest amount- Receipts relied upon by GPA holder qua payment of amount to plaintiffs found forged by handwriting expert- Trial Court decreeing suit- Appeal also dismissed. (Para 7 to 9) Title: Harish Kumar vs. Suresh Chand & Others , Page- 565.

'T'

Tort - Defamation -Suit for damages – Good faith –Defence - Held, Defendant is enjoined to adduce evidence that libelous item besides being truthful was published after thorough verifications of its narratives, in good faith and for public good. (Para-6) Title: Vijay Puri Vs. Ajay Mittal &Ors Page-228.

Tort-Defamation – Suit for damages - Public good – What is ? – Plaintiff posted as Principal Private Secretary to Chief Minister of State, transferred and posted as Principal Secretary of Department – Newspaper (D.1) publishing detailed write up concerning his transfer and attributing acts of misfeasance and nonfeasance on him - Article also suggesting that such act and conduct were cause of his transfer – News item alleging officer of having withdrawn huge sum towards medical bills of his brother - Public servant filing suit for damages by averring allegations made in write up to be altogether false, malicious and demeaning – Defendants taking plea of write up based on true facts and having been published in good faith for public good – Trial Court decreeing suit – Appeal against –On evidence, acts of nonfeasance as alleged in write up not established – Medical bills of his brother found reimbursed on claim raised by officer's Bhabhi, who herself was Govt. employee and entitled for medical claim – No evidence that plaintiff exercised any pressure for clearance of

said medical bills- Held - Alleged medical bills had no connectivity with plaintiff – Defendants failed in establishing that libelous narratives were fair and preceded by close scrutiny qua truth thereof - Imputations of financial delinquency being false had effect qua reputation and esteem of plaintiff and same lowered his reputation in society. (Paras-8 & 9) Title: Vijay Puri Vs. Ajay Mittal &Ors Page-228.

Tort- Defamation – Suit for damages – Good faith - Defence– News article published by defendants imputing that officer was having affinity towards RSS – Imputation said to be based on statement of opposition leader in Vidhan Sabha – And also that dissident group of Ruling Party had complained to Chief Minister of his arrogant behaviour- Defendant however admitting in cross-examination not having gone through record of proceedings of Vidhan Sabha wherein some Members had accused officer of having affinity towards RSS - Defendant also admitting that no Minister of Govt. accused officer of being arrogant in any of his Press briefings - Held, Plea of defendants of having published write up after due verification qua truth of its contents, not proved – News item could be construable to stand sparked by animodefamandi. (Para-10) Title: Vijay Puri Vs. Ajay Mittal &Ors Page-228.

Trade Unions Act, 1926- Section 2(h) – Trade Union- Meaning – Whether group of Truck Operators is Trade Union? –Held-Object of Union being to provide transport facility to general public and industries of area – Sole purpose of Union being to regulate freight to be paid to them by people and industrial units of area for transporting goods outside – Arrangement cannot said to be regulating trade relations between workmen and employer or between workmen and workmen – Association not been formed to regulate relations between employers and employers – Truck operators can be registered as Trade Union only when they qualify as 'Trade Union' as contemplated under Section 2(h) of Act – Petition disposed of with direction to Registrar, Trade Unions to look into registration of all Truck Operator Unions in State. (Para-11) Title: Ex and Non-Ex-Servicemen Truck Operators Union Vs. State of Himachal Pradesh & others Page-374

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Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58

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

Shivam Sharma ... Petitioner
Versus
State of H.P. &ors. ... Respondents

CWP No. 1353 of 2018 a/w connected matters
Reserved on: 5.7.2018.
Decided on: 13.7.2018.

Constitution of India, 1950- Articles 14, 15 and 226- Admission to MBBS/BDS Courses against state quota seats – Eligibility criterion – Court interference – Justifiability – Prospectus for admission year 2018-19 deleting clauses providing exemption from having qualified requisite examinations from Schools situated in State for admission against State quota seats for candidates belonging to bonafideHimachali parents though residing outside State due to their service in private sector/private occupation – However such exemption available to candidates residing outside due to their parents being engaged/employed with Central Government/ other State Governments, UTs/Corporations etc. – Challenge thereto – Deletion of clauses alleged to be arbitrary and unreasonable vis-à-vis candidates whose parents working with Central Government Board/Corporation etc. – State justifying its stand on ground that deletion was made pursuant to recommendation of Prospectus Review Committee – And in absence of such exemption clauses, petitioner not entitled for admission against State quota seats – Held, as per Hon'ble Shri Justice Dharam Chand Chaudhary (J.) (i) making provisions for exemptions of having qualified requisite examinations from schools situated in State or withdrawal thereof is policy decision and in absence of proof of decision being arbitrary, policy cannot be interfered with (ii) children of retired/serving employees of Central Government/ Other State Governments/UTs/autonomous bodies etc. form distinct class vis-à-vis children of persons employed in private concern as their parents left State out of compulsion (iii) reasonable classification has nexus with object to train doctors well versed with geographical and climatic conditions to ensure medical facilities to people residing in remote areas (iv) doctrine of legitimate expectation not applicable against policy matters.

Hon'ble Shri Justice Vivek Singh Thakur partially dissenting – Held, Distinction has to be drawn between bonafideHimachalis working outside State in Private Sector vis-à-vis Himachalis working in private occupation like business – Himachalis serving outside in private sector cannot be said to have opted jobs outside Himachal of their own volition – They are living outside due to compulsion - Job opportunities in Himachal are less – They have instinct to come to their native place – Grounds for denial of exemption to them equally applicable to children of parents serving outside Himachal with Central/other State Governments/Public Sector undertakings etc., whose children availing such exemption(s) – Distinction between children of Himachali parents working outside with Centre Government/other State Governments/Public Sector undertakings vis-à-vis children of Himachalis parents working in 'private sector' outside Himachal, not based on any intelligible criterion – Discrimination of children of Himachalis employed in Private Sector outside State by giving preferential treatment to children of bonafideHimachalis working outside State in Government Department/Public Sector, constitutionally impermissible – In view of divergence of opinion between Hon'ble Judges on minor aspect i.e. deletion of exemption to children of bonafideHimachalis working outside State in 'Private Sector', matter referred to Hon'ble third Judge. (Paras- 5, 26, 27, 30, 31, 58, 60, 61 and 71)

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National Council for Teacher Education and others vs. Shri Shyam Shiksha PrashikshanSansthan and ors., (2011) 3 SCC 238
S. Seshachalam and ors. Vs. Chairman, Bar Council of T.N. &ors., (2014) 16 SCC 72
Union of India &ors. Vs. N. Rathnam& sons, (2015) 10 SCC 681
Lok Prahari through ITS General Secretary vs. The State of Uttar Pradesh &ors., 2018 SCC Online SC491
Transport and Dock Workers Union &ors. Vs. Mumbai Port Trust &anr., (2011) 2 SCC 575
ShayaraBano vs. Union of India &ors. & connected petitions, (2017) 9 SCC 1
Gunjan Kapoor vs. State of Himachal Pradesh &ors. 1999(1) Sim. L.C. 246
Deepak Sibal vs. Punjab University &anr., (1989) 2 SCC 145
Dr. Pradeep Jain and others versus Union of India and others, (1984) 3 Supreme Court Cases 654
Dr. Dinesh Kumar and others versus Motilal Nehru Medical College, Allahabad and others (1986) 3 Supreme Court Cases 727
Anant Madaan versus State of Haryana and others, (1995) 2 Supreme Court Cases 135
Meenakshi Malik versus University of Delhi and others, (1989) 3 Supreme Court Cases 112
Nishant Puri versus State of H.P. and others, (1999) 1 Supreme Court Cases 126
Deepak Sibal versus Punjab University and another, (1989) 2 Supreme Court Cases 145

For the petitioner:	M/S. Sunil Mohan Goel, K.B. Khajuria, Vinod Chauhan, Pardeep K. Sharma, Raj Negi, Pawnish K. Shukla, Vivek Singh Thakur, Adarsh K. Vashisht, Advocates for the respective petitioners.
For the respondents:	Mr. Ashok Sharma, AG with Mr. Ajay Vaidya, Sr. Addl. AG and Mr. Nand Lal Thakur, Addl. AG for the respondent-State. Mr. Neel Kamal Sharma, Advocate for respondent-University. Sh. Shrawan Dogra, Sr. Advocate with M/S. Bharat Thakur, Devan Khanna and Harsh Kalta, Advocates for respondent No. 4 in CWP No. 1353 of 2018. Mr. B.C.Negi, Sr. Advocate, with Mr. Nitin Thakur, Advocate for respondent No. 5 in CWP No. 1353 of 2018. Mr. R.M. Bisht, Advocate for respondent No. 6 in CWP No. 1353 of 2018. Mr. Ravinder Thakur, Advocate, for respondent No. 7 in CWP No. 1353 of 2018.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

This judgment shall dispose of the present writ petition and its connected matters CWP Nos. 1347, 1354, 1355, 1374, 1375, 1384, 1393, 1413, 1416, 1501, 1504 to 1508, 1517 and 1524 of 2018. The petitioners in these writ petitions except in CWP No. 1501 of 2018 and respondents No. 4 to 7 in this writ petition are the children of bona fide

Himachalis either employed in private sector or being in private occupation outside the State of Himachal Pradesh. The petitioner in CWP No. 1501 of 2018 and respondents No. 4 to 7 in this petition are the children of bona fide Himachalis employed either in the Central Government departments/other State Governments/local and other authorities owned and controlled by the Central Government/other State Governments. In Himachal Pradesh, in terms of item No. IV (A) 1 of the Prospectus published for the academic session 2018-19, one of the eligibility conditions is passing of two examinations out of the following four from the schools situated within the territory of Himachal Pradesh:

(a) Middle or equivalent

(b) Matric or equivalent

(c) 10+1 or equivalent

(d) 10+2 or equivalent.

2. In the recent past, the exemption from the condition of passing two examinations out of four indicated above was available to the category of the petitioners and that of the category of the petitioner in CWP No. 1501 of 2018 under clause 3(ii) and 3(iv) read with Note 1 below it as is apparent from the Prospectus up to the academic session 2017-18. However, in the Prospectus published by the respondents for admission to the MBBS/BDS courses in the colleges situated in the State for the academic session 2018-19, the provisions i.e. item No. 3(iv), words "private occupation" in Clause 3 and Note 1 stands deleted and thereby the exemption from passing the condition of two examinations from the schools situated in the State of Himachal Pradesh has been withdrawn. While clause 3 (iv) was deleted well before the publication of Prospectus, the Note 1 and words "private occupation" in clause 3 of main item No. IV (A) were deleted vide Corrigendum dated 12.6.2018 Annexure P-10 and Corrigendum-II dated 13.6.2018 Annexure P-12. Since the petitioners in these writ petitions except respondents No. 4 to 7 in this petition and petitioner in CWP No. 1501 of 2018 have assailed the decision so taken by the respondents on the grounds of being discriminatory, arbitrary, illegal, un-Constitutional and violative of Article 14 of the Constitution of India on several grounds, particularly that allowing such exemption to the category of the petitioner in CWP No. 1501 of 2018 and respondents No. 4 t0 7 in the main writ petition under clause 3(ii) of main item No. IV (A) in the Prospectus, therefore, the parties on both sides were heard at length on 26.6.2018 and even on 5.7.2018 also.

3. As a matter of fact, on hearing arguments on 26.6.2018, the writ petitions were posted for pronouncement of judgment to 29.6.2018, however, instead of pronouncement of judgment, a detailed order has been passed on that day for the reasons recorded therein as without hearing the candidates qualified for appearance in counseling from the exempted category 3(ii) of item No. IV (A) in the Prospectus, it was deemed appropriate not to dispose of the writ petitions finally without hearing the candidates belonging to above said exempted category. However, not only the petitioners in these writ petitions except in CWP No. 1501 of 2018 were allowed to participate in the counseling but those qualified from exempted category 3(ii) supra were also allowed to appear in counseling provisionally with a direction to the respondents not to admit them to the course without the leave of the Court.

4. The candidates belonging to the exempted category i.e. clause 3(ii) have now filed CWP No. 1501 of 2018 and also sought their impleadment in the main matter i.e. CWP No. 1353 of 2018. Though, they have not filed response to the civil writ petition but their response, in a nut shell, is that providing exemption to their category has already been held legal and valid by a Division Bench of this Court in ***Vikram Singh Negi vs. State of H.P.***, (2009) 2 Sim. L. C. 362. Therefore, according to them, the petitioners in other writ petitions

are not justified in claiming that allowing the exemption to their category is discriminatory in nature.

5. Now, all these matters have to be considered in the light of the above background and also taking into consideration the given facts and circumstances. We have taken note of the facts in detail in our order passed in these matters on 29.6.2018. Therefore, mentioning the same again would be nothing but merely a repetition to overload the judgment unnecessarily. Anyhow, for the sake of convenience, the facts as we have noticed in the order ibid are being reproduced here as under:

> "The petitioners in these writ petitions are the children/wards allegedly of bonafideHimachalies 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 bonafideHimachalies, 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 bonafideHimachalies 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 bonafideHimachalies 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.

5. 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.

6. 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).

6. It is in this backdrop, Mr. Sunil Mohan Goel, Advocate assisted by S/Sh. K.B. Khajuria, Vinod Chauhan, Pradeep K. Sharma, Raj Negi, Pawnish K. Shukla, Vivek Singh Thakur, Adarsh K. Vashishta, Advocates and Sh. Ashok Sharma, Advocate General assisted by Mr. Ajay Vaidya, Sr. Addl. Advocate General, Mr. Vikas Rathore, Addl. AG and Mr. Narinder Guleria, Addl. AG were heard at length on 26.6.2018 and also on 5.7.2018. On behalf of another exempted category i.e the children of retired/serving Central Government, other State Governments as well as local and other authorities owned and controlled by the Central Government/State Governments falling under clause 3(ii) of item IV (A), we have heard Sh. Shrawan Dogra Sr. Advocate and Sh. B.C. Negi, Sr. Advocate assisted by S/Sh. R.M. Bisht, Ravinder Thakur and Nitin Thakur, Advocates.

7. Mr. Sunil Mohan Goel, Advocate has emphasized that denial of exemption to the category of petitioners i.e. children of bonafidehimachalis working in private sector/being in private occupation outside the State from passing of two examinations from the Schools situated in the State abruptly at a stage after declaration of the result of NEET (UG) 2018 by way of deleting clause 3(iv) of main item IV (A) in the last year Prospectus Annexure P-8, has taken the petitioners to surprise and thereby snatched away their right of seeking admission to MBBS/BDS courses in the colleges situated in the State that too when such concession has been allowed to continue in favour of the category of the petitioners in CWP No. 1501 of 2018 and respondents No. 4 to 7 in CWP No. 1353 of 2018, similarly

situated as their parents are also residing outside the State in connection with their job either in Central Government or State Governments or Board/Corporations and other Authorities owned and controlled by the Central/State Governments. The denial of such exemption to the category of the petitioners according to Mr. Goel is in sheer violation of Article 14 of the Constitution of India. According to Mr. Goel, the respondents by deleting the provisions qua exemption from passing two examinations from the schools situated in the State being provided to the category of the petitioners vis-a-vis the exempted category i.e. 3(ii) has made a classification which is **not founded on intelligible differentia and rather distinguishes the petitioners and the children of other exempted category 3(ii)** viz. similarly situated were grouped together. Also that, the differentiation as made has no rationale relation to the object sought to be achieved. It has also been urged that by deleting the exemption available to the category of the petitioners in recent past they remained high and dry and shall have to compete against limited 15% All India Quota seats. It has also been urged that the parents of the petitioners are residing outside the State to earn their livelihood by working in private sector and also being in private occupation as they did not get any employment in the State. Also that when the Prospectus Annexure P-11 for admission in the academic session 2018-19 was issued/published, the provisions qua exemption to the category of the petitioners could have not been withdrawn by way of Corrigendums Annexures P-10 and P-12. Besides the above submissions, Mr. Sunil Mohan Goel, Advocate to urge that when the condition of passing two examinations out of the four from the schools situated in the State was upheld by a Division Bench of this Court in ***Gagan Deep vs. State of H.P***. 1996(1) Sim. L.C. 242, therefore, providing exemption from such condition to other category excluding the category of the petitioners is arbitrary exercise of power by the respondent-State.

8. Now, if coming to the arguments addressed on behalf of respondents, Mr. Ashok Sharma, learned Advocate General has strenuously contended that a decision to delete item 3(iv) of item No. IV(A) was taken by the competent authority at highest level and the Prospectus Annexure P-11 for the academic session 2018-19 when published, the said clause did not find mention therein. Merely that in clause 3 words “private occupation” and Note No. 1 below it came to be reflected by way of mistake does not extend any right in favour of the petitioners to seek exemption since the mistake occurred in the Prospectus Annexure P-11 which was rectified on the very next date i.e. 13.6.2018 by issuing impugned Corrigendums Annexures P-10 and P-12. The candidates in merits from the category of the petitioners were well aware of the withdrawal of the concession being availed by them up to the academic session 2017-18. Therefore, they have not been taken to surprise or by such a decision left high and dry. Also that the rules governing the eligibility condition are clause 1 & 2 of main item IV (A) whereas clause 3 an exception. The exception i.e. 3(iv) of item IV (A) allegedly unreasonable is stated to be rightly deleted. The decision so taken by the respondent-State is neither arbitrary nor violative of Article 14 of the Constitution of India. Withdrawal of concession to the category of the petitioners from the ensuing academic session is a policy decision, hence, doctrine of “legitimate expectation” is not attracted in the instant cases. Learned Advocate General has also urged that while taking a decision to withdraw the concession granted to the category of the petitioners, the interest of the State and also the people residing here was the only paramount consideration. Such a decision, according to learned Advocate General can be assailed in a case of manifest arbitrariness which is something done by the Legislature capriciously, irrationally and whimsically. The decision of the respondent-State is, however, not tainted thereby. Learned Advocate General has also argued that mere differential treatment does not amount to violation of Article 14 of the Constitution of India. It violates only when no conceivable and reasonable basis exists for such differentiation. Learned Advocate General has, therefore, contended that the exemption granted to the children of retired/serving central government employees/state

government employees/other authorities owned and controlled by Central/State Governments under clause 3(ii) of main item IV(A) is absolutely legal and valid, however, such exemption being availed by the category of the petitioners under clause 3(iv) as per the Prospectus for the last academic session 2017-18 has rightly been withdrawn by the respondent-State.

9. Mr. Shrawan Dogra, Sr. Advocate assisted by S/Sh. R.M. Bisht, Ravinder Thakur and Bharat Thakur, Advocates while addressing arguments on behalf of respondents No. 4 to 7 in the main matter have placed reliance on the judgment of the Division Bench of this Court in ***Vikram Singh Negi's case*** cited supra and submitted that such exemption granted to the children of this category has been held legal and valid and the judgment so passed has attained finality. The petitioners in this petition and also the remaining petitions (except CWP No. 1501 of 2018), therefore, according to Mr. Dogra cannot seek parity with the children belonging to exempted category 3(ii) under main item IV(A) which still exists in the Prospectus Annexure P-13 published for admission to MBBS/BDS courses during the academic session 2018-19. It is a policy decision taken by the respondent-State, the policy maker and ousted them from seeking exemption by taking such a decision. Similar are the submissions made on behalf of petitioner in CWP No. 1501 of 2018 by Mr. B.C. Negi, Sr. Advocate assisted by Mr. Nitin Thakur, Advocate.

10. On analyzing the rival submissions as aforesaid, the following points arise for determination in these petitions:

1. Whether withdrawal of exemption to the category of the petitioners in these writ petitions except CWP No. 1501 of 2018 is violative of Article 14 of the Constitution of India being not founded on an intelligible differentia and there being no relation between such differentia and the object sought to be achieved?
2. Whether the category of the petitioners and the children of exempted category 3(ii) of item No. IV (A) being identical forms a group hence withdrawing of exemption from condition of passing two exams from one of the category i.e. of the petitioners creates a class within a class and also distinguishes the category of the petitioners from that of the so called other exempted category 3(ii) of item No. IV (A), is discriminatory?
3. Whether the Prospectus Annexure P-11 initially issued for admission in MBBS/BDS courses was containing the provision qua exemption to the category of petitioners in addition to the private respondents in the main matter and petitioner in CWP No. 1501 of 2018 and that the respondent-State by way of Corrigendum(s) Annexures P-10 and P-12 has illegally withdrawn the same from their category?

11. Before coming to the above points framed for discussion, it is deemed appropriate to note down the eligibility and qualification for seeking admission against State quota seats in MBBS/BDS courses in the State of Himachal Pradesh and the provisions qua exemption therefrom to the category of the petitioners under these writ petitions and the category of the petitioner in CWP No. 1501 of 2018. The relevant text of the Prospectus for the academic session 2017-18 Annexure P-8, Prospectus issued initially for the current academic session 2018-19 Annexure P-11 and modified provisions in the Prospectus Annexure P-13, issued after issuance of the Corrigendums Annexures P-10 and P-12 reads as under:

"Prospectus for the academic session 2017-18:

IV. ELIGIBILITY AND QUALIFICATIONS

(A) For State Quota Seats :

1. Children of BonafideHimachali/Himachal Govt. employees and employees of autonomous bodies wholly or partially financed by the Himachal Pradesh Government who qualified the NEET-UG-2017 will only be eligible to apply for admission to MBBS/BDS Courses through Counseling in Government Medical/Dental Colleges including State Quota seats in Private unaided Medical/Dental Colleges situated in Himachal Pradesh. They should have passed atleast 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

x x x xx xx x x xx x xx xx x

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 BonafideHimachali and <u>their father/mother are living outside Himachal Pradesh on account of their service/posting /private occupation</u>. 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):-

x x xx x xxxxxxxxxxxx

(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.

x xxxxxxxxxxxx x x

(iv) Children of employees of Private Sector / Private occupation.

Note : (1) The candidates claiming exemption for 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.

x xxxxxxxxx"

"Prospectus issued initially for the academic session 2018-19:

IV. ELIGIBILITY AND QUALIFICATIONS

(A) For State Quota Seats :

1. Children of BonafideHimachali/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 Counseling in Government Medical/Dental Colleges including State Quota seats in Private unaided Medical/Dental Colleges situated in Himachal Pradesh. They should have passed atleast 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

x xxxxxxxxxxxxx

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 BonafideHimachali and 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):-

x xxxxxxxxxxxx

(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.

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 certificate on the prescribed format as given in the Prospectus at Appendix A-12, A-13 with the application form in original, as applicable.

x xxxxxxxxxx"

"Prospectus with modified eligibility and qualifications issued for the academic session 2018-19 after issuance of two Corrigendums on 13.6.2018:

IV. ELIGIBILITY AND QUALIFICATIONS

(A) For State Quota Seats :

1. Children of BonafideHimachali/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

x xxxxxxxxxxx

> 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 BonafideHimachali and their father/mother are living outside Himachal Pradesh on account of their service/posting. 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):-
>
> x xxxxxxxxxx
>
> (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.
>
> x xxxxxxxxxx"

12. It is thus seen that clause 3(iv) which was in the Prospectus Annexure P-8 qua providing exemption to the category of the petitioners from the condition of passing two examinations from the schools situated in the State of H.P. was withdrawn and as it was not there in the Prospectus Annexure P-11 issued initially for the academic session 2018-19. Although in clause 3 words "private occupation" and Note 1 figured in the Prospectus were also removed by way of issuance of two Corrigendums Annexures P-10 & P-12 on the very next day i.e. 13.6.2018. We have dealt with this aspect of the matter in para 10 to 12 of our order passed in these matters on 29.6.2018, which reads as follows:

> "10. 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.
>
> 11. 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.

12. 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 bonafideHimachalies 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."

13. Being so, it would not be improper to conclude that the provisions qua providing exemption to the category of the petitioners were already dropped. We have perused the record which reveals that the recommendation of the Prospectus Review Committee was placed before the State Government at highest level and the same was approved with sufficient and valid reasons. The matter dealt with by the Government on the basis of the report of the Prospectus Review Committee is reproduced hereunder:

"……. In the prospectus of 2017-18, wards of bonafideHimachalis who are living outside the State due to private employment or occupation are also exempted from the condition of schooling in the State.

As detailed at point no. 5 of N-43 this exemption was introduced in 2013-14. At that time Director Medical Education had opposed this

exemption on the grounds that it would be difficult to verify bonafides of such candidates. However, the government introduced this exemption overruling DME.

It is very obvious that with this exemption, almost every bonafideHimachali is exempted from schooling in the State condition. This exemption effectively means that all bonafideHimachalis are eligible for admission making schooling condition infructuous.

In view of this it is proposed that exemption from schooling condition for persons in private employment and occupation is removed.

.....

.....

The Prospectus may kindly be approved as proposed by the Prospectus Committee with modification as per N-61.

.....

Sd/-
ACS (Health)
8.6.2018.

H.M.

Sd/-
H.M.
9.6.2018.

ACS (Health)- Out.

S.S. (Health)

May issue letter for necessary changes in the Prospectus.

Sd/-
S.S. (Health)
11.6.2018.

S.O.(Health)"

14. As a matter of fact, the recommendation made by Prospectus Review Committee to drop the provisions qua providing exemption to the category of the petitioners was placed for decision before the Council of Ministers. After the decision taken at the highest level, the provisions were dropped from the Prospectus Annexure P-11. Subsequently, the words "private occupation" and Note 1 appeared in the Prospectus Annexure P-11 issued initially were also deleted by way of two Corrigendums Annexure P-10 & P-12 on 13.6.2018 when online applications were being filled in as per the time schedule i.e. 12.6.2018 onwards till 20.6.2018. The candidates belonging to the category of the petitioners were, therefore, well aware about the deletion of clause 3(iv) providing them exemption from the condition of passing two examinations out of the four from the Prospectus for the academic session 2018-19. The petitioners, as such, are not justified in claiming that such decision of the respondent-State has left them high and dry. As a matter of fact, the Prospectus was to be issued after declaration of the result of NEET (UG-2018) of course, before submission of online applications for admission. The Prospectus Annexure P-11 was issued on 12.6.2018 and the Corrigendums on the very next day i.e. 13.6.2018, hence, within time. The power of the respondent-State to amend or alter the Prospectus stood discussed in para 11 of the order dated 28.6.2018 reproduced supra. As a matter of fact, it is the note below item XXIV of the Prospectus (Annexure P-13) which empowers the

respondent-State and for that matter the University also to make any change/amendment in the Prospectus even after issuance of the same, which shall be binding on all concerned, including the students.

15. In this view of the matter, no case in favour of the petitioners on this score is made out. The providing of benefit of exemption to the category of the petitioners is a policy decision taken by the competent authority. The power to lay a policy also includes to withdraw it. Hence, the doctrine of legitimate expectation is not at all attracted in this case. While arriving at such conclusion, support can be drawn from the judgment of the Apex Court in ***Bajaj Hindustan Ltd. Sir Shadi Lal Enterprises Ltd. &anr., (2011) 1 SCC 640.*** The relevant text of the same reads as follows:

> "41. The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is by mala fide exercise of power, or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is settled law that the court gives a large leeway to the executive and the legislature. Granting licences for import or export is an executive or legislative policy. The Government would take diverse factors for formulating the policy in the overall larger interest of the economy of the country. When the Government is satisfied that change in the policy was necessary in the public interest it would be entitled to revise the policy and lay down a new policy."

16. There is nothing on record that such a decision is the result of malafide exercise of power and rather the same was required to be taken in the interest of the State. The points (supra) arising for determination are now being discussed as follows:

Points No. 1 to 3.

17. All the points being interlinked and inter connected have been taken up together for discussion and decision. On behalf of the petitioners, an effort has been made to persuade this Court to form an opinion that the category of the petitioners and other exempted category 3(ii) being one and the same forms a group, hence denial of the benefit of exemption to their category is not based upon intelligible differentia and rather amount to creation of a class within the class which is neither legally permissible nor is there any relation between such classification and the object sought to be achieved. In order to buttress the arguments so addressed, reliance has been placed on the judgment of Larger Bench of the Apex Court in ***Budhan Chaudhary &ors. Vs. State of Bihar, AIR 1955 SC 191***. The relevant text of the same reads as follows:

> "5. The provisions of article 14 of the Constitution have come up for discussion before this Court in a number of cases., namely, Chiranjit Lal Chowdhuri v. The Union of India(1), The State of Bombay v. F. N. Balsara(2), The State of West Bengal v. Anwar Ali Sarkar(3), Kathi Raning Rawat v. The State of Saurashtra, AIR 1952 SC 123 (D); LachmandasKewalram Ahuja v. The State of Bombay, AIR 1952 SC 235, and QasimRazvi v. The State of Hyderabad, AIR 1953 SC 156 and Habeeb Mohamad v. The State of Hyderabad, AIR 1953 SC 287. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well-established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the

test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The contention now put forward as to the invalidity of the trial of the appellants has, therefore to be tested in the light of the principles so laid down in the decisions of this Court."

18. The Larger Bench of the Apex Court in ***Smt. Menaka Gandhi vs. Union of India, 1978 SC 597,*** has also held as follows:

"56. Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach._ No attempt should be made to truncate itsall embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned Within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E. P. Royappa v. State of Tamil Nadu & Another (1) namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes, at arbi- trariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "'right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. How far natural justice is air essential element of procedure established by law."

19. The Apex Court has again held in ***National Council for Teacher Education and others vs. Shri Shyam Shiksha PrashikshanSansthan and ors., (2011) 3 SCC 238*** as follows:

"22. Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question. In re the Special Courts Bill, 1978 (1979) 1 SCC 380, Chandrachud, C.J., speaking for majority of the Court

adverted to large number of judicial precedents involving interpretation of Article 14 and culled out several propositions including the following:

> "(2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.
>
> (3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.
>
> (4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same. (5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.
>
> (6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.
>
> (7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act."

20. Similar is the ratio of the judgment, again that of the Apex Court, in ***S. Seshachalam and ors. Vs. Chairman, Bar Council of T.N. &ors., (2014) 16 SCC 72,*** which reads as under:

> "21. Article 14 of the Constitution of India states that "The State shall not deny to any person equality before the law of the equal protection of the laws within the territory of India". Article 14 forbids class-legislation but it does not forbid reasonable classification. The classification however must not be "arbitrary, artificial or evasive" but must be based on some real and substantial bearing, a just and reasonable relation to the object sought to be achieved by the legislation. Article 14 applies where equals are treated differently without any reasonable basis. But where equals and unequals are treated differently, Article 14 does not apply. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privilege granted and between those on whom the privilege is conferred whom and the persons not so favoured, no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege.
>
> 22. While Article 14 forbids class legislation, it does not forbid reasonable classification of persons, objects, and transactions by the legislature for the purpose of achieving specific ends. But classification must not be "arbitrary, artificial or evasive". It must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. Classification to be reasonable must fulfil the following two conditions:- Firstly, the classification must be founded on the intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group. Secondly, the differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are two distinct things. What is necessary is that there must be nexus between the basis of classification and the object of the Act. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory."

21. A Constitution Bench of the Apex Court in ***Union of India &ors. Vs. N. Rathnam& sons, (2015) 10 SCC 681,*** has again ruled as follows:

> "13. It is, thus, beyond any pale of doubt that the justiciability of particular Notification can be tested on the touchstone of Article 14 of the Constitution. Article 14, which is treated as basic feature of the Constitution, ensures equality before the law or equal protection of laws. Equal protection means the right to equal treatment in similar circumstances, both in the priviliges conferred and in the liabilities imposed. Therefore, if the two persons or two sets of persons are similarly situated/placed, they have to be treated equally. At the same time, the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It would mean that the State has the power to classify persons for legitimate purposes. The legislature is competent to exercise its discretion and make classification. Thus, every classification is in some degree likely to produce some inequality but mere production of inequality is not enough.Article 14 would be treated as violated only when equal protection is denied even when the two persons

belong to same class/category. Therefore, the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between the two classes created by the State. Article 14 prohibits class legislation and not reasonable classification.

14. What follows from the above is that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (ii) that, that differential must have a rational relation to the object sought to be achieved by the statute in question. If the government fails to support its action of classification on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held as arbitrary and discriminatory. In Sube Singh v. State of Haryana[5], this aspect is highlighted by the Court in the following manner:

> "10. In the counter and the note of submission filed on behalf of the appellants it is averred, inter alia, that the Land Acquisition Collector on considering the objections filed by the appellants had recommended to the State Government for exclusion of the properties of appellants 1 and 3 to 6 and the State Government had not accepted such recommendations only on the ground that the constructions made by the appellants were of 'B' or 'C' class and could not be easily amalgamated into the developed colony which was proposed to be built. There is no averment in the pleadings of the respondents stating the basis of classification of structures as 'A' 'B' and 'C' class, nor is it stated how the amalgamation of all 'A' class structures was feasible and possible while those of 'B' and 'C' class structures was not possible. It is not the case of the State Government and also not argued before us that there is no policy decision of the Government for excluding the lands having structures thereon from acquisition under the Act. Indeed, as noted earlier, in these cases the State Government has accepted the request of some land owners for exclusion of their properties on this very ground. It remains to be seen whether the purported classification of existing structures into 'A', 'B' and 'C' class is a reasonable classification having an intelligible differential and a rational basis germane to the purpose. If the State Government fails to support its action on the touchstone of the above principle then this decision has to be held as arbitrary and discriminatory. It is relevant to note here that the acquisition of the lands is for the purpose of planned development of the area which includes both residential and commercial purposes. That being the purpose of acquisition it is difficult to accept the case of the State Government that certain types of structures which according to its own classification are of 'A' class can be allowed to remain while other structures situated in close vicinity and being used for same purposes (residential or commercial) should be demolished. At the cost of repetition, it may be stated here that no material was placed before us to show the basis of classification of the existing structures on the land proposed to be acquired. This assumes importance in view of the specific contention raised on behalf of the appellants that they have pucca structures with R.C. roofing, Mozaic flooring etc. No attempt was also made from the side of the State Government to place any

> architectural plan of different types of structures proposed to be constructed on the land notified for acquisition in support of its contention that the structures which exist on the lands of the appellants could not be amalgamated into the plan."

22. It is thus seen from the legal principles settled in the judgments supra that Article 14 forbids class legislation but not reasonable classification. It is violated only if equal protection out of two persons belonging to same class/category is denied to one of them. Additionally, that Article 14 strikes at arbitrariness in the State action and ensure fairness and equality of treatment. Although, the legality and validity of the policy decision taken by the government would have been decided after hearing arguments in these matters on 26.6.2018 yet, it is the question of discriminatory treatment and arbitrariness in action by the respondent-State raised by Mr. Sunil Mohan Goel, Advocate, during the course of arguments, it was not possible to do so without hearing the candidates belonging to the exempted category 3(ii) of item No. IV(A). This question was left open to be decided after associating them also as party respondents in the writ petitions. For the sake of convenience, it is deemed appropriate to refer to the following paras of our order dated 29.6.2018 passed in these writ petitions:

> "13. 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.
>
> 14. 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.

15. 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.

16. 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."

23. It is seen that in the order ibid, prima-facie, the category of the petitioners was held to be similar to that of the exempted category 3(ii). Such opinion was formed with sole idea to examine the rights of the petitioners to appear in counseling vis-à-vis the right of the candidates of exempted category 3(ii) and nothing beyond it. It was further observed that in case candidates belonging to the exempted category 3(ii) were also ultimately not held entitled to such exemption, why they should be allowed to occupy the seats in the

Medical/Dental Colleges at the cost of the eligible and qualified Himachali students. Therefore, while in terms of the exemption provided under clause 3(ii) of item IV (A), the qualified candidates of this category had to appear for counseling, the petitioners were also allowed to appear provisionally for counseling with a stipulation that the candidates of both categories shall not be admitted to the course except with the leave of the Court.

24. The exemption from the condition of passing two examinations out of the four from the schools situated within the State of Himachal Pradesh to the children of exempted category 3(ii) has been held legal and valid by this Court in ***Vikram Singh Negi vs. State of H.P. &ors., (2009) 2 Shim. LC 362.*** The relevant text of this judgment reads as follows:

> "8. It is contended on behalf of the petitioner that the parents of such students, who were working with other States have left the State of H.P. of their own volition and they have attained better quality of education outside the State and therefore, they should not be given the benefit of such an exemption. We are unable to accept this contention. It is for the State to decide whether such an exemption should be given or not. It is for the State to decide whether reservation should be made and if so for what category of people. Reservation can never be claimed as a matter of right. Articles 15 and 16 of the Constitution of India are only enabling provisions which permit the State to make reservation. What is the extent of reservation to be made is something to be decided by the State. Supposing the State in its wisdom decides that the condition regarding passing of some examinations from Schools situated within Himachal should be done away with and deletes the same from the prospectus. Can any person have a right to claim that the State must be compelled to retain this condition? The answer has to be an emphatic no. Article 14 which pervades through our Constitution provides equal opportunity to all. Articles 15 & 16 of the Constitution of India are exceptions to Article 14. They cannot override Article 14 itself. That is why the Apex Court has repeatedly held that the reservation normally can never exceed 50%. What is the extent and manner of reservation is something for the Executive to decide. The Court can only interfere if it is shown that powers have been exercised arbitrarily or in violation of the Constitution of India."

25. In view of such authoritative pronouncement, we need not to go into this aspect of the matter any further and hold without any hesitation that the exemption from the condition of passing two examinations to the category i.e. 3(ii) to the category of retired/serving Central Government employees/UT/ other State Governments and children of employees of the Autonomous Organizations/Semi-Government Bodies of State/Central Governments, is legal and valid as nothing has been brought to our notice that granting such concession to this category and withdrawing from the category of the petitioners is arbitrary and result of malafide exercise of power.

26. Now, if coming to further claim of the petitioners that their category is at par with the exempted category 3(ii) and that depriving them from such benefit amounts to creation of class within the class, hence violative of Article 14 of the Constitution of India. Though so was the prima facie opinion formed in the order dated 29.6.2018, however, the category of the petitioners is not at par with the exempted category 3(ii) for the reason that the retired/serving Central Government employees/UT/ other State Governments and children of employees of the Autonomous Organizations/Semi-Government Bodies of State/Central Governments forms a separate and distinct class as compared to that of the petitioners. They are outside the State on account of their appointment in the Central/other

State Governments or Boards/Corporations owned and controlled by the Central/State Governments. At the most, the employees in the private sector can be said to have some resemblance with the employees under exempted category 3(ii), however, it is for the policy makers to take a decision in this regard. The decision now taken, however, is not open for judicial scrutiny because it is the policy makers who had included this category for the first time in the Prospectus in the year 2013-14 and it is again the policy makers who in their wisdom have now dropped the same from the current academic session 2018-19.

27. As regards the persons in private occupation, they are not entitled to any exemption from the condition of passing two examinations from the schools situated in the State for the reason firstly that they can not be said to have left the State under any compulsion and secondly they could have started such occupation in the State of Himachal Pradesh itself. If they have chosen to start such occupation/business outside the State, they did so out of their own volition and may be with a view to earn more which they may have not earned while carrying such occupation/business in the State. The possibility of such exemption being availed even by multi-millionaires and those carrying business/occupation in abroad also can not be ruled out.

28. We are not oblivious to the fact that bona fide Himachlis in large number are residing outside in connection with doing small-small jobs and carrying petty business i.e. Taxi drivers, chaffs, cooks, riksha pullers etc. and also carrying business as Hawkers and "RehriPhariwala" but their children by and large reside at their native places in Himachal Pradesh itself and undergo their studies in the schools situated in the State of Himachal Pradesh. Therefore, the policy makers have rightly differentiated the category of the petitioners from that of the exempted category 3(ii). As a matter of fact, the two categories are distinct and separate and do not form same group. The differentia between the two as such is intelligible and there is relation between such classification and the object sought to be achieved i.e. to provide more avenues to Himachali students to seek admissions in MBBS/BDS courses in the colleges situated in the State. The prime object sought to be achieved thereby is to train doctors well verse with the geographical and climatic conditions prevailing in the State of Himachal Pradesh, particularly in the snow bound and remote areas to ensure better medical facilities to the people residing in such areas. The intention of the respondent-State, as such, does not suffer from malafide and bias and rather the power has been exercised in larger public interest.

29. The Apex Court in a recent judgment in ***Lok Prahari through ITS General Secretary vs. The State of Uttar Pradesh &ors., 2018 SCC Online SC491,*** has held as follows:

> "30. In Budhan Choudhry (supra), the classical test based on a reasonable classification to give legitimacy to an act of differential treatment was expounded in the following terms:
>
> > ".....It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the

> basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

30. We find the present a case where dropping the category of petitioners from Prospectus for the purpose of the exemption is on the basis of reasonable classification because the category of the petitioners and the exempted category 3(ii) are distinct and separate and there is rationale relationship between such classification and the object sought to be achieved by deletion of category 3(iv) and Note 1 appended below it. The classification is based upon various considerations like topography of the State, socio-economic condition of the people, scarcity of good schools, tutors and coaching centres for the children studying in the schools situated in the State and that the meritorious Himachali children gets a chance of admission in the MBBS/BDS courses to serve the State. The paramount consideration, of course, is to provide better medical facilities to the people of the State, especially in snow bound and remote areas. Therefore, there is a nexus between the basis of such classification and the object i.e. dropping the provisions in the Prospectus qua providing exemption to the category of the petitioners, sought to be achieved.

31. It is held by the Hon'ble Apex Court in ***Transport and Dock Workers Union &ors. Vs. Mumbai Port Trust &anr., (2011) 2 SCC 575,*** that differential treatment always does not amount to violation of Article 14 of the Constitution. It violates the same only when there is no reasonable basis for the differentiation. Since, as noticed supra, the exclusion of the category of the petitioners from exemption is based on intelligible differentia and there is a nexus between such exclusion and the object sought to be achieved, therefore, there is no question of violation of Article 14 of the Constitution of India in this case. Support in this regard can be drawn from the judgment of the Apex Court in ***ShayaraBano vs. Union of India &ors. & connected petitions, (2017) 9 SCC 1.*** The relevant text thereof reads as follows:

> "101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

32. True it is that it is not possible to the State to provide employment to all, however, those who are residing outside the State in connection with their service in private sector or being in private occupation, must also know that their children can seek admission in the Medical/Dental colleges situated in the State only on having passed two examinations out of the four mentioned below clause 1 of item IV(A) of the Prospectus. Therefore, their children like the children of those who are permanently residing in the State can also pass two examinations from the schools situated in the State. They cannot be heard of any

grievance nor that declining the exemption to their children is discriminatory or violative of Article 14 of the Constitution of India. Mr. Sunil Mohan Goel, Advocate, though has tried to draw support from the judgment of this Court in ***Vikram Singh Negi's case*** cited supra, however, unsuccessfully because observations in the judgment came to be made while examining the legality and validity of the exemption provided to the exempted category 3(ii). True it is that the Court at that time had no occasion to compare the rights of the petitioners to seek exemption vis-à-vis the right of the exempted category 3(ii), however, for the reasons recorded hereinabove and also to be recorded hereinafter, we find no similarity in the category of the petitioners with exempted category 3(ii). We agree with further submission made by Mr. Sunil Mohan Goel, that the eligibility criteria i.e. requirement of passing two examinations out of four from the Schools situated in the State of Himachal Pradesh held legal and valid by this Court in ***Gagan Deep's case*** (supra) should have been applied in letter and spirit. The eligibility criteria should have been applied as it is, however, the policy makers have exempted most probably subsequently some of the categories mentioned in clauses 2, 3 (i) to 3(iii) of main item IV (A). Such benefit was available to the category of the petitioners also in the recent past, however, as discussed hereinabove, the same now stands withdrawn from the current academic session 2018-19. We leave it open to the policy makers to re-consider the desirability of continuing such concession to these categories in future for the reason that when the persons falling under these categories claim themselves to be Himachalis having roots in the society can conveniently make their children to study in the schools situated in their respective areas or elsewhere in the State of Himachal Pradesh, if interested in seeking admission in the Medical/Dental Colleges situate in the State. Their children having not studied from the schools situated in the State amply demonstrate that they have been proclaiming themselves to be a Himachali merely to avail such concession.

33. The another argument that the Prospectus once published could have not been unilaterally changed to the detriment of the petitioners is again without any substance for the reasons we have already recorded in para 11 of the order dated 29.6.2018, reproduced supra. No doubt the provisions in the Prospectus have the force of law as it is held so by this Court in ***Gunjan Kapoor vs. State of Himachal Pradesh &ors. 1999(1) Sim. L.C. 246.*** However, when the Prospectus itself reserves a right in favour of the respondents to make any change/amendment, the same shall be binding on the students. It is held so by a Division Bench of Delhi High Court in ***Varun Kumar Agarwal vs. Union of India &ors. LPA No. 599 of 2010,*** decided on 3.3.2011. The relevant text of the same reads as follows:

> "16. We have referred to the aforesaid decisions only to highlight that the conditions stipulated in the prospectus are guidelines for all concerned and everyone is required to follow the same in letter and spirit and not act in transgression. The hopes and aspirations of the students, who came within the zone of merit, cannot be scuttled by changing the prospectus by way of introducing a corrigendum. **A change in the conditions of the prospectus can be conceived of and allowed if such power is specifically reserved while making the prospectus public as in that case, no one can think of having a right. In that event, the same could be capable of change**."

34. The judgment of the Apex Court in ***Deepak Sibal vs. Punjab University &anr., (1989) 2 SCC 145,*** relied upon by the learned counsel for the petitioners is distinguishable on facts because in that case the admission to law courses in evening College of Punjab University was denied to the employees of private/public establishments/ institutions on the ground of production of bogus certificates by them, imparting legal education to employees of government/semi-government institutions in public interest,

continuity of service for 3 years period of State and elimination of wastage of seats. Such, however, is not the position in the case in hand nor the withdrawal of concession to the category of the petitioners suffers from any illegality or arbitrariness. The ratio of the judgment, as such, is of no help to the case of the petitioners.

35. For all the reasons hereinabove, this writ petition (CWP No. 1353 of 2018) and its connected writ petitions CWP Nos.1347, 1354, 1355, 1374, 1375, 1384, 1393, 1413, 1416, 1504 to 1508, 1517 and 1524 of 2018 are dismissed and the interim order(s) vacated. However, CWP No. 1501 of 2018 is allowed. Consequently, the petitioner in Civil Writ Petition No. 1501 of 2018 and respondents No. 4 to 7 in main matter i.e. CWP No. 1353 of 2018 are held entitled to the exemption from the condition of passing two examinations out of four and consequently admission from their category i.e. 3(ii) of item IV (A), if otherwise qualified and in merits against 85% State quota seats.

36. Before parting, irrespective of withholding the benefit of exemption to the category of the petitioners in these writ petitions, except petitioners in CWP No. 1501 of 2018, has been held legal and valid, we leave it open to the respondent-State to consider granting admission only to those petitioners who have approached this Court by filing Civil Writ Petitions well before the pronouncement of order therein on 29.6.2018 for the reason that in the said order, the right of counseling has been restricted only to them as per para 16 of the order, reproduced in this judgment (supra) against the vacant seats, if any available in the Medical/Dental Colleges situated in the State. We make it clear that the admission, if any, granted by the respondents against the remaining vacant seat(s) after the counseling as per the eligibility criteria prescribed in the Prospectus Annexure P-13 is over, shall be as a special case and to be not treated as precedent in future.

37. All the Writ Petitions stand accordingly disposed of, so also the pending application(s), if any.

Sd/-
(Dharam Chand Chaudhary),
Judge.

Sd/-
July 13, 2018, (Vivek Singh Thakur),
(karan-) Judge.

Per Vivek Singh Thakur, Judge.

38. I have the privilege of going through the elaborate judgment of my esteemed brother, Chaudhary, J. addressing contentions of parties in detail. With due regard and utmost respect I agree with him but with difference of opinion on conclusion arrived at on one point, as discussed hereinafter.

39. Facts and issues involved in these petitions, already discussed in judgment delivered by learned brother, are not necessary to be repeated unless necessity and relevance is there to recount the same.

40. By now, it is settled position that merit based admission is a rule for admission to MBBS/BDS courses in Medical/Dental Colleges, as has been held in **Dr. Pradeep Jain and others versus Union of India and others,** reported in **(1984) 3 Supreme Court Cases 654,** and repeatedly reiterated in subsequent judgments by observing that object of any valid scheme to Medical/Dental Colleges must be to select the best candidates for being admitted to these colleges. However, in **Pradeep Jain's case (supra)** itself, mainly on the basis of 'State interest' and 'Region's claim of backwardness',

States, in the scheme of admission to the Medical/Dental Colleges, were permitted to depart from the principle of selection based on merit. Considering the 'State interest' in serving the residents of the State by providing much needed medical aid to the people and in improving the public health generally and also in bringing about real equality of opportunity between those who are unequals, the reservation based on residence, for bonafide residents of the State, was permitted on the assumption that those, who are bonafide residents of the State, would, after becoming doctors, settle down in the State and serve the need of people for the State and thus, attempt of the State to impart medical education to the best talent available out of a class of persons, who will likely, so far as it can reasonably be foreseen, be available to serve the inhabitants of the State as doctors, was held to be justified and, therefore, reservation on the basis of classification to serve the object and the purpose of providing broad-based medical aid to the people of the State and to provide medical education to those, who are best suited to such education, was permitted.

41. In **Pradeep Jain's case (supra),** recognizing the 'State interest', it is further held that Government, which bears the financial burden of running the Government Colleges, is entitled to lay down criteria for admission to is own colleges and to decide the source from which admission would be made, provided, of course, such classification is not arbitrary and has rational basis and reasonable connection with the object of the rules and classification of candidates on the basis of passing out of examination from particular institution(s) was also held to be justified by observing that such rules cannot justly be attacked on the grounds of hostile discrimination or as being otherwise in breach of Article 14 of the Constitution of India.

42. Another reason for departure from principle of admission on merit, as discussed in **Pradeep Jain's case (supra),** i.e. region's claim of backwardness, is not relevant in present case as there is no reservation provided to a particular region of the State on the basis of backwardness and also it is a fact that the entire State of Himachal Pradesh cannot be termed as a backward region for the reason that there are numerous schools affiliated to the H.P. Board of School Education as well as CBSE and ICSE etc., which are known for excellence not only in the State, but, in the country also and are having repute not less than any other school in the country and students of those schools have been considered at par with students of schools of rural and far flung remote areas of the State.

43. In **Pradeep Jain's case (supra),** 70% reservation for State quota was permitted, however, the same was permitted up to 85% by the Apex Court in **Dr. Dinesh Kumar and others versus Motilal Nehru Medical College, Allahabad and others** reported in **(1986) 3 Supreme Court Cases 727.**

44. In aforesaid circumstances, as considered in detail in **Pradeep Jain's case (supra),** reservation for bonafideHimachalis with condition of passing certain exams from the schools situated in the State of Himachal Pradesh, incorporated in the prospectus, has been continuing for admission to the Medical/Dental Colleges in the State of Himachal Pradesh.

45. Constitutionality and legality of the similar condition in the State of Haryana was also upheld by the Apex Court in **Anant Madaan versus State of Haryana and others,** reported in **(1995) 2 Supreme Court Cases 135.** Thereafter in 1996, similar condition in the State of Himachal Pradesh has also been held to be legal and valid by this High Court in **Gagan Deep's case (supra).**

46. Issue of exemption, from aforesaid condition of passing exams, came up for consideration before the Apex Court in case titled as **Meenakshi Malik versus University of Delhi and others,** reported in **(1989) 3 Supreme Court Cases 112,** wherein father of the candidate was posted by the Government outside India resulting into shifting of the family,

including children, to abroad. It was considered by the Apex Court to be a hard case as the family was compelled to go outside the State on account of posting of father of the candidate and on account of this compulsion, there was not a real choice of child to study outside the State and hence, rigours of condition of passing of examinations from the State concerned were exempted.

47. In **Anant Madaan's case (supra),** prerogative **of** the State to choose the source for admission wasreiterated. At that time,eligibility, as prescribed in the prospectus for State of Haryana, was as under:

> *"(i) The candidates who have studied 10th, 10+1 and 10+ classes as regular candidates in recognised institutions in Haryana...*
>
> *(ii) The children/wards ... of the employees appointed on regular basis of Haryana State Government/Members of All-India Services borne on Haryana cadre/statutory bodies/corporations established by or under an Act of the State of Haryana whether posted in Haryana or outside...*
>
> *(iii) The children/wards ... of the employees of Indian Defence Services/Paramilitary Forces belonging to Haryana State at the time of entry into service as per their service records...."*

In a connected Civil Appeal in the said case, preferred by one **Nandita Kalra**, whose father was serving in Department of Science & Technology in Delhi and mother was a Professor and, thus, she had not passed required examinations from Haryana, as prescribed for admission to Medical Colleges in Haryana, but from Delhi, for her living with the family; rejection of her claim by the Punjab and Haryana High Court was upheld by the Apex Court for the reason that no such exemption was available and further that her parents had taken employment voluntarily outside the State of Haryana.

48. In **Nandita Kalra's case,** (in Anant Madaan's case supra) referring judgment of the Apex Court in **Deepak Sibal's case,** it was canvassed that there was no valid base for making distinction between the employees exempted in the prospectus and employees in private service outside the State of Haryana. But, the said contention was not answered by the Apex Court on the ground that since this issue had not been either discussed or decided by any of three Judges of Punjab and Haryana High Court, whose judgment was before it, with observation that the Apex Court was not called upon to examine this question.

49. In **Gagan Deep's case (supra)** also, in absence of exemption clause in prospectus no exemption to the condition of passing examinations from the State of Himachal Pradesh was permitted and even claim of a student, who had passed his examinations from a Navodaya School situated outside the State of Himachal Pradesh on account of his shifting in pursuance to State sponsored Exchange Scheme, was also rejected.

50. In case **Nishant Puri versus State of H.P. and others,** reported in **(1999) 1 Supreme Court Cases 126, t**here was no exemption to employees of Departments/Boards/Corporations/other institutions, owned and controlled by the State of Himachal Pradesh as apparent from prescribed eligibility for admission quoted in the said judgment, which was as under:

> *"Eligibility -*
>
> *"(i) Candidates who have to compete for admission to Indira Gandhi Medical College, Shimla (MBBS), Dr. Rajendra Prasad Govt. Medical College Kangra, Himachal Pradesh Government Dental College and Hospital Shimla (BDS),*

OR

Free seats available in various Private Dental Colleges and Medical Colleges situated in Himachal Pradesh and Rajiv Gandhi Government Ayurvedic College, Paprola should have passed at least two of the following examinations from the recognised Schools or Colleges affiliated to ICSE/CBSE and HP Board of School Education or equivalent Boards/University established by law in India.

(a) Middle or Equivalent.

(b) Matric or Equivalent.

(c) 10+2 or Equivalent.

(ii) The bona fide Himachali students who are admitted to Navodaya Schools situated in Himachal Pradesh and who pass Matric or + 2 examination under the exchange programme from other Navodaya Schools in the Country shall also be eligible for admission to the above courses.

(iii) The wards of Defencepersonnels/ serving Central Government employees who are bona fide Himachalis are also exempted from the condition of passing two classes from the State of Himachal Pradesh."

As there was no exemption to wards of State Government employees, the Apex Court, considering aforesaid eligibility condition, had rejected the claim of the candidate for exemption, whose mother, an employee of State of Himachal Pradesh, was posted at Chandigarh (outside the State of Himachal Pradesh) on her request on medical grounds. His claim was rejected on the ground that despite posting of his mother at Chandigarh, she was not a Central Government employee, but, was a State Government employee having lien with the State of Himachal Pradesh and also that she went on deputation of her own volition and not out of compulsion or exigencies of service.

51. Entitlement of the State to lay down interia has been reiterated in **Vikram Singh Negi's case (supra),** holding that the respondent-State was competent and empowered to include or exclude any category for grant of reservation of 85% State quota and also to include or exclude any category from the exempted class, but with observation that such power cannot be exercised arbitrarily, irrationally and unconstitutionally.

52. Verdict of **Gagan Deep's case (supra)** lead for providing an exemption clause to the condition of passing out exams from the schools of the State to candidates on the basis of principle, as recognized by the Apex Court in **Meenakshi Malik's case (supra),** that child living and passing out examination from outside the State out of compulsion should be exempted from such condition and as such, an exemption for students, children of bonafideHimachalis, studying in Navodaya Schools situated outside Himachal Pradesh under the Exchange Scheme, appears to have been introduced.

53. Similarly, later on, another exemption to the children of employees serving in defence services/Central Government employees, who are bonafideHimachalis, has also been introduced.

54. After Nishant Puri's case aforesaid exemption appears to have been extended to the children of the serving/retired employees of Himachal Pradesh Government/HP Government Undertaking/autonomous bodies, wholly owned by HP Government, whose parents are living outside State of Himachal Pradesh on account of their service.

55. Later on, aforesaid exemption was further extended to children of serving/retired employees of central Government/UT/other State Governments and children

of employees of the autonomous organizations/Semi Government Bodies of Central Government/UT/other State Governments. Validity of the said exemption was upheld by this High Court in **Vikram Singh Negi's case (supra).**

56. In the year 2013-14, the same exemption was extended to candidates, who are children of bonafideHimachalis and whose father/mother are living outside Himachal Pradesh on account of their private occupation, deletion whereof in the prospectus for the year 2018-2019 is under consideration in present petitions.

57. The Apex Court in **Deepak Sibal versus Punjab University and another,** reported in **(1989) 2 Supreme Court Cases 145,** has held that Article 14 forbids class legislation, but, does not forbid reasonable classification and whether a classification is a permissible classification under Article 14 or not, two conditions must be satisfied, namely: (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question. It has also been held that in order to consider the question as to the reasonableness of the classification, it is necessary to take into account the objective for such classification and if the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. Further, that the surrounding circumstances may be taken into consideration in support of the constitutionality of a law which is otherwise hostile or discriminatory in nature, but, the circumstances must be such as to justify the discriminatory treatment or the classification sub-serving the object sought to be achieved. A classification by the identification of a source must not be arbitrary, but should be on a reasonable basis having a nexus with the object sought to be achieved by the rules for such admission. A classification need not be made with mathematical precision but, if there be little or no difference between the person or things which have been grouped together and those left out of the group, the classification cannot be said to be a reasonable one. The Apex Court in case titled as **S. Seshachalam's case,** as quoted by learned brother, has reiterated the aforesaid settled exposition of law.

58. I am in agreement with my respected brother that not all persons belonging to category private occupation but, out of them, only persons serving in private sector have resemblance with employees of exempted category Item IVA Clause 3 (ii) and rest persons with private occupation are not comparable with this exempted category. I would like to add that for reasons detailed hereinafter employees of Govt/Public Sector under exempted clause 3(ii) and employees in private sector under deleted clause 3(iv) constitute a single class for the purpose of adjudicating issue in present case. All observations made hereinafter referring private sector would be referring only employees of private sector under deleted clause (iv) but none else.

59. In **Deepak Sibal's case (supra),** it has been held by the Apex Court that the classification of the employees as Government employee and private employee was impermissible under law for the purpose of deciding eligibility for admission to the evening classes. Similarly, in the present cases, children of Government employees are being extended the benefit of exemption whereas children of private employees are prevented from such benefit.

60. In **Vikram Singh Negi's case (supra)** also, Division Bench of this Court has taken the judicial notice of the fact that all educated persons belonging to Himachal Pradesh cannot get government employment in the State and due to this reason, some of them have to perforce take up jobs outside the State of Himachal Pradesh and, therefore, it was considered by the Court that there was no reason as to why the children of these persons, who have taken up jobs outside the State of Himachal Pradesh, but, are bonafide residents

of Himachal Pradesh, should be denied admission to the Medical Colleges within the State of Himachal Pradesh as roots of these people are in Himachal Pradesh.

61. Main factors for providing exemption under Item IV (A) Clause 3 (ii) and for upholding the same in **Vikram Singh Negi's case (supra)** in favour of children of bonafideHimachalis serving in departments/ autonomous bodies, wholly or partially controlled by the Government other than State of Himachal Pradesh, amongst others are as under:

(21) State of Himachal Pradesh cannot provide job to all.

(22) BonafideHimachalis have to go outside Himachal Pradesh due to compulsion.

(23) Children of such persons have to study out of Himachal Pradesh for living with their parents, which is beyond their control.

All these factors amongst others applicable to Government/ Public Sector are also applicable to BonafideHimachalis serving/working outside State of Himachal Pradesh in Private Sector.

62. In present cases, parents of both the categories, i.e. serving in Government/Public Sector and Private Sector, are similarly situated and are falling in the same class of persons, who are compelled to serve outside the State for want of provisions/opportunities of job in the State of Himachal Pradesh, but, are bonafideHimachalis having roots in the State of Himachal Pradesh and falls in one and the same category in whose favour Division Bench of this Court in **Vikram Singh Negi's case (supra)** has upheld the exemption. Therefore, to treat parents serving in Government sector and in private/ unorganized sector a separate class, is not based on intelligible differentia for the purpose of adjudication of issue in question in present petitions.

63. In the past, in the era of nationalization, everything was proposed and supposed to be controlled by the State or its undertakings and at that time, maximum opportunities of job were available in the Government/Public Sector. Now, in the era of disinvestment in the Government Sector and age of privatization, the opportunities of jobs in Government/Public Sector have tremendously decreased and vast scope of job opportunities in Private Sector has risen. Even, the Governments are appealing to the unemployed youth to explore and avail opportunities of jobs in private sector. Like State of Himachal Pradesh, which cannot provide jobs to all, Government/Public Sectors of other States and Central Government can also not provide jobs to all, and the opportunities of job in the Government/Public Sectors are becoming bleak day by day.

64. Further, there are numerous fields in which even no opportunity of job is available in Himachal Pradesh and in those fields, outside the State of Himachal Pradesh also, there is limited opportunity in Government/Public Sector, but, vast opportunities are available in Private Sector. Instead of enumerating all, it would be suffice to quote examples of Civil Aviation and Merchant Navy. In Civil Aviation, Air India is the only Public Undertaking whereas there are numerous other air shipping companies in private sector. Not only this, recently, Air India has also been proposed to be sold in open market to a Private Sector.

65. As discussed hereinabove, bonafideHimachalis serving, either in Public Sector or in Private Sector, cannot be said to have opted jobs outside the State of Himachal Pradesh of their own volition. They are living outside the State due to compulsion and it is a basic human instinct, who is serving either in Public Sector or in Private Sector, to have desire to come to his native place, to his roots, to his society. The said instinct may not have the same force in persons who are in established business as there is no age of

retirement in other private occupations like service sector. Therefore, persons serving in Private Sector are equivalent to persons serving in Government/Public Sector, but, not persons of other private occupations, like business etc.

66. Reasons, as canvassed by respondent-State for ouster of Private Sector of bonafideHimachalis living outside the State of Himachal Pradesh, amongst others are as follows:

a) To provide level playing field to candidates studied in Himachal Pradesh.

b) They are serving outside for their own choice.

c) Candidates in this category are benefited by better facilities/educational institutions/ coaching opportunities available outside Himachal Pradesh.

All these factors amongst others applicable to private sector are applicable to children whose parents are serving in Government/Public Sector other than State of Himachal Pradesh outside Himachal Pradesh.

67. It appears that whether it is the inclusion or the exclusion of category of children whose parents having private occupation outside the State of Himachal Pradesh, it has been made on stray and casual observations without considering the facts in its entirety. There is no data or study available on record placed before the Court whereby decision of inclusion/ exclusion of this category was decided. At the time of inclusion of this category, the reason given was that Government had decided to amend the prospectus to the effect that State quota seats of MBBS/BDS courses be made accessible to all bonafideHimachalis, who possesses HimachaliBonafide Certificate, but, residing outside the State of Himachal Pradesh on account of some private business or working in private companies and not just for Government employees working outside the State. The only objection of Director (Medical Education) was that it would be difficult to verify the bonafides of such candidates, but, the said objection was overruled at that time. Now, this exemption has been deleted only on the ground that this exemption effectively means that all bonafideHimachalis are eligible for admission, making schooling condition infructuous but not for dissimilarty with category exempted under clause (ii) where inclusion was made by equating them with the said category. It was never objected on the ground that they are not similarly situated to the category exempted under clause (ii). There is complete non-application of mind at the time of taking decision(s) for inclusion or exclusion of category of private occupation in wholesale without realizing and considering that, in present case, employees in Government/Public Sector and Private Sector are on the same footing and an inseparable class for the purpose of considering eligibility of these candidates for admission. In my opinion, as held in **Deepak Sibal's case (supra),** such classification differentiating Government/Public Sector and Private Sector for purpose of admission in present case is not permissible.

68. Objection of Director Medical Education, at the time of providing exemption to the children of parents having private occupation outside the State of Himachal Pradesh first time in 2013-2014 against this exemption, that it would be difficult to verify bonafide of such candidates, is not a valid ground to oppose such exemption to employees of private sector for the reason that not only in the State of Himachal Pradesh, but, there is constitutional machinery existing in every State having various authorities to verify the facts. Condition to produce certificate of a competent authority, as deemed fit by the Government, may be introduced and in addition thereto, the condition like verification from the concerned Panchayat/local self body, duly countersigned by the Executive Magistrate or any other competent authority of the native place, may also be introduced. It can be noticed that even, as of now, in every certificate filled in and certified by competent authority on prescribed format in Appendix with prospectus to be submitted before admission, it has

been mentioned that doubtful certificate will be got verified through the intelligence sources and if found wrong, will render the student liable to expulsion and suitable legal action. Therefore, difficulty in verifying the bona fide of any candidate is no ground for his ouster.

69. At the time of deciding exclusion of the aforesaid category, it has been observed that this exemption effectively means that all bonafideHimachalis are eligible for admission making the schooling condition infructuous. The said observation is also without any substance as there was no material before the Prospectus Review Committee nor any such material has been placed before the court. Further, the children of this category, who are similarly situated to the children of the exempted category under Item IV (A) Clause 3 (ii) cannot be discriminated only on this count. The provisions of passing out two examinations is not for debarring bonafideHimachalis from admission to the Medical/Dental Colleges situated in the State of Himachal Pradesh, but, to allow all children of bonafideHimachalis, who genuinely deserve it and, therefore only, exemption has been provided to allow all such children of bonafideHimachalis, who, by compulsion, are not able to study in Himachal Pradesh. This exemption is to be provided or denied to all similarly situated persons in the same manner.

70. Based on the plea of respondent-State that candidates studying outside the State of Himachal Pradesh are marring the opportunities of candidates studying in Himachal Pradesh, it can be inferred that exemption being provided to the children of parents serving outside the State of Himachal Pradesh either in Government/Public sector other than State of Himachal Pradesh or in private/unorganized sector is bad and is adversely affecting the nexus to be achieved by imposing the condition of passing of two examinations from Himachal Pradesh, State vide order, dated 29th June, 2018, was directed to place on record year-wise details of students admitted under State quota belonging to these categories during academic sessions 2012-2013 to 2017-2018. The same has been placed on record, in an affidavit filed by Special Secretary (Health) to the Government of Himachal Pradesh, which transpires that during these years, candidates exempted under deleted Clause 3 (iv) in Item IV (A) had occupied that children of Item IV (A) Clause 3 (ii) and deleted clause (iv) had occupying seats almost in equal proportion. In such a situation both categories are to be treated equally in either manner.

71. Reservation/Exemption is not a bounty to be disbursed at whims of the State to the persons of choice by adopting pick and choose method. In the era of East India Company and during regime of Britishers, there was policy of State to bestow status upon its employees by enlarging special benefits to them so as to encourage tendency in Indians to join their services. But, now we are living in a Democratic State governed by the Constitution. Therefore, discrimination to the children of employees in private sector by giving preferential treatment to Government/Public Sector, in a case like present one, is not only unwarranted but impermissible.

72. Reason for extending preferential treatment to Government Sector/Public Sector i.e. principle of living outside State out of compulsion, is also applicable with same magnitude to the Private Sector. Therefore, while agreeing with my learned brother, that Private Sector is similarly situated to Public Sector, but, not every private occupation, I would like to add further that deletion of category of children of parents living outside State on account of private occupation in all fields, other than serving in Private Sector, may not be discriminatory, but, deletion of category of children, whose parents are serving in Private Sector outside the State, is definitely violative of Article 14 of the Constitution of India.

73. I agree that everyone in private sector/business/occupation is not well established and this category includes labourers, workmen in industrial areas, rickshaw puller, auto/taxi/private transport vehicle drivers etc., having lower rank of occupation for

whom even basic needs are also beyond reach whereas persons having higher placement in their career are capable of providing all facilities to their children which are not available in Himachal Pradesh, particularly, in remote areas. Similarly, Government/Public Sector other than State of Himachal Pradesh also includes persons having occupation of lower rank like Peon, Clerk etc. and also persons holding higher posts, who are capable of providing all facilities to their children which are not available in Himachal Pradesh, particularly, in remote areas. But, respondent-State has failed to consider this aspect at the time of providing/denying exemption to the category of candidates, whose parents are living outside Himachal Pradesh, either in Government/Public Sector or in Private Sector and has treated equals and unequals in the same manner either for granting exemption or for excluding from exemption. It again reflects non-application of mind by concerned authority/committee.

74. Purpose of providing opportunity to the socially and educationally backward candidates of Himachal Pradesh is also defeated when the children of parents of all categories of exempted class are considered eligible for admission to Medical/Dental Colleges in Himachal Pradesh irrespective of their posting and status as the persons serving as Class-I employees in various departments/ Boards/organizations are having capacity to afford better facilities for their children available outside the State of Himachal Pradesh either at their place of posting or somewhere else, but, the children of such parents are also considered at par with others resulting into equal treatment of unequals. In case, State intends to continue such exemptions, a bar of maximum income can be imposed so as to prevent unequals to be treated equal amongst those who are not having sufficient means to avail the facilities available outside the State of Himachal Pradesh, even after living there.

75. It is contended on behalf of the State of Himachal Pradesh that exemption regarding children of bonafideHimachalis in private employment/occupation outside the State was introduced in the year 2013-14 for the first time and now, this exemption has been withdrawn from this academic session primarily for the reason that it is not giving a level playing field to the students who have done their schooling from the State of Himachal Pradesh as this exemption was providing opportunity to students to compete with socially/educationally backward Himachali students despite the fact that the students have studied outside the State on account of their parents being engaged in private occupation outside the State by their choice whereas children of people living in the State are being debarred from 85% quota if they choose to study outside the State. However action of State is to the contary. There was condition for proof of schooling at place of residence of parents for children of parents in private occupation outside State of Himachal Pradesh, but, no such condition to other exempted categories renders plea of compulsion, for living outside State with parents at the place of their posting, a farce for other exempted categories. All such candidates have been exempted without taking care of the fact that they have studied in the schools of their choice outside the State of Himachal Pradesh. For example; A child of parents of exempted categories under Clauses 3 (ii) or 3 (iii) opts for schooling at Chandigarh despite posting of his father at Pathankot, then his case, in no manner, is different than any other bonafideHimachaliliving in the State with children studying outside Himachal in the school of choice. There is no difference between a child sent outside Himachal by parents living in Himachal and a child by parents living outside Himachal sent for studies in schools of choice situated at place other than of their posting in Government/ Public Sector. Thus, preferential treatment being given to children of exempted categories under Clauses (ii) and/or (iii) becomes discriminatory.

76. Plea of respondent-State, that the elimination of aforesaid category is for providing level playing field to the children of Himachal Pradesh, is also negated by their own act of providing exemption to children falling under the category of Item IV (A) Clause 3

(ii) as children belonging to the said category are also having all better facilities/ educational institutions/coaching opportunities available outside Himachal Pradesh, which are not available to a normal student studying in Himachal Pradesh and parents of these children are similarly situated to those parents, who are serving in Private Sector outside the State of Himachal Pradesh as no one wants to leave his home in case opportunities to earn livelihood are available there. It is by compulsion to earn for survival which drives a person outside his native place and, more particularly, from the State.

77. Plea of the State, as submitted by the learned Advocate General that exemption clause has been provided in the prospectus for benefit of those children who have to live with their parents outside the State of Himachal Pradesh on account of compulsion for the reason that their parents are serving Government/Semi-Government/ autonomous bodies, owned and controlled by the Government as the State of Himachal Pradesh cannot provide job to all persons and, therefore, this category of children is required to be exempted from rigours of rule providing passing of two exams in the State of Himachal Pradesh and children of such categories are not to be penalized; also applies to children of parents serving outside State in Private Sector, as discussed hereinbefore.

78. Plea of the State that the students of Himachal Pradesh were not getting medical education outside the State and when the question of admission to Medical College in the State arose, the students of other States' Universities and Schools managed to get admission in the Medical College in Himachal Pradesh, thereby preventing the students of Himachal Pradesh from pursuing MBBS/BDS courses, again becomes redundant when exemption is granted to those students, who are studying at their places of choice irrespective of place of posting of their parents outside the State of Himachal Pradesh. Moreover, this plea may be relevant for reservation on the basis of schooling in Himachal Pradesh, which is not in dispute in present case. But, this plea has no relevance to present lis, rather, it runs contrary to the exemption granted to categories 3 (ii) and 3 (iii).

79. Issue of ouster of children, whose parents are living outside on account of their employment in Private Sector, but, providing exemption to similarly situated children whose parents are in Government/Public Sector other than State of Himachal Pradesh was not under consideration either in **Gagan Deep's** or in **Vikram Singh Negi's cases (supra).** This issue has crystallized for the first time.

80. Inclusion of one category in exempted category does not create indefinite and indefeasible right to remain included for ever. The said category can be excluded by Government for valid reasons even if its inclusion would have been upheld by the Court. As factors for inclusion and exclusion of children of bonafideHimachalis parents living outside on account of working in Private Sector are equally applicable to the children of bonafideHimachali parents serving in Government/Public Sector other than State of Himachal Pradesh, the state is expected to treat both of them equally.

81. Parents working in private sector are being differentiated on the basis of the plea that it would help to provide level playing field to the candidates belonging to Himachal Pradesh. But, here also, children of parents serving in Government sector and private/organized sector are on same footings. In case, there is possibility of usurping seats by the children of parents serving in Private Sector outside the State of Himachal Pradesh, for the same reasons, children of parents serving in Government Sector/Public Sector outside the State of Himachal Pradesh will also usurp the seats at the cost of students studied in Himachal Pradesh as children of both the categories have equal and same opportunity and facilities outside the State of Himachal Pradesh, which may not be available to the students of Himachal Pradesh.

82. Therefore, in my opinion, either the children belonging to both the categories are to be allowed exemption or none of them is entitled for the same. Thus, in my opinion, irrespective of the fact that the State has power to do so, as discussed hereinabove, the action of the State is violative of Article 14 of the Constitution of India and deserves to be interfered with.

83. Plea of the State, that petitioners have no vested right to seek exemption as such policy decision is absolutely in domain of the State and cannot be claimed as a matter of right, is not permissible in present case. Had claim of the petitioners, except in CWP No. 1501 of 2018, been for inclusion of their category for exemption for the first time, the same may not have been maintainable for powers of the State to choose and decide the category for which exemption is to be provided but for the reason that the said category was existing under exempted categories and similarly situated persons are still exempted, the petitions are maintainable to assail exclusion of the petitioners from exempted category.

84. It has been submitted on behalf of the petitioners except in CWP No. 1501 of 2018 that process of NEET had started in the month of January-February, 2018 and at that time, there was an option for candidates to opt for the State and for the reason that their category was eligible for the last more than five years, they had opted for the State of Himachal Pradesh, but, as held vide order, dated 29th June, 2018, the deletion of category of petitioners cannot be held to be invalid or illegal on this ground.

85. I am in agreement that it is the domain of the State to consider as to which category should be included or excluded in the exemption class and also that the respondent has a right to make out corrections in the prospectus after issuance of the same, but, with the rider that such correction should only be remedial measure to remove inherent mistakes, ambiguity, to give harmonious construction to the provisions of the prospectus or to remove practical difficulty in the provisions of the prospectus, but, not to change/replace the criterion itself changing the basic conditions. In the present case, the corrections have been made to remove the ambiguity only as, before publication of prospectus, it was decided to withdraw the exemption to the children of parents having private occupation living outside the State of Himachal Pradesh and the said decision was also given effect in prospectus in its first publication. There was no exemption available to the children of said category in the prospectus in absence of clause (iv) and, therefore, to implement the decision of exclusion of their category, the respondent-State, including the University, was well within its rights to rectify its ministerial mistakes. Therefore, corrigenda (Annexure P-11 and P-13) issued by respondent-State to correct ministerial mistake are permissible.

86. In aforesaid circumstances, in order, dated 29th June, 2018, it has been observed that category of petitioners, except CWP No.1501 of 2018, was not existing on the date of publication of prospectus, but, in view of contention raised, it was considered that permitting similarly situated children of parents serving outside the State of Himachal Pradesh in Government/Public Sector of other than State of H.P.would amount discrimination in violation of Article 14 of the Constitution of India and it was opined that children of parents serving in Government/Public Sector and children of parents serving in Private Sector outside the State of Himachal Pradesh belong to the same class and to differentiate them may amount to create a class within a class.

87. I am also in agreement that harsh policy decisions are also permitted to be taken in larger interest of the public, and that legitimate expectation is no ground for striking down the action of the respondent-State in present case, but, at the same time, it is expected that State should be sensitive in dealing with matters where such a sudden hammer stroke of withdrawing of such exemption existing since four-five years may not only have adverse impact on the career of children, but, also have great psychological impact

upon them, as in such cases, the respondent-State is dealing with young children, who are at the threshold of their career and life and are not well acquainted with legal technicalities. Therefore, any such deletion should be decided well in advance so as to enable the children to visualize and elect options available to them in their career. It is not a question of being right technically, but, it is also moral duty of the respondent-State to deal with such issues with great care and sensitivity. Therefore, for future, respondent-State should evolve a mechanism so as to finalize, the eligibility criteria for admission in the Medical/Dental Colleges in the State of Himachal Pradesh well in advance after due deliberations and publish such decision giving wide publicity even before issuance of the prospectus. It should also be kept in mind that in case of matters like present in nature, the respondent-State is dealing with children and any policy decision adversely affecting any category of candidates must be taken into consideration well in advance so as providing opportunity of the candidates to opt for other option available to them. It is not a case where the State has to exercise its discretion to grant something, but, it is a case where certain exemption, as available to a particular category since 2013-14, has been decided to be withdrawn.

88. Being a policy matter, it is also domain of the State to take a decision with regard to categories to whom exemption is to be provided or not, but, at the same time, such decision should not be violative of Article 14 of the Constitution of India and for the reason that the Public Sector and Private Sector cannot be discriminated. As discussed hereinabove, in my opinion, deletion of children of parents serving in Private Sector, but not of Government/Public Sector, is definitely violative of Article 14 of the Constitution of India. But, deletion of the children of the parents, who are living outside the State of Himachal Pradesh on account of other private occupation like business etc. is not violative of Article 14 of the Constitution of India.

89. As discussed above, exemption clause 3(iv) was not in the prospectus on the very first day, and thus candidates of this category were well aware about the said deletion. But only a few candidates have approached this Court who vide order dated 29.6.2018 were permitted to participate in counseling. Now only those candidates of the category can be considered for admission to the Medical/BDS College who have participated in the counseling. Candidates of exemption clause 3(ii) are otherwise entitled for admission. Therefore, Petitioners belonging to category of exempted under clause 3(ii) and children of parents serving outside Himachal Pradesh in private sector as well as respondents No. 4 to 7 in CWP No. 1353 of 2018 are entitled to claim right for admission against 85% State quota.

90. I am in agreement with desirability of reconsideration of continuing of concessions as proposed by my learned brother in the light of observation made. I would like to add further that children of persons serving in Defence Forces/Paramilitary Forces, requires reconsideration to achieve the object behind reservation for bonafideHimachalis having passed two examinations from schools of Himachal Pradesh as the persons belonging to these forces are a separate and distinct class having no comparison with any other class, especially keeping in view the arduous nature of their service and duty, but children of employees of State Government and Undertakings/Institutions controlled by State/Central Government may be subjected to furnish certificate of schooling from a school at a place of posting of their parents outside the State of Himachal Pradesh unless such facility is not available at that place also.

91. As discussed above, State has power to lay down criteria for admission to is own colleges and to decide the source from which admission would be made, but, such classification should not be arbitrary and must have rational basis and reasonable nexus with purpose and object to be achieved; prospectus has statutory force and basic conditions contained therein cannot be changed but correction/amendment to remove

inherent mistakes, ambiguity, to give harmonious construction to the provisions of the prospectus or to remove practical difficulty in the provisions of the prospectus are permissible, particularly when specific mention of power to amend/correct is there in prospectus itself; exemption to conditions of passing two examinations from the schools situated in the State of Himachal Pradesh prescribed in Item IV (A) Clause 3 must not be defeating the purpose and object for which this condition has been prescribed by State and permitted by the Apex Court and upheld by this High Court; Item IV (A) Clause 3 (iv) was not existing in the Prospectus 2018-2019 at the time of its publication and, thus, corrigenda, dated 13th June, 2018 (Annexures P-10 and P-12) are permissible for carrying out correction of ministerial mistakes; candidates of category under Item IV (A) Clause 3 (ii) are entitled for admission to the Medical/Dental Colleges of the State of Himachal Pradesh as per prospectus of current session and State may re-consider desirability of continuing exemption under Item IV (A) Clause 3 to these categories, in the light of observations made in this judgment.

92. I am in agreement with my esteemed brother except partial difference with respect to conclusion that deletion of Clause 3(iv) in Item IV-A is not violative of Article 14 of the Constitution of India. In my opinion, though, all persons comprised in private occupation under clause (iv) are not similarly situated to Clause 3(ii) category but employees serving in Private Sector outside Himachal Pradesh can be equated with employees serving outside Himachal Pradesh in Government/ Public Sector of other than State of Himachal Pradesh and thus wholesale deletion of category of children whose parent(s) are living outside Himachal Pradesh on account of their private occupation is violative of Article 14 of the Constitution of India qua children whose parents are serving in private sector and is liable to strike down to that extent and consequently, candidates of deleted category of Item IV (A) Clause 3 (iv) who are children of parents serving outside Himachal Pradesh in private sector, participated in counseling are also entitled for admission to the Medical/Dental Colleges of the State during this session.

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

Dev Raj .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr. Revision No. 22 of 2009
Decided on July 20, 2018

Indian Penal Code, 1860- Sections 279, 304-A, 337 and 338- **Motor Vehicles Act, 1988-** Section 184- Rash and negligent driving – Proof – Trial Court convicting and sentencing accused for rash driving and causing death of as well as injuries to persons working or moving on road – Sessions Judge upholding conviction – Revision against – Accused not denying occurrence of accident but submitting that it happened because of mechanical failure of vehicle –Eye-witnesses 'S', 'V', 'P' and 'A' clearly stating before trial Court of rashly driven offending vehicle hitting victims laying cables by side of road – Accused admitting of his driving offending vehicle at time of accident in statement recorded under Section 313 of Cr.P.C - Mechanical examination revealing vehicle in fit condition for plying – Held, accident was result of rash driving on part of accused – Conviction for aforesaid offences upheld. (Paras-6 to 17)

Probation of Offenders Act, 1958- Section 4- Release on probation – Rash and negligent driving – Accused aged 55 years and found settled in life – Fourteen years passed since accident - Accused suffered trauma on account of pendency of case – Held, accused entitled for benefit of probation. (Paras- 22 and 26)

Cases referred:
State of Kerla versus PuttumanaIllathJathavedan Namboodiri(1999)2 SCC 452
Krishnan and another versus Krishnaveni and another,(1997) 4 SCC 241
State of Punjab versus Saurabh Bakshi, 2015 (5) SCC 182
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858
Hari Kishan&Anr versus Sukhbir Singh &Ors, 1988 AIR (SC) 2127

For the petitioner	Mr. Suneet Goel, Advocate.
For the respondent	Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant Cr. Revision petition filed under Section 397 read with Section 401 CrPC is directed against judgment dated 9.7.2008, passed by learned Sessions Judge, Hamirpur, H.P. in Criminal Appeal No. 43 of 2007, affirming judgment of conviction and sentence dated 14.8.2007, passed by Additional Chief Judicial Magistrate, Hamirpur, District Hamirpur, Himachal Pradesh in Police *Challan* No. 38-I-2004 RBT No. 61-II/2007, whereby court below, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offences punishable under Sections 279, 337, 338 and 304A IPC and Section 184 of the Motor Vehicles Act, convicted and sentenced him to pay fine of Rs. 1000/- for the offence punishable under Section 279 IPC; pay fine of Rs. 1,000/- for the commission of offence punishable under Section 337 IPC; undergo simple imprisonment for a period of six months for the commission of offence punishable under Section 338 IPC and simple imprisonment for a period of two years for the commission of offence punishable under Section 304A IPC; and further to pay a fine of Rs. 500/- for the commission of offence under Section 184 of the Motor Vehicles Act and in default of payment of fine, accused has been directed to further undergo simple imprisonment for a period of six months.

2. Facts, as emerge from the record are that PW-8 Ami Chand got his statement recorded under Section 154 CrPC i.e. Exhibit PW-14/A dated 1.5.2004, alleging therein that at about 12.30 pm, when he was present outside his shop at Bhalet, a Tempo bearing registration No. PB-10-AW-7872 came in a rash and negligent manner from Sujanpur side and while it reached Bhalet, it hit persons namely Prithi Chand and Vipan Kumar, who at the relevant time were working on cable line on the road side. He further reported to the police that Kushal Kumar and Ajay Kumar were crushed under the Tempo, whereas motorcycle bearing registration No. HP-22-1869 was also crushed by the Tempo, as a consequence of which, person namely Kushal Kumar died on the spot, whereas other three injured persons were shifted to the hospital. Driver of the Tempo fled away from the spot after alleged incident. On the basis of aforesaid statement of PW-8, Ami Chand recorded under Section 154 CrPC, a formal FIR exhibit PW-8/A came to be registered against the accused. After completion of investigation, police presented *Challan* in the competent Court of law, who being satisfied that prima facie case exists against accused, put notice of

accusation to the accused for having committed offences punishable under Sections 279, 337, 338 and 304A IPC and Section 184 of the Motor Vehicles Act, to which accused pleaded not guilty and claimed trial. Learned trial Court subsequently, on the basis of evidence adduced on record by the prosecution held accused guilty of having committed offences punishable under aforesaid provisions of law and convicted and sentenced him as per description given herein above.

3. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the learned trial court, accused preferred an appeal in the court of learned Sessions Judge, Hamirpur, however, the fact remains that the same was dismissed vide judgment dated 9.7.2008, as a consequence of which, judgment of conviction recorded by the learned Additional Chief Judicial Magistrate Hamirpur came to be upheld. In the aforesaid background, accused approached this Court in the instant proceedings, praying therein for his acquittal after setting aside impugned judgments of conviction passed by learned Courts below.

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

5. Having carefully perused the impugned judgment vis-à-vis material available on record of the case, this Court is not inclined to agree with the contention of Mr. Suneet Goel, learned counsel representing the petitioner that impugned judgments passed by the learned Courts below are result of misreading, misinterpretation and misconstruction of evidence, rather, this Court having carefully examined the evidence led on record by the prosecution has no hesitation to conclude that both the learned Courts below have dealt with each and every aspect of the matter meticulously and there appears to be no scope of interference by this court. This court is also unable to accept the contention of Mr. Goel, learned counsel representing the petitioner that the learned Courts below have not appreciated the evidence led on record by prosecution in its right perspective, as a consequence of which erroneous findings have come to the fore. Evidence led on record by prosecution proves beyond reasonable doubt that on the date of alleged incident, vehicle in question was being plied rashly and negligently by the accused, as a consequence of which, two persons lost their lives and two others were seriously injured. In the case at hand, factum with respect to accident is not in dispute. Accused in his statement recorded under Section 313 CrPC has categorically admitted the factum with regard to the accident and he has taken a defence that the accident occurred on account of mechanical failure. Though, suggestions put to the prosecution witnesses suggest that accused made an endeavour to prove on record that the ill-fated vehicle was not being driven by him, but that is of no consequence, especially when in his statement recorded under Section 313 CrPC, defence taken by him with regard to mechanical failure is not corroborated by the evidence led on record.

6. Prosecution, in the case at hand, examined as many as 15 witnesses to prove its case, whereas accused did not lead any evidence in his defence. All the material prosecution witnesses i.e. PW-1 Satish Kumar, PW-2 Vipan Kumar and PW-3 Prithi Chand have categorically deposed before the court below that accident occurred on account of rash and negligent driving of accused, as a consequence of which, persons namely Kushal Kumar and Ajay Kumar lost their lives.

7. DW-7 Rajan Sharma, who mechanically examined the Tempo, has nowhere supported the version put forth by the accused, rather vide report Exhibit PW-7/A, which stands duly proved on record, he stated that vehicle was found to be in a fit condition and there was no mechanical defect.

8. PW-1 Satish Kumar deposed that he had gone to the shop of one Ami Chand, to purchase *Biri*, at that time, he saw Kushal, Ajay and Vipan Kumar working on the cable line. He further deposed that Kushal Kumar had parked his motor cycle on the road side and they were talking. He further deposed that as he had purchased *Biri*, he saw a Tempo coming from Sujanpur side in a rash and negligent manner and its driver could not control the vehicle and hit the aforesaid persons, who were subsequently injured and shifted to the hospital. He further deposed that Kushal Kumar died on the spot, whereas, Ajay Kumar succumbed to the injuries on the way to the hospital.

9. PW-2 Vipan Kumar and PW-3 Prithi Chand also corroborated the version put forth by PW-1 Satish Kumar by stating that persons namely Prithi Chand, Ajay Kumar and Kushal Kumar were working on the spot on cable line and they were hit by Tempo being driven rashly and negligently by the accused. Cross-examination conducted upon these witnesses, nowhere suggests that the defence was able to extract anything from these witnesses contrary to what they stated in their examination-in-chief.

10. PW-4 Bidhi Singh and PW-5 Suresh Kumar are formal witnesses and their statements may not be very relevant to determine the guilty, if any, of the accused.

11. PW-6 Dr. Chaman Lal, who medically examined Vipan Kumar vide MLC exhibit PW-6/A, observed following injuries on the person of Vipan Kumar:

> "1. There was a red colour bruised measuring 3 cms x 2 cms. of size on left hand. There was marked swelling on left hand. Advised X-ray left hand.
>
> 2. There was a lacerated wound measuring 1 cm. x 5 cm. of size skin deep situated in front of forehead margins of would were irregular.
>
> 3. Patient was not able to stand walk. There was no external injury advised X-ray."

12. PW-8 Ami Chand, complainant also stated that on the date of alleged incident, he was standing on the roadside when Tempo No. PW-10AW-7872 hit cable workers on the spot, as a result of which, Kushal Kumar died on the spot and other injured were shifted to the hospital.

13. Statements of other witnesses i.e. PW-9 BrahmDass, PW-11 Pritam Chand, PW-12 Surender Kumar and PW-13 Ashok Kumar are not very relevant for the adjudication of the case, as such, same are not being discussed here.

14. True it is, that PW-10 Parkash Chand in his cross-examination admitted that name of driver was mentioned as Karnail Singh but no benefit can be claimed on this count by the accused because in his statement under Section 313 CrPC he himself admitted the factum with regard to accident as well as his being the driver of the vehicle in question, so admission, if any, made by PW-10 with regard to mention of Karnail Singh as driver of the offending vehicle, is of no relevance.

15. Similarly, this Court is not very much convinced and impressed with the argument of the learned counsel representing the petitioner that since complainant Ami Chand PW-8 had resiled from his statement with regard to identification of driver because once the accused himself has admitted the factum with regard to accident and his being driver of the vehicle, statement/admission, if any, made by Ami Chand PW-8 is of no consequence and could not be considered while determining the guilt of the accused.

16. Having carefully perused the statements of material prosecution witnesses, this Court is in agreement with Mr. S.C. Sharma, learned Additional Advocate General that the prosecution has successfully proved beyond reasonable doubt that on the date of alleged

incident, vehicle was being driven rashly and negligently by the accused, as a consequence of which, two persons lost their lives. Otherwise also, this court has a very limited scope to re-appreciate the evidence, while exercising power under Section 397 CrPC, as has been held by Hon'ble Apex Court in **State of Kerla**versus**PuttumanaIllathJathavedan Namboodiri**(1999)2 SCC 452. No doubt, Hon'ble Apex Court in **Krishnan and another** versus**Krishnaveni and another,**(1997) 4 SCC 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 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."

17. In the case at hand, as has been discussed in detail, both the learned Courts below have carefully examined and analysed the evidence led on record by the prosecution, which proves beyond reasonable doubt that on the date of alleged incident, vehicle in question was being driven rashly and negligently by the accused as such this court finds no reason to interfere with the well reasoned judgments of conviction recorded by the learned Courts below.

18. While inviting attention of this Court to the judgment rendered by Hon'ble Apex Court in **State of Punjab**versus**Saurabh Bakshi,** 2015 (5) SCC 182, Mr. S.C. Sharma, learned Additional Advocate General contended that the person driving in a rash and negligent manner does not deserve any leniency, rather he needs to be dealt with severely

19. This Court is also fully conscious of judgment of Hon'ble Apex Court in **State of Punjab**versus**Saurabh Bakshi** (supra),wherein it has been held that no leniency should be shown to reckless drivers. The Hon'ble Apex Court has observed as follows:-

> "25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

20. There can not be any disagreement with the concern expressed by the Hon'ble Apex Court in the aforesaid judgment with regard to carelessness /recklessness of

the drivers, especially under the influence of alcohol. Hence, after bestowing my thoughtful consideration to the facts of the case, I find no reason to differ with the concurrent findings of fact recorded by the Courts below and as such judgment of conviction recorded by learned trial Court and affirmed by first appellate Court deserves to be upheld.

21. Consequently, in view of aforesaid discussion as well as judgments referred to herein above, this Court is of the view that the judgments passed by learned Courts below are based on correct appreciation of evidence and there is no scope, whatsoever for this Court to interfere with the well reasoned judgments passed by learned Courts below. Accordingly, the present petition is dismissed.

22 At this stage, learned counsel representing accused stated that the accused is 55 years old person having a family to support and in case he is sent behind the bars pursuant to judgments of conviction recorded by the courts below, great prejudice would be caused to him as well as his family He further stated that more than fourteen years have passed after the alleged incident and during this period, accused has also suffered trauma on account of pendency of case against him firstly before trial Court then before appellate court and now before this court, as such, he deserves to be extended benefit of Probation of Offenders Act.

23. In support of the aforesaid arguments, learned counsel for the petitioner-accused also invited the attention of this Court to the judgment passed by this Court in **Yudhbir Singh** versus **State of Himachal Pradesh** 1998(1)S.L.J. 58, wherein it has been held as under:

> "9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons."

24. In this regard, reliance is placed upon judgment of the Hon'ble Apex Court in **Ramesh Kumar @ Babla** versus **State of Punjab** 2016 AIR (SC) 2858, wherein it has been held as under:

> "7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial

court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.

8. In view of aforesaid, in our view the ends of justice would be met by granting benefit of Probation of Offenders Act to the appellant. We order accordingly and direct that the appellant be released on executing appropriate bond before the trial court to appear and receive sentence of rigorous imprisonment for 1 (one) year when called upon to do so and in the meantime to keep the peace and be of good behaviour."

25. Reliance is also placed upon judgment passed by Hon'ble Apex Court **Hari Kishan&Anr** versus **Sukhbir Singh &Ors**, 1988 AIR (SC) 2127, wherein it has been held as under:

"8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not showing to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to the first offenders cannot be said to be inappropriate.

9. This takes us to, the third questions which we have formulated earlier in this judgments. The High Court has directed each of the respondents to pay Rs.2500/- as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to section 357 Criminal Procedure Code Section 357, leaving aside the unnecessary, provides:-

"357. Order to pay compensation:

(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a civil Court;

Xxxxxxxxxxxxxx

Xxxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way

of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this Section.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default."

26. In view of the aforesaid law as well as submissions having been made by learned counsel appearing on behalf of the accused and after taking into consideration the facts and circumstances of the present case, I am of the considered opinion that the present petitioner-accused can be granted benefit of Section 4 of the Probation of Offenders Act, 1958.

27. Accordingly, Registry is directed to call for the report of the Probation Officer, Hamirpur, District Hamirpur, Himachal Pradesh on or before 31.8.2018. Registry to list this matter on 31.8.2018.

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

Devi Singh ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

Arb. Case No. 46 of 2017
Decided on: July 20, 2018

Arbitration and Conciliation Act, 1996- Section 11(6)- Appointment of arbitrator – Limitation – Delay – Consequences – Work awarded to petitioner on 2.11.2002 – Period to complete work expired on 20.11.2003 – Work not completed by petitioner – Department finally closing agreement on 29.9.2008 on account of deviation – Petitioner not praying for appointment of arbitrator even in legal notice dated 10.8.2009 sent by him to department- Petitioner merely pressed for payment of balance – Department even not replying notice – Petitioner filing petition for appointment of arbitrator only on 2.5.2017 –Held, when assertion for payment is made, and there is no payment by way of clearance of final bill, cause of action will arise from that date – Closure of agreement vide communication dated 29.9.2008 within knowledge of petitioner – He ought to have filed application for appointment of arbitrator within three years from 29.9.2008 – Petition filed on 2.5.2017 barred by limitation and not maintainable. (Para-5)

Case referred:
Major (Retd.) Inder Singh Rekhi vs Delhi Development Authority, AIR 1988 SCC 1007

For the Petitioner	:	Mr. Karan Singh Kanwar, Advocate.
For the Respondents	:	Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge(oral**)**

By way of present petition filed under Section 11(6) of the Arbitration & Conciliation Act 1996, prayer has been made for appointment of an arbitrator in terms of Clause 25 of the agreement (Annexure C-1), relating to work i.e. "C/O F.I.S. Udeen in G.P. Shoon" and Agreement No. 124 for the year 2002-03.

2. Undisputedly, petitioner being the lowest bidder, came to be awarded work vide order date 2.11.2002, for a total amount of Rs.39,50,735/-. Pursuant to aforesaid award letter, petitioner entered into an agreement with the Executive Engineer, HPPWD KillarChamba, (Annexure C-1). Allegedly, claimant carried out and completed the work in terms of award made in his favour to the entire satisfaction of the said Engineer but since claimant was paid Rs. 33,19,613/-, against his claim of Rs. 43,07,371/-, dispute arose *inter se* parties. As per averments contained in the petition, claimant has been paid Rs. 33,19, 613/- against the work done by him qua Rs.43,07,731/-. A sum of Rs.9,97,758/- is yet to be paid to him by the respondents. Allegedly, no final bill has been prepared so far. Apart from above another sum of Rs. 12,25,037/- is lying with respondents in the shape of security and Rs. 2,32,795/- is payable to the claimant alongwith interest. Due to extra items and deviation on the work site, duly approved by respondent, cost of work increased manifold and respondent No.1 vide order dated 29.9.2008 closed agreement due to deviation occurred on account of increase in quantity of R.R. Masonry in 1:6 and edge wall at different R.D. On 10.8.2009, petitioner sent a legal notice to the respondent (Annexure C-2) praying therein for payment of amount.

3. Mr. Karan Singh Kanwar, learned counsel representing the petitioner, while inviting attention of this Court to the communication dated 7.7.2010 received by the petitioner under Right to Information Act, contended that respondents have themselves admitted that still amount is payable by the respondents to the claimant/petitioner but despite that money is not being released to the claimant and as such, he had no option but to approach the authority concerned for appointment of arbitrator. Vide notice (Annexure C-4), petitioner requested respondent authorities to appoint an arbitrator in terms of Clause 25 of the agreement No. 124 for settlement of dispute *inter se* parties but respondents vide communication dated 2.5.2014 though admitted the claim of the claimant but refused to appoint an arbitrator on the ground that there is delay of eleven years. Mr. Karan Singh Kanwar, learned counsel representing the petitioner, while referring to the record vehemently argued that since at no point of time, petitioner was apprised with regard to preparation of final bill as has been specifically observed in Clause 25 of the agreement, there was no occasion for the petitioner to raise demand for appointment of arbitrator within the time frame provided under Clause 25 of the agreement. He further argued that since it stands duly proved from bare perusal of Annexure C-3 communication dated 7.7.2010 that amount is still payable to the petitioner, prayer made by petitioner for appointment of arbitrator vide Annexure C-4 ought to have been accepted. Lastly, Mr. Kanwar argued that

the respondents, while replying to demand notice issued by petitioner for appointment of arbitrator (Annexure C-4) have admitted factum with regard to money to be paid to the petitioner, and thus the limitation would start from that day i.e. 2.5.2014 as such, present petition, which has been filed on 2.5.2017 is well within prescribed period of limitation i.e. three years. It has been stated in the reply filed on behalf of the respondents that at no point of time, petitioner ever approached Chief Engineer, I&PH Department for approval of deviation as well as appointment of arbitrator in terms of Clause 25 of the agreement.

4. Mr. Dinesh Thakur, learned Additional Advocate General, while referring to the record made serious attempt to persuade this court to agree with his contention that since factum with regard to closure of agreement dated 29.9.2008 was well within the knowledge of the petitioner, who after that date never made any attempt to complete his work, limitation to file application, seeking therein appointment of arbitrator ought to have been filed within a period of three years from that date i.e. 29.9.2008. He further argued that first legal notice as per own admission of the petitioner was issued on 10.8.2009 (Annexure C-2), wherein, at no point of time, prayer, if any, was ever made for appointment of arbitrator rather, department was requested to release balance payment. While inviting attention of this Court to communication dated 2.5.2014 (Annexure C-5), Mr. Thakur strenuously argued that there is nothing in the communication suggestive of the fact that claim, if any, was ever acknowledged by the Department, rather, it stands mentioned in the communication that the petitioner failed to complete the work within stipulated time. While placing reliance upon the judgment rendered by Hon'ble Apex Court in **Major (Retd.) Inder Singh Rekhi** vs **Delhi Development Authority**,AIR 1988 SCC 1007, Mr. Thakur argued that the prayer made in the present petition deserves to be rejected on the ground of inordinate delay.

5. Having heard the learned counsel for the parties and gone through the record, it is quite apparent that petitioner was awarded work vide order dated 2.11.2002 for execution of work in question. However, on 29.9.2008, Department had closed agreement due to deviation occurred on account of increase in quantity of RR masonry in 1:6 and edge wall on different RD. It is also not in dispute that claimant has already received a sum of Rs.33,19,613/- against total work done by him amounting to Rs.43,07,371/-. There is nothing on record to demonstrate that steps, if any, were ever taken by claimant to get the time extended for completion of work. It emerges from the record that the time period to complete the work in question had expired on 20.11.2003, but even after that work was not completed. For the first time, claimant served a legal notice dated 10.8.2009 (Annexure C-2) to respondent No. 3 but even in that communication, no prayer was ever made for appointment of arbitrator, rather, request was made to release balance payment, which was never replied to by the Department. Perusal of Annexure C-3, communication dated 7.7.2010 received by petitioner under Right to Information Act though suggests that certain amount is/was payable to the claimant on account of work done by him qua certain extra items but by no stretch of imagination, communication dated 7.7.2010 can be termed to be acknowledgment, if any, on the part of respondents with regard to money, if any, payable to the petitioner. Aforesaid information has been sent by the authority concerned under Right to Information Act, wherein authority has informed that balance payment of Rs. 29,70,434/- is to be made as per MB No. 994 P-46. In the aforesaid communication, Department has clarified that work i.e. “C/o FIS Udeen, GP Shoon” was awarded to the contractor (petitioner) vide letter No. PW-KD-GA-Tender/2001-02-8389-97 dated 2.11.2002 for Rs. 39,50,735/- against the agreement No. 124 for 2002-03 but he failed to obtain any approval from the competent authority for deviating amount against agreement in question to Rs.43,07,371/- hence, payment could not be made. Though, having perused information rendered in the aforesaid communication, there appears to be no dispute with regard to amount claimed but

it appears that money was not released since contractor failed to obtain prior approval from competent authority for deviating the amount. Otherwise also, there is no document available on record suggestive of the fact that intimation, if any, was ever given with regard to preparation of final bill but definitely as per own statement of petitioner, an amount of Rs. 33,19,613/- was received by him against claim of Rs. 43,07,371/- and as such, petitioner, at the time of receiving aforesaid amount, could raise dispute under Clause 25 of the Agreement. There is no document placed on record by the petitioner to demonstrate that he had ever raised demand for appointment of arbitrator to adjudicate dispute *inter se* parties having arisen on account of deviation. Once, factum with regard to closure of agreement had come to the notice of the petitioner on 29.9.2008, he ought to have raised demand under clause 25 of the agreement for appointment of arbitrator, but, in the case at hand, he failed to send any communication, praying therein for appointment of an arbitrator. Even in the legal notice dated 10.8.2009 (Annexure C-2) no prayer was ever made for appointment of an arbitrator rather, request was made to release amount which was denied by the Department. Since, department failed to reply to aforesaid legal notice dated 10.8.2009, petitioner ought to have moved appropriate application in accordance with law before appropriate court of law, seeking therein appointment of arbitrator but he chose to remain silent for almost eight years after issuance of notice because admittedly petition at hand came to be filed on 2.5.2017. This court finds considerable force in the arguments of Mr. Dinesh Thakur, learned Additional Advocate General that since factum with regard to closure of agreement vide communication dated 29.9.2008 was well within the knowledge of the petitioner, he ought to have filed application for appointment of arbitrator within three years from the date of communication dated 29.9.2008 and as such, present petition being barred by limitation, is not maintainable. In the case at hand, present petition has been filed after inordinate delay of eleven years and there is no plausible explanation rendered on record on this count. In **Maj. Inder Singh Rekhi** (supra), Hon'ble Apex Court has held that on completion of work, right to get payment would certainly arise but where final bill is not prepared and when assertion is made and there was no payment, cause of action shall arise from that date. In the case at hand, though no date has been specified with regard to receipt of amount of Rs. 35,19,613/- against total amount of Rs. 43,07,731/-, but, in the legal notice dated 10.8.2009, petitioner has acknowledged the factum with regard to receipt of aforesaid amount and as such, even if limitation is counted from that date, petition ought to have been filed within the period of limitation for appointment of arbitrator i.e. within three years from 10.8.2009.

6. Even, if it is viewed from another angle, it can be safely concluded that the claim, if any, of the petitioner was denied or closed by respondents by way of passing order dated 29.9.2008 and as such, cause of action had arisen to him from that date, and not from the date, when he was supplied information under Right to Information Act with regard to balance payment to be made to him. Otherwise also, serving of notice dated 11.9.2013 (Annexure C-4), which has been admittedly received by the respondents, shall not give any cause of action to the petitioner nor will it increase the period of limitation for appointment of arbitrator.

7. It has not been disputed by the learned counsel representing the petitioner that limitation for filing petition under Section 11 of the Arbitration & Conciliation Act is three years and as such present petition being beyond period of limitation is not maintainable.

8. Consequently, in view of detailed discussion above, present petition is dismissed being devoid of merits.

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

Shivam Sharma ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 1353 of 2018 with
CWP's No. 1347, 1354, 1355, 1374, 1375, 1384, 1393, 1413, 1416, 1501, 1504 to 1508, 1517 & 1524 of 18

Reserved on: July 23, 2018
Decided on: July 31, 2018

Constitution of India, 1950- Articles 14, 15 and 226- Admission to Medical/Dental Colleges against State quota seats – Policy decision – Court's interference – Prospectus issued by University requiring candidates seeking admission against State quota seats of having qualified requisite examinations from Schools located in State – Exemption from having qualified such examinations as existing earlier, stood withdrawn with respect to children of bonafideHimachalis working outside in Private Sector/occupation – However, such exemption still available to children of bonafideHimachalis employed outside State with Central Govt./Other State Governments/Local bodies/Public Sector undertakings etc. – Challenge thereto – Divergence of opinion between Hon'ble Judges of Division Bench – Matter referred to Hon'ble third Judge – State arguing that stipulations contained in prospectus being policy matter, cannot be interfered with by Court – Also justifying retention of exemption clauses in favour of children of bonafideHimachalis retired from/or working in Government/Public Sector outside State on ground that their parents were compelled by circumstances to join such employment for want of job opportunities in State – Held, Grant of benefit of exemption is policy decision to be taken by Competent Authority but such decision cannot be arbitrary, irrational and without any basis and can be tested on touchstone of Article 14 of Constitution of India- Persons employed in private occupation cannot be said to have left State under any compulsion as they could have established their business in State – Their children not entitled for benefit of exemption of qualifying requisite examinations from Schools in State – Benefit of exemption is only on account of service rendered by bonafideHimachalis outside State and such exemption cannot be only made available to children of persons who work under Central/other State Governments/UTs etc., and not to persons who reside outside State of Himachal Pradesh on account of employment in Private Sector- Benefit of exemption to candidates is on account of service by their parents outside State and not on account of Government service – Decision of State to withdraw benefit of exemption otherwise earlier available to children of parents employed in private sector not based upon intelligible differentia and amounts to creation of class within a class , which is legally not permissible. (Paras-23, 31 and 58 to 60)

Cases referred:

Gagan Deep vs. State 1996 (1) Sim. L.C. 242
Vikram Singh Negi V. State of H.P. (2009) 2 Shim. LC 362
Nishant Puri vs. State of H.P. and others AIR 1999 SC 227
Meenakshi Malik vs. University of Delhi &Ors (1989) 3 SCC 112
Pradeep Jain v. Union of India, (1984) 3 SCC 654

Dr. Dinesh Kumar and others vs. Motilal Nehru Medical College, Allahabad and others, (1986) 3 SCC 727
Anant Madaan vs. State of Haryana and others, (1995) 2 SCC 135
Union of India &Ors. vs. N. Rathnam& sons, (2015) 10 SCC 681
Budhan Chaudhary &Ors. vs. State of Bihar, AIR 1955 SC 191
S. Seshachalam and Ors. vs. Chairman, Bar Council of T.N. &Ors, (2014) 16 SCC 72
National Council for Teacher Education and others vs. Shri Shyam Shiksha PrashikshanSansthan and Ors., (2011) 3 SCC 238
Deepak Sibal vs. Punjab University (1989) 2 SCC 145
Ranjan Singh v. State of Himachal Pradesh AIR 2016 HP 101
Independent Thought v. Union of India (2017) 10 SCC 800

For the Petitioner(s)	:	M/s Sunil Mohan Goel, Kulbhushan Khajuria, Vinod Chauhan, Pardeep K. Sharma, Raj Negi, Pawanish K. Shukla, Vivek Singh Thakur and Adarsh K. Vashishta, Advocates in respective petitions.
For the Respondents	:	Mr. Ashok Sharma, AG with Mr. S.C. Sharma and Mr. Dinesh Thakur, AAG's, for the respondent-State in all the petitions. Mr. Neel Kamal Sharma, Advocate, for the respondent-University in all the petitions and for respondent-MBBS Counselling Committee, in respective petitions. Mr. Shrawan Dogra, Sr. Advocate with Mr. Bharat Thakur, Mr. Devan Khanna and Mr. Harsh Kalta, Advocates, for respondents No. 4 and 7 in CWP No. 1353 of 2018. Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate, for respondent No. 5 in CWP No. 1353 of 2018. Mr. R.M. Bisht and Mr. Ravinder Thakur, Advocates, for respondent No. 6 in CWP No. 1353 of 2018. Mr. Surender Sharma, Advocate, for respondent No. 8 in CWP No. 1353 of 2018.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge

Above captioned writ petitions were heard and decided by Hon'ble Division Bench of this Court comprising of Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge and Hon'ble Mr. Justice Vivek Singh Thakur, Judge. The Members on the Hon'ble Division Bench referred to herein above expressed divergence of opinion vide two separate judgments delivered on 13.7.2018, as a consequence of which, cases at hand came to be placed before me. A careful perusal of judgment(s) rendered by the Division Bench suggests that following points were framed for determination after hearing the rival contentions and perusing material adduced on record:

> "1. Whether withdrawal of exemption to the category of the petitioners in these writ petitions except CWP No. 1501 of 2018 is violative of Article 14 of the Constitution of India being not founded on an intelligible differentia and there being no relation between such differentia and the object sought to be achieved?

2. Whether the category of the petitioners and the children of exempted category 3(ii) of item No. IV (A) being identical forms a group hence withdrawing of exemption from condition of passing two exams from one of the category i.e. of the petitioners creates a class within a class and also distinguishes the category of the petitioners from that of the so called other exempted category 3(ii) of item No. IV (A), is discriminatory?

3. Whether the Prospectus Annexure P-11 initially issued for admission in MBBS/BDS courses was containing the provision qua exemption to the category of petitioners in addition to the private respondents in the main matter and petitioner in CWP No. 1501 of 2018 and that the respondent-State by way of Corrigendum(s) Annexures P-10 and P-12 has illegally withdrawn the same from their category?"

2. Both the esteemed brothers on the Hon'ble Division Bench have concurred as far as Point No. 3 formulated herein above is concerned, as such, same does not require consideration/ adjudication by me. However, there appears to be disagreement between the two Hon'ble Brother Judges as far as Points No. 1 and 2 are concerned. Vide his judgment, Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge dismissed all the petitions save and except CWP No. 1501 of 2018 and held petitioner in CWP No. 1501 of 2018 and respondents No. 4 to 7 in CWP No. 1353 of 2018 entitled to exemption from condition of passing two examinations out of four from the schools situate in the State of Himachal Pradesh affiliated to I.C.S.E., C.B.S.E. or H.P. Board of School Education (herein after referred to as, 'Exemption') and consequently, such students have been held entitled for admission from their category. Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge has held that deletion of category 3(iv) from the prospectus for the purpose of exemption is based on reasonable classification because category 3(iv) and exempted category under Clause 3(ii) are distinct and separate and there is rational relationship between such classification and object sought to be achieved by deletion of category 3(iv) and Note (1) appended below it. Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge has further held that classification is based upon various considerations like topography of the State, socio-economic conditions of the people, scarcity of good schools, tutors and coaching centres for the children studying in the schools situated in the State and that the meritorious *Himachali* children get chance of admission to the MBBS/BDS courses to serve the State. Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge has further held that providing of benefit of exemption to various categories is a policy decision taken by competent authority and power to make policy also includes power to withdraw it, as such no fault can be found with the decision of the respondent-State in as much as withdrawal of exemption from category 3(iv) is concerned.

3. Hon'ble Mr. Justice Vivek Singh Thakur, Judge though has concurred/agreed with the judgment authored by Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge so far power of respondent-State/University to issue and modify prospectus and issue corrigenda with regard to deletion of category 3(iv) under Part IV(A) is concerned, but has held that though all the persons mentioned in category 3(iv) are not similarly situate to that of persons under category 3(ii) but persons who are bonafide*Himachali* and employed in private sector outside the State of Himachal Pradesh can be equated with the category 3(ii) and as such, wholesale deletion of category of students, whose parents are living outside the State of Himachal Pradesh on account of their employment in private sector is violative of Article 14 of the Constitution of India, and as such, decision in this regard taken by the respondent-State is liable to be struck down to that extent. Hon'ble Mr. Justice Vivek Singh Thakur, Judge has further held that being a policy matter, though it is in the domain of the State to take a decision as to whom

exemption is to be provided but, at the same time, such a decision should not be violative of Article 14 of the Constitution of India. Hon'ble Mr. Justice Vivek Singh Thakur, Judge has further returned the findings that deletion of category of candidates, whose parents are employed in private sector and not government or public sector, is violative of Article 14 of the Constitution of India.

4. It is evidently clear from the judgments rendered by both the esteemed members of the Hon'ble Division Bench that divergence of opinion is only with regard to validity and legality of the decision taken by the respondent-State, wherein it has been decided that benefit of Exemption shall not be available to wards of persons employed in private sector and as such, I am to examine and consider the material available on record solely with a view to explore answer to the aforesaid issue, which otherwise stands formulated as points No. 1 and 2 in the judgment rendered by the Hon'ble Division Bench.

5. However, at this stage, it may be clarified that since there is no divergence of opinion amongst the esteemed Brothers sitting in the Hon'ble Division Bench as far as withdrawal of benefit of exemption from the wards of persons, residing outside the State on account of their private occupation, I shall consider only the issue with regard to exclusion of wards of persons, residing outside the State on account of their employment in private sector.

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

7. For the sake of convenience and clarity, facts and documents/annexures placed alongwith CWP No. 1353 of 2018 are being referred to in this judgment and reference shall also be made to any other specific fact or document of other petition(s), if need so arises.

8. It may be noticed that the learned counsel representing the parties have made their submissions almost on the similar lines as were made before the Hon'ble Division Bench, as such same do not require reproduction.

9. Certain undisputed facts as emerge from the record are that the petitioners, save and except petitioner in CWP No. 1501 of 2018 and respondents No. 4 to 7 in CWP No. 1353 of 2018, are the children of bona fide *Himachalis* residing outside the State of Himachal Pradesh on account of their employment in private sector/private occupation. Petitioner in CWP No. 1501 of 2018 and respondents No.4 to 7 in CWP No. 1353 of 2018 are children of bonafide*Himachalis* employed either in Central Government Departments/ other State Governments/ local and other authorities owned and controlled by Central Government/ other State Governments. Respondent-University, after declaration of result of NEET-UG-2018 issued prospectus-cum-application form (Annexure P-11) for counseling and admission to under-graduate MBBS/BDS courses in Indira Gandhi Medical College, Shimla, Dr. Rajendra Prasad Government Medical College, Tanda and other private Medical Colleges, Government Dental College and other private Dental Colleges in the State of Himachal Pradesh for Academic Session 2018-19. Part IV of the prospectus referred to herein above prescribes the eligibility and qualifications for the State Quota Seats, which provides as under:

> **"IV. ELIGIBILITY AND QUALIFICATIONS**
>
> (A) For State Quota Seats:
>
> 1. Children of BonafideHimachali/ 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 BonafideHimachali 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 BonafideHimachali 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 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."

10. Clause 1 of Part IV(A) referred to herein above provides that children of BonafideHimachali/ Domicile/ Himachal Government employees and employees of autonomous bodies wholly or partially financed by the Himachal Pradesh Government, who qualify NEET-UG-2018 shall 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 and they should have passed at least two exams out of four examinations from the recognized schools or colleges situate 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. Clause 3 of Part IV(A) further provides that students of certain categories, which are defined/prescribed in this Clause itself are exempted from the condition of passing two examinations out of four specified above from recognized schools affiliated to I.C.S.E., C.B.S.E. or H.P. Board of School Education situate within Himachal Pradesh, provided that candidates of such categories are bonafide*Himachalis* and their fathers/mothers are living outside Himachal Pradesh on account of their service/posting/private occupation. This clause further provides that 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). Though in Clause 3 of Part IV(A), there is mention of parents working outside Himachal Pradesh on account of their service/posting/private occupation but definitely in latter part of Clause 3, wherein exempted categories have been specifically defined, there is no mention of children of employees working outside the State of Himachal Pradesh on account of employment in private sector/private occupation.

11. At this stage, it may be noticed that there is no dispute *inter se* parties that prior to publication of prospectus for Academic Session 2018-19, exemption under Clause 3 of Part IV(A) as is available to the children of bonafide*Himachalis*, who were working outside the State of Himachal Pradesh on account of their government service, was also available to wards of bonafide*Himachalis* residing outside the State on account of their employment in private sector alongwith other categories as defined/prescribed under Clause 3 of Part IV(A) of the prospectus for the Academic Session 2018-19. Careful perusal of prospectuses published by the Himachal Pradesh University for the Academic Sessions 2013-14 (Annexure P-4), 2014-15 (Annexure P-5), 2015-16 (Annexure P-6), 2016-17 (Annexure P-7) and 2017-18 (Annexure P-8), reveals that children of bonafide*Himachalis* working outside the State of Himachal Pradesh on account of employment in private sector/occupation were also extended benefit of Exemption.

12. On 12.6.2018, respondent-University issued prospectus-cum-application form for counselling/admission for under-graduate MBBS/ BDS courses, Annexure P-9, wherein words, “private occupation” though were mentioned under Clause 3 of Part IV(A) but such category was not prescribed/defined in the exempted categories specifically prescribed below Clause 3 of Part IV(A). On 13.6.2018, corrigendum (Annexure P-12) came to be issued clarifying therein that in the prospectus for admission to MBBS/BDS courses for the Academic Session 2018-19, words, “private occupation” under eligibility Clause IV(A)3 at page 17 stand deleted and prospectus stands modified accordingly. After issuance of aforesaid corrigendum, respondents issued amended/modified prospectus for the Academic Session 2018-19, deleting therein words, “private occupation” under Part IV(A)3, as a consequence of which, benefit of exemption, which was otherwise earlier available to the children of persons working outside the State of Himachal Pradesh on account of their employment in private sector/private occupation, came to be withdrawn. Though petitioners have not laid specific challenge to the action of the respondent-State in as much as withdrawal of benefit of exemption is concerned, rather, prayer is only to quash corrigenda (Annexures P-10 and P-12) and modified prospectuses (Annexures P-11 and P-13) whereby words, “private occupation” in eligibility clause IV(A)3 and Note (1) appended thereto came to be deleted but the Division Bench not only allowed the learned counsel representing the petitioners to raise/make submissions assailing the action of the State in withdrawing benefit of exemption available to the children of the persons working outside the State on account of their employment in private sector/ private occupation but also returned definite

findings qua validity and legality of the aforesaid decision of respondent-State, though in divergence.

13. Learned counsel representing the petitioners strenuously argued that denial of exemption to petitioners whose parents are working outside the State on account of their employment in private sector/private occupation, can not be allowed to sustain being violative of Article 14 of the Constitution of India. Learned counsel for the petitioners also made an attempt to persuade this Court that the petitioners have been taken by surprise by the respondents by withdrawing the Exemption from the petitioners and such illegal action of the respondents has snatched from them their right to seek admission to MBBS/BDS courses in the colleges situated in the State, especially when such concession/ exemption has been allowed to be continued in favour of the petitioner in CWP No. 1501 of 2018 and respondents No. 4 to 7 in CWP No. 1353 of 2018 i.e. children/students, whose parents are residing outside the State of Himachal Pradesh on account of their job either in Central Government Departments, others State Governments or Boards/Corporations and other authorities owned and controlled by Central Government or other State Governments. Learned counsel further argued that the respondent-State by deleting the provision qua the Exemption being provided to the petitioners vis-à-vis exempted category 3(ii) has made a classification which is not founded on intelligible differentia rather distinguishes petitioners from candidates of exempted category 3(ii). Learned counsel for the petitioners further argued that differentiation as made has no rationale with the object sought to be achieved, as such, decision taken in this regard by the State deserves to be quashed and set aside.

14. Lastly, learned counsel representing the petitioners forcefully argued that petitioners' parents are residing outside the State of Himachal Pradesh to earn their livelihood by working in private sector/ private occupation not by their choice but because of compulsion because they were not able to secure jobs in the State. Learned counsel further contended that prospectus (Annexure P-9) for Academic Session 2018-19 could not have been amended by way of corrigendum that too after its issuance as such exclusion of petitioners, who are children of persons, working outside the State of Himachal Pradesh on account of their employment in private sector/occupation, from the categories to whom benefit of Exemption has been provided, is not only arbitrary and discriminatory rather a colourable exercise of power by the respondent-State.

15. On the other hand, Mr.Ashok Sharma, learned Advocate General duly assisted by Mr. S.C. Sharma and Mr. Dinesh Thakur, Additional Advocates General, defended the decision of the respondent-State so far deletion of category 3(iv) from Part IV(A) is concerned and argued that decision of deletion of category 3(iv) was taken at highest level being a policy matter and can not be interfered with by this Court. Mr. Ashok Sharma, learned Advocate General argued that the words, "private occupation" and Note (1) appended below thereto were reflected inadvertently in the prospectus for the Academic Session 2018-19 and it does not confer any right in favour of the petitioners to seek exemption, moreover such mistake was rectified on the very next date by issuing corrigenda. While refuting contention of the learned counsel representing the petitioners that they were taken by surprise and have been left high and dry, Mr. Ashok Sharma, learned Advocate General contended that petitioners were well aware of concession being available upto Academic Session 2017-18. He argued that decision to withdraw the benefit of exemption available to the category of petitioners is neither arbitrary nor violative of Article 14 of the Constitution, rather decision with regard to deletion of 3(iv) and Note (1) appended below it, from the Academic Session 2018-19 is purely a policy decision hence doctrine of legitimate expectations is not attracted. He further argued that decision to withdraw the concession available to the category of petitioners has been taken in the interest of the State and its residents and there is no arbitrariness in the same. While defending the decision of the

respondent-State to continue benefit of exemption to category 3(ii), Mr. Ashok Sharma, learned Advocate General argued that exemption granted to aforesaid category is legal and valid and by no stretch of imagination, petitioners can be equated with the aforesaid category as defined under Clause 3(ii) of Part IV(A). Learned Advocate General further submitted that the petitioners can not seek any parity with the children of the aforesaid exempted category as mentioned in Clause 3(ii) under Part IV(A), which still exists in the prospectus published for admission to MBBS/BDS courses during Academic Session 2018-19 and State being policy-maker is competent to take any decision in the interest of justice.

16. Before ascertaining correctness of the aforesaid submissions having been made by the learned counsel representing the parties vis-à-vis issue at hand, it may be observed that there is no dispute that eligibility criterion i.e. requirement of passing two examinations out of four from the schools situate in the State of Himachal Pradesh, was held to be legal and valid by the Division Bench of this Court in **Gagan Deep** vs. **State** 1996 (1) Sim. L.C. 242. It would be profitable to take note of following paras of the aforesaid judgment:

> "4. Further contention of the petitioners is that Part-IV of the prospectus provides that:
>
> "IV. ELIGIBILITY
>
> I. Candidates who have to compete for admission to Indira Gandhi Medical College, Shimla (MBBS) and Himachal Pradesh Government Dental College and Hospital Shimla (BDS), OR Free seats available in various private Dental Colleges and Medical College situate in Himachal Pradesh should have passed atleast two of the following examinations from the recognized Schools and Colleges, situated in the State of Himachal Pradesh:--
>
> (a) Middle or Equivalent.
>
> (b) Matric or Equivalent.
>
> (c) 10+2 or Equivalent."
>
> x x x x
>
> 27. The third facet for sustaining the eligibility is equally efficacious when it is pointed out by the respondents that although quite a large number of persons have qualified medical degree from the State Medical College, yet people are deprived of medical facilities in rural and far flung areas of the State since the doctors do not want to go to such areas and they flee the State to avoid postings in such areas. Although bond amount has been increased, yet that has not given the desired results. State Government is spending lacs of rupees on a student for doing the medical course but the amount is going into the drawins since they are not prepared to remain in the State and serve the people.
>
> 28. The fourth facet is about the arbitrariness, unjustness and hardship being caused to the petitioners by the eligibility criteria. Having up-held the institutional preference and accepting the submission of the learned Advocate General that the candidates studying in Schools, Colleges and Institutions situated in the State of Himachal Pradesh form a separate category and are entitled to protection to enable them to secure admissions in the medical institutions as compared to the petitioners and similarly placed candidates falling in different group with better facilities and chances to appear in the institutions located in the States they are studying, nothing

much remains for examination of this question, more particularly, in view of the latest decision of the apex Court reported in Anant Madaan v. State of Haryana and others, (1995) 2 SCC 135 upholding reservation of 85 per cent seats to MBBS/BDS Courses on the basis of candidates' education for preceding three years in the State and rejecting the contention of the reservation being arbitrary, discriminatory and causing hardship. It is necessary to quote paras 8 and 9 of this judgment:

> "8. In view of the above facts, we have to consider whether the condition requiring a candidate to have studied in 10th, 10+1 and 10+2 classes in a recognised institution in the State of Haryana, can be considered as arbitrary or unreasonable. It is by now well settled that preference in admissions on the basis of residence, as well as institutional preference is permissible so long as there is no total reservation on the basis of residential or institutional preference. As far back as in 1955, in the case of D.P Joshi v. State of Madhya Bharat, this Court making a distinction between the place of birth and residence, upheld a preference on the basis of residence in aducational institutions."
>
> "9. In the case of Jagdish Saran (Dr.) v. Union of India this Court reiterated that regional preference or preference on the ground of residence in granting admission to medical colleges was not arbitrary or unreasonable so long as it was not a wholesale reservation on this basis. This Court referred to various reasons why such preference may be required. For example, the residents of a particular region may have very limited opportunities for technical education while the region may require such technically qualified persons. Candidates who were residents of that region were more likely to remain in the region and serve their region if they were preferred for admission to technical institutions in the State, particularly medical colleges. A State which was short of medical personnel would be justified in giving preference to its own residents in medical colleges as these residents, after qualifying as doctors, were more likely to remain in the State and give their services to their State. The Court also observed that in the case of women students, regional or residential preference may be justified as their parents may not be willing to send them outside the State for medical education. We, however, need not examine the various reasons which have impelled this Court to uphold residential or institutional preference for admission to medical colleges. The question is settled by the decision of this Court in Pradeep Jain (Dr) v. Union of India. This Court has observed in that judgment: (SCR p. 981 : SCC p. 687, para 19)
>
> > 'We are, therefore, of the view that a certain percentage of reservation on the basis of residence requirement may legitimately be made in order to equalise opportunities for medical admission on a broader basis and to bring about real and not formal, actual and not merely legal, equality. The percentage of reservation made on this count may also include institutional reservation for students passing the PUC or pre-medical examination of the same university or clearing the

qualifying examination from the school system of the educational hinterland of the medical colleges in the State.....'

This Court held in that case that reservation to the extent of 70% on this basis would be permissible. This percentage of reservation was subsequently increased to 85% by this Court in the case of Dinesh Kumar (Dr) v. Motilal Nehru Medical College. This Court in that case directed an entrance examination on an all-India basis for the remaining 15% of seats."

Consequently, all the submission raised by the petitioners on this aspect of the case are rejected.

29. Next, it was contended that children of defence personnel have been severely affected by this eligibility criteria since they have to serve outside the State in the exigency of their service. As a mater of fact, this contention is similar to the contention raised by the learned Counsel appearing for other petitioners who also studied outside the State due to the service of their parents or some other reasons, therefore, deserves to be rejected. Apart from that, it was pointed out to us by the learned Advocate General that the children of Army personnel seek admission in the Army Medical College, Pune. They get one seat by nomination against 'Group-A (8) Reserved' ; in all 19 seats in 12 Medical Colleges in the Country and BDS too as per office Memorandum No. U-14014/8/95. ME (UG), dated July 28, 1995 of the Government of India, Ministry of Health and Family Welfare, (Department of Health), New Delhi and the statement annexed therewith. They can also compete for seats against 'Group-A(5) as well as 15 seats to be filled on the basis of all-India Entrance Test. In the State of Haryana, there is no nomination for Government of India. The petitioners can seek admission in the States they have studied (see the prospectus for admission furnished by Miss Neetika Ahuja and others, C.M.P. No. 2197 of 1995). In any case, they can not be extended benefit here as well as there. Argument of hardship has no force. It is well settled that mere hardship caused to one or more persons due to operation of a rule or policy decision cannot be a ground for invalidating the rule or policy which is otherwise constitutionally valid."

17. Subsequent to passing of aforesaid judgment in **Gagan Deep** (supra), Division Bench of this Court in **VIKRAM SINGH NEGI v. STATE OF H.P.** (2009) 2 Shim. LC 362, held that respondent-State was competent to include or exclude any category for grant of reservation. It would be profitable to take note of the following paras of the aforesaid judgment:

"3. It would be apposite to refer to eligibility clauses 1 to 3:-

"1. Children of bonafideHimachali/Himachal Govt. employees and employees of autonomous bodies wholly or partially financed by the Himachal Pradesh Government will only be eligible to apply for competing for admission to MBBS/BDS Courses through Entrance Test in Government Medical/Dental colleges including 50% State Quota seats in Private un-aided Dental Colleges situated in Himachal Pradesh. They should have passed at least two of the following examinations from the recognized schools or colleges situated in the State of Himachal Pradesh and affiliated to ICSE/CBSE and 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 bonafideHimachali students who are admitted to Navodya Schools situated in Himachal Pradesh and who pass matric or +2 examination 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 situated in Himachal Pradesh provided that the candidates of these categories should be bonafideHimachali and their parents be living outside Himachal Pradesh on account of their service and in their case non-schooling in H.P. 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

Or

(ii) Children of Employees of Central Government including U.T./ Other State Governments and children of employees of the Autonomous Organizations/Semi Government Bodies of Central Government and Other State Governments.

Or

(iii) Children of Himachal Government Employees/Employees of wholly owned H.P. Govt. undertakings/Autonomous Bodies."

4. Shri Varun Thakur, Advocate has strenuously contended that the persons who are working in other State Governments or Semi Government and Autonomous Bodies of other States Government have willingly left the State out of their own volition and therefore, the exemption granted in their favour is illegal and violative or Article 14 of the Constitution of India. He has placed reliance on the judgment of the apex Court in Anant Madan versus State of Haryana and others, (1995) 2 SCC 135; Nishant Puri versus State of H.P. and others, AIR 1999 SC 227 and a judgment of this court delivered in Gagan Deep vs. State, 1996 (1) Sim. L.C. 242.

5. In Anant Madan's case, the apex Court was concerned with the conditions laid down in the State of Haryana which provided that to be eligible for admission in the Medical Colleges, the students must have studied class 10, 10+1 and 10+2 in a recognized institution of the State of Haryana. This was a condition laid down by the Government and challenged by certain students. This condition was upheld by the apex Court on the ground that the State was entitled to make such reservation.

6. In Nishant Puri's case, the petitioner's mother was an employee of the State of H.P. She went on deputation to the Central Government and Nishant Puri consequently studied outside Himachal Pradesh. His candidature was rejected on the ground that he did not qualify

the requisite number of examination from the Schools situated within the State. He laid challenge to this and his petition was dismissed by this Court. In Appeal filed before the apex Court, it was held that the mother of the appellant went on deputation on her own request on health ground to the Centre but continued to be an employee of the State. She maintained her lien in the State of H.P. and therefore would fall under the category of State Government employee and could not be treated as a Central Government employee. Therefore, her son was not entitled to claim exemption from the conditions laid down. In our considered view this judgment has no relevance to the case in hand.

7. In Gagandeep's case (supra), a Division Bench of this court upheld the validity of the eligibility criteria laid down in the prospectus whereby at that relevant time it was provided that the students must have passed two out of three examinations i.e. Middle or equivalent, Matric or equivalent and 10+2 or equivalent from the Schools situated within the State of H.P. The question whether children of bona fide Himachalis, who were employees of some other States or working in Autonomous/ Government Organizations of such State Governments should be given such benefit or not was never considered in any of these cases.

8. It is contended on behalf of the petitioner that the parents of such students, who were working with other States have left the State of H.P. of their own volition and they have attained better quality of education outside the State and therefore, they should not be given the benefit of such an exemption. We are unable to accept this contention. It is for the State to decide whether such an exemption should be given or not. It is for the State to decide whether reservation should be made and if so for what category of people. Reservation can never be claimed as a matter of right. Articles 15 and 16 of the Constitution of India are only enabling provisions which permit the State to make reservation. What is the extent of reservation to be made is something to be decided by the State. Supposing the State in its wisdom decides that the condition regarding passing of some examinations from Schools situated within Himachal should be done away with and deletes the same from the prospectus. Can any person have a right to claim that the State must be compelled to retain this condition? The answer has to be an emphatic no. Article 14 which pervades through our Constitution provides equal opportunity to all. Articles 15 and 16 of the Constitution of India are exceptions to Article 14. They cannot override Article 14 itself. That is why the Apex Court has repeatedly held that the reservation normally can never exceed 50%. What is the extent and manner of reservation is something for the Executive to decide. The court can only interfere if it is shown that powers have been exercised arbitrarily or in violation of the Constitution of India.

9. In the present case, we find that the exemption granted to children of bona fide Himachalis serving other States or Semi Government or Autonomous Organizations under different State Governments is not at all violative of the provisions of Article 14 of the Constitution of

> India. We may take judicial notice of the fact that all educated persons belonging to H.P. cannot be given employment in the State. Due to this reason, some of them have to perforce take up jobs out side the State of Himachal Pradesh. We see no reason why the children of these persons, who have taken up jobs outside the State of H.P., but who are bona fide residents of Himachal should be denied admission to the Medical Colleges within the State of Himachal Pradesh. The roots of these people are in Himachal Pradesh and therefore, the State has rightly decided to extend the benefit of the exemption to such persons. There is no merit in this writ petition which is accordingly dismissed."

18. Decision of the respondent-State to provide exemption to the category of wards of retired/serving employees of Central Government/other State Governments/UT and wards of employees of autonomous organisations, semi-government bodies owned and controlled by Central Government/ UT's/ other State Governments i.e. 3(ii) of Part IV(A) has been already held to be legal and valid as such decision of respondent-State to continue providing such Exemption to the category referred to herein above can not be questioned at all. Otherwise also, no specific challenge in this regard has been laid in the present petitions, rather, attempt has been made by the learned counsel representing the petitioners to show that the petitioners are also entitled to same benefit like category 3(ii) of eligibility clause IV(A), because their parents are also residing out of the State on account of their employment in private sector/occupation. In **Vikram Singh Negi** (supra), judicial notice of the fact has been taken that all educated persons belonging to Himachal Pradesh can not get government employment in the State and as such some of them may take up jobs outside the State of Himachal Pradesh and in this background, Hon'ble Division Bench arrived at a conclusion that there was no reason why the children of those persons, who have taken jobs outside the State of Himachal Pradesh but are bonafide residents of Himachal, should be denied admission to medical colleges in the State.

19. Subsequently, in **Nishant Puri**vs. **State of H.P. and others** AIR 1999 SC 227, Hon'ble Apex Court while examining the issue that whether a State Government employee lent on deputation at request or on health grounds to a Central Government Department can be considered as "serving Central Government employee" within the meaning of eligibility clause as provided in Himachal Pradesh University combined prospectus for admission to MBBS /BDS/ BMS courses, held that purpose behind the clause relating to eligibility appears to be that bonafide*Himachali* students should be given preference over others. Hon'ble Apex Court further held that in achieving above object, care is to be taken to protect the interests of those students, whose parents are obliged to move out of the State on account of exigencies of service by reason of which the children also move out of State. In the case before the apex court, State Government employee went on deputation on her own request on medical grounds to work as an employee of Central Government but still retained her lien with the State Government and as such, she was not held entitled to benefit of exemption from passing two examinations out of four from schools situate in the State of Himachal Pradesh. It appears that after aforesaid pronouncement made by Hon'ble Apex Court in **Nishant Puri**(supra) and verdict given by this Court in **Gagan Deep** (supra), respondent-State took a conscious decision to provide exemption from condition of passing two examinations from the schools of State to the candidates whose parents reside outside the State of Himachal Pradesh on account of their service, be it in government or private sector, on the principles as laid down by Hon'ble Apex Court in **Meenakshi Malik** vs. **University of Delhi &Ors** (1989) 3 SCC 112.

20. It is not in dispute that for the first time in the year 2013-14, benefit of Exemption came to be extended to students/candidates, who are children of bonafide*Himachali*s working outside the State on account of their service/posting/private occupation. It is also not in dispute that the respondents kept on extending aforesaid benefit of exemption to the category of petitioners till Academic Session 2017-18. Even at the first instance, respondents in the prospectus issued for the Academic Session 2018-19, mentioned category, "private occupation" in Clause 3 of Part IV(A), however, the same is/was not specifically defined/described in the categories specifically mentioned below Clause 3 of eligibility clause IV. That is another matter that such mention of words, "private occupation" and Note (1) appended thereto subsequently came to be deleted by way of corrigenda. One of the reasons/arguments advanced on behalf of the State for withdrawal of Exemption from the petitioners is that the recommendations of the Prospectus Review Committee were placed before the State Government at the highest level, who in its wisdom decided to withdraw benefit of exemption available to the category of petitioners. Matter came to be dealt by the Government on the basis of report of Prospectus Review Committee, which stands reproduced in para-13 of the judgment rendered by the Division Bench. It has been stated in the report of the Prospectus Review Committee that this exemption was introduced in the Academic Session 2013-14 but even at that time, Director Medical Education, Himachal Pradesh, had opposed this exemption on the ground that it would be difficult to verify the bonafides of such candidates, however, Government introduced exemption overruling him. It is further observed in the report that with this exemption, every bonafide*Himachali* is exempted from schooling in the State and this exemption would effectively make all bonafide*Himachali*s eligible for admission making schooling condition infructuous and as such, it was proposed that exemption from schooling condition for the children of persons employed in private sector/private occupation be removed. In the year 2013-14, Director Medical Education had opposed exemption on the ground that it would be difficult to verify bonafides of such candidates but there is no material adduced on record by the respondent-State to demonstrate that during Academic Sessions 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18, difficulty, if any, arose as far as verification of bonafides of the candidates, who applied taking benefit of exemption available to them, is concerned. Similarly, another logic /reasoning advanced by the Prospectus Review Committee that continuation of exemption as introduced in the Academic Session 2013-14 would effectively mean that all bonafide*Himachali*s will be eligible for admission, making schooling condition infructuous, does not appear to be tenable, especially in view of the fact that other category i.e. children of bonafide*Himachali*s, residing outside the State on account of their posting in Central Government Departments/UT's or other State Governments or other bodies/organizations of Central Government/UT's/ other State Governments, have been allowed such exemption. Aforesaid recommendation made by Prospectus Review Committee may hold some water as far as category of persons doing private occupation outside State of Himachal Pradesh is concerned but definitely withdrawal of benefit of Exemption from the petitioners, which has been otherwise made available to the wards of other categories of employees working under Central Government/ UT's/ other State Governments, could not be withdrawn qua children/students, who are compelled to reside outside Himachal Pradesh on account of employment of in private sector.

21. No doubt, decision with respect to providing of benefit of Exemption is a policy decision to be taken by competent authority, but such decision can not be arbitrary, irrational and without any basis and can be tested on the touchstone of Article 14 of the Constitution of India.

22. Since my esteemed Brothers on the Hon'ble Division Bench are in respectful agreement that persons belonging to the category of "private occupation" are not eligible for

benefit of Exemption, this Court in the present case shall only be considering claim of the category of the petitioners, who are children of bonafide *Himachalis* working outside the State of Himachal Pradesh on account of their employment in private sector.

23. Judgment rendered by the Hon'ble Division Bench, if is read in its entirety, clearly reveals that both the Hon'ble Judges on the Bench are in agreement with each other that the persons employed in private sector can be said to have some resemblance with the employees under exempted category 3(ii) but one of Hon'ble Members of the Division Bench has held that it is for the policy makers to take a decision in this regard and since decision stands taken, it is not open for judicial scrutiny because it is policy makers who had included this category for the first time in Academic Session 2013-14 and it is again policy makers who, in their wisdom have dropped the same from current Academic Session. There can not be any dispute/quarrel with the findings returned by my esteemed brothers that persons engaged in private occupation are not entitled for the Exemption because, by no stretch of imagination, it can be said that they have left the State under any compulsion because, admittedly they could also start such occupation in the State of Himachal Pradesh itself, but since they chose/ decided to start such business/occupation outside the State of Himachal Pradesh, with a view to earn more, they can not be allowed to claim benefit of exemption from condition of passing two examinations out of four from the schools situate in the State of Himachal Pradesh. However, I am of the view that the policy makers have not rightly differentiated the wards of persons employed in private sector from the exempted category 3(ii). It is not in dispute that children of serving/retired employees of Central Government/UT's and other State Governments and children of employees of autonomous bodies, semi-government bodies of Central Government/UT's or other State Governments have been extended benefit of Exemption on the ground that their parents are compelled to serve outside the State on account of their service, on the same analogy, decision was taken in the year 2013-14 to extend benefit of exemption to the category of petitioners, whose parents are residing outside the State on account of employment in private sector and as such arguments advanced by Mr. Ashok Sharma, learned Advocate General can not be accepted that the two categories are distinct and separate and do not form one group. Benefit of Exemption is only on account of service rendered by bonafide *Himachali* outside the State of Himachal Pradesh, and as such exemption can not be only made available to the children of persons, who work under the Central Government/other State Governments/ UT's and not to the persons who reside or live outside the State of Himachal Pradesh on account of their employment in private sector. Benefit of Exemption to the candidates is on account of rendering of services by their parents, outside the State and not on account of government service.

24. Hon'ble Apex Court in **Pradeep Jain** v. **Union of India**, (1984) 3 SCC 654, has held that object of any valid scheme to Medical/Dental colleges must be to select the best candidates for being admitted to these colleges. However, in this case, Hon'ble Apex Court taking note of "State Interest" and "Region's claim of backwardness" permitted State to depart from the principle of 'selection on merit'. In the aforesaid case, Hon'ble Apex Court held that Government, which bears the financial burden of running Government colleges, is entitled to lay down criteria for admission to its own college(s) and source from which admissions would be made, provided such classification is not arbitrary and has reasonable connection with the object of Rules and classification of candidates on the basis of passing out of examination from particular institution.

25. At this stage, following paragraphs of judgment rendered by Hon'ble Apex Court in **Pradeep Jain** (supra), can be usefully relied:

> "12. But let us understand what we mean when we say that selection for admission to medical colleges must be based on merit. What is merit

which must govern the process of selection? It undoubtedly consists of a high degree of intelligence coupled with a keen and incisive mind, sound knowledge of the basic subjects and infinite capacity for hard work, but that is not enough; it also calls for a sense of social commitment and dedication to the cause of the poor. We agree with Krishna Iyer, J. when he says in Jagdish Saran[5]: (SCC p. 778, para 21)

> If potential for rural service or aptitude for rendering medical attention among backward people is a criterion of merit-and it, undoubtedly, is in a land of sickness and misery, neglect and penury, wails and tears-then, surely, belonging to a university catering to a deprived region is a plus point of merit. Excellence is composite and the heart and its sensitivity are as precious in the scale of educational values as the head and its creativity and social medicine for the common people is more relevant than peak performance in freak cases."

Merit cannot be measured in terms of marks alone, but human sympathies are equally important. The heart is as much a factor as the head in assessing the social value of a member of the medical profession. This is also an aspect which may, to the limited extent possible, be borne in mind while determining merit for selection of candidates for admission to medical colleges though concededly it would not be easy to do so, since it is a factor which is extremely difficult to judge and not easily susceptible to evaluation.

13. We may now proceed to consider what are the circumstances in which departure may justifiably be made from the principle of selection based on merit. Obviously, such departure can be justified only on equality-oriented grounds, for whatever be the principle of selection followed for making admissions to medical colleges, it must satisfy the test of equality. Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalisation and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities. Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities. Where, therefore, there is inequality, in fact, legal equality always tends to accentuate it. What the famous poet William Blake said graphically is very true, namely, "One law for the Lion and the Ox is oppression," Those who are unequal, in fact, cannot treated by identical standards; that may be equality in law but it would certainly not be real equality. It is, therefore, necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality Such affirmative action though apparently discriminatory is calculated to

produce equality an a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections, so that each member of the community, whatever is his birth occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence. We may in this connection usefully quote what Mathew, J. said in Ahmedabad St. Xavier's College Society and Anr. v. State of Gujarat[8]: (SCC p. 799, para 132)

> .....it is obvious that "equality in law precludes discrimination of any kind; whereas equality, in fact, may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations."

We cannot, therefore, have arid equality which does not take into account the social and economic disabilities and inequalities from which large masses of people suffer in the country. Equality in law must produce real equality; de jure equality must ultimately find its raison d'etre in de facto equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. The State must, to use again the words of Krishna Iyer. J. in Jagdish Saran case[5] (SCC p. 782, para 29) " weave those special facilities into the web of equality which, in an equitable setting provide for the weak and promote their levelling up so that, in the long run, the community at large may enjoy a general measure of real equal opportunity..... equality is not negated or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistently with the general good and individual merit." The scheme of admission to medical colleges may, therefore, depart from the principle of selection based on merit, where it is necessary to do so for the purpose of bringing about real equality of opportunity between those who are unequals.

14. There are, in the application of this principle, two considerations which appear to have weighed with the Courts in justifying departure from the principle of selection based on merit. One is what may be called State interest and the other is what may be described as a region's claim of backwardness. The legitimacy of claim of State interest was recognised explicitly in one of the early decisions of this Court in D.P. Joshi case[2] The Rule impugned in this case was a Rule made by the State of Madhya Bharat for admission to the Mahatma Gandhi Memorial Medical College, Indore providing that no capitation fee should be charged for students who are bona fide residents of Madhya Bharat but for other non-Madhya Bharat students, there should be a capitation fee of Rs. 1300 for nominees and Rs. 1500 for others. The expression 'bona fide resident' was defined for the purpose of this Rule to mean inter alia a citizen whose original domicile was in Madhya Bharat provided he had not acquired a domicile elsewhere or a citizen whose original domicile was not in Madhya Bharat but who had acquired a domicile in Madhya Bharat and had resided there for not less than five years at the date of the application for admission. The constitutional validity of this Rule was challenged on the ground that it discriminated between students who were bona fide residents of Madhya Bharat and students who were not and since this discrimination was

based on residence in the State of Madhya Bharat, it was violative of Article 14 of the Constitution. The Court by a majority of four against one held that the Rule was not discriminatory as being in contravention of Article 14, because the classification between students who were bona fide residents of Madhya Bharat and those who were not was based on an intelligible differentia having rational relation to the object of the Rule. VenkataramaAyyar, J. speaking on behalf of the majority observed:

> "The object of the classification underlying the impugned rule was clearly to help to some extent students who are residents of Madhya Bharat in the prosecution of their studies, and it cannot be disputed that it is quite a legitimate and laudable objective for a State to encourage education within its borders. Education is a State subject, and one of the directive principles declared in Part IV of the Constitution is that the State should make effective provisions for education within the limits of its economy. (Vide Article 41). The State has to contribute for the up keep and the running of its educational institutions. We are in this petition concerned with a Medical College, and it is well known that it requires considerable finance to maintain such an institution. If the State has to spend money on it, is it unreasonable that it should so order the educational system that the advantage of it would to some extent at least enure for the benefit of the State? A concession given to the residents of the State in the matter of fees is obviously calculated to serve that end, as presumably some of them might, after passing out of the College, settle down as doctors and serve the needs of the locality. The classification is thus based on a ground which has a reasonable relation to the subject-matter of the legislation, and is in consequence not open to attack. It has been held in The State of Punjab v. Ajaib Singh[10] that a classification might validly be made on a geographical basis. Such a classification would be eminently just and reasonable, where it relates to education which is the concern, primarily of the State. The contention, therefore, that the rule imposing capitation fee is in contravention of Article 14 must be rejected."(emphasis supplied)

It may be noted that here discrimination was based on residence within the State of Madhya Bharat and yet it was held justified on the ground that the object of the State in making the Rules was to encourage students who were residents of Madhya Bharat to take up the medical course so that "some of them might, after passing out from the college, settle down as doctors and serve the needs of the locality" and the classification made by the Rule had rational relation to this object. This justification of the discrimination based on residence obviously rests on the assumption that those who were bona fide residents of Madhya Bharat would after becoming doctors settle down and serve the needs of the people in the State. We are not sure whether any facts were pleaded in the affidavits justifying this assumption but the judgment of VenkataramaAyyar, J. shows that the decision of the majority Judges proceeded on this assumption and that was regarded as a valid ground justifying the discrimination made by the impugned Rule."

26. Issue with regard to classification of candidates on the basis of passing of examination from a particular institution has been repeatedly held to be justified by the

Hon'ble Apex Court in a plethora of cases i.e. **Dr. Dinesh Kumar and others** vs. **Motilal Nehru Medical College, Allahabad and others**, (1986) 3 SCC 727, **Anant Madaan**vs. **State of Haryana and others**, (1995) 2 SCC 135 and **Meenakshi Malik** vs. **University of Delhi and others**, (1989) 3 SCC 112 and **Nandita Kalra**. Apart from aforesaid judgments, Division Bench of this Court had an occasion to deal with issue of exemption in **Gagan Deep** (supra) and **Vikram Singh Negi** (supra), wherein decision of the State to provide exemption from passing two examinations out of four from the State of Himachal Pradesh to the category of students/ children of bonafide*Himachalis* serving outside the State of Himachal Pradesh on account of their service has been approved. Since ratio laid down in the aforesaid judgment has been elaborately considered and dealt with by my esteemed Brothers in their judgment(s), same are not reproduced herein for the sake of brevity.

27. By now it is well settled that Article 14 of the Constitution forbids class legislation but does not forbid reasonable classification. Hon'ble Apex Court in **Union of India &Ors**. vs. **N. Rathnam& sons**, (2015) 10 SCC 681, specifically held that if two persons or two sets of persons are similarly situated/placed, they have to be treated equally. In the aforesaid judgment Hon'ble Apex Court has held that principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It would mean that the State has the power to classify persons for legitimate purposes. Though, in the aforesaid judgment, Hon'ble Apex Court has held that legislature is competent to exercise its discretion and make classification and every classification is in some degree likely to produce some inequality but mere production of inequality is not enough. Article 14 would be treated as violated only when equal protection is denied even when two persons belong to same class/category. It is further held that the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between two classes created by the State. Article 14 prohibits class legislation but does not forbid reasonable classification.

28. In the petitions at hand, it has been argued on behalf of the petitioners that they (petitioners) and other exempted category 3(ii) are not distinct, rather form one group, hence denial of benefit of Exemption is not based upon intelligible differentia, rather creates class within class, which is neither permissible nor there is any relation between such classification and object sought to be achieved.

29. Hon'ble Apex Court in **Budhan Chaudhary &Ors.** vs. **State of Bihar**, AIR 1955 SC 191, has held that by now it is well settled that Article 14 forbids class legislation but not reasonable classification for the purposes of legislation. It has been held in this judgment that to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. It is also held that the classification may be founded on different bases; namely geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.

30. Hon'ble Apex Court in **S. Seshachalam and Ors.** vs. **Chairman, Bar Council of T.N. &Ors**, (2014) 16 SCC 72, has categorically held that Article 14 states that, “the State shall not deny to any person equality before the law of the equal protection of the laws within the territory of India.” Article 14 forbids class legislation but not reasonable classification. The classification however must not be arbitrary, artificial or evasive but must be based on some real and substantial bearing, a just and reasonable relation to the object

sought to be achieved by the legislation. Article 14 applies where equals are treated differently without any reasonable basis. Article 14 does not apply where equals and unequals are treated differently. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privilege granted and between those on whom the privilege is conferred and the persons not so favoured, no reasonable distinction or substantial difference can be found justifying the inclusion of one and exclusion of the other from such privilege.

31. Since my Esteemed Brothers on the Bench have already taken notice of aforesaid law laid down by Hon'ble Apex Court on the issue at hand, it is not necessary for me to elaborate on or deal with the issue at hand by referring to more judgments. The decision of the respondent-State to withdraw benefit of Exemption, which was otherwise earlier available to the petitioners, does not appear to be based upon intelligible differentia and certainly amounts to creation of class within a class, which is legally not permissible. There appears to be no reasonable rationale between such classification and the object sought to be achieved.

32. When, for the first time, such benefit of exemption came to be extended to the category of petitioners, object sought to be achieved while introducing benefit of exemption from passing two examinations, out of four from the schools situate in Himachal Pradesh, was to provide relief and succour to those candidates, who were compelled to reside/live outside the State on account of employment of their parents, be it in government sector or private sector. It is not in dispute that benefit of Exemption is only available to bonafide*Himachalis*, who, on account of their employment, reside outside the State of Himachal Pradesh. Probably, when such decision to provide Exemption was taken, it was clear in the mind of the policy makers that children of those persons, who are bonafide*Himachalis* but are compelled to live outside the State on account of employment of their parents, should not be deprived of benefit of State quota, while seeking admission in MBBS/BDS courses. That is why, for the first time, in the Academic Session 2013-14, benefit of Exemption was provided to children of bonafide*Himachalis,* who reside /live outside the State on account of their employment in government sector and private sector or private occupation. Suddenly, in the year 2018, decision is taken by respondent-State that benefit of exemption shall only be available to children of bonafide*Himachalis,* who live/reside out of State due to their service in Central Government/UT's/ other State Governments or autonomous bodies/semi-government bodies of Central Government/ UT's/ other State Governments and not to the petitioners', whose parents live/reside out of the State on account of their employment in private sector/occupation. Reason assigned for withdrawal of benefit of such exemption from the wards of persons residing outside the State on account of employment in private sector is not based upon any rationale, as has been noticed herein above. Prospectus Review Committee, while recommending withdrawal of benefit of exemption from category 3(iv), has only observed that with this exemption almost every bonafide*Himachali* is exempted from schooling in the State, which effectively would mean that all bonafide*Himachalis* are eligible for admission, making schooling condition infructuous. As has been held by Hon'ble Apex Court in the judgments referred to supra that Article 14 forbids class legislation but not reasonable classification for the purpose of legislation. But, in the case at hand, there is no reasonable classification so far extending of benefit of Exemption to category 3(ii) is concerned, which by all means is akin and similar to the category of wards, whose parents are residing out of State on account of their employment in private sector. It has been held by Hon'ble Apex Court that classification must be founded on intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group but, unfortunately, in the case at hand,

decision of the respondent-State to withdraw benefit of exemption from the category of students, whose parents live/reside outside State of Himachal Pradesh on account of their employment in private sector, is not only arbitrary but also not based upon intelligible differentia. As has been observed, object to grant the Exemption is /was to provide succour/relief to those students/children, whose parents are working outside the State of Himachal Pradesh on account of their employment, be it in Government sector or private sector and no discrimination, if any, can be made on the ground that candidates, whose parents live outside the State of Himachal Pradesh on account of their government service are eligible for benefit of exemption, whereas, students, whose parents live /reside outside State of Himachal Pradesh on account of employment in private sector, are not eligible.

33. True it is that, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things and the courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case but classification is justified if it is not palpably arbitrary as has been held by Hon'ble Apex Court in **National Council for Teacher Education and others** vs. **Shri Shyam Shiksha PrashikshanSansthan and Ors**., (2011) 3 SCC 238.

34. Hon'ble Apex Court in the aforesaid judgment has further held that principle underlying the guarantee of Article 14 is not that same rules or laws should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all similarly circumstanced persons shall be treated alike both in privileges conferred and liabilities imposed. Equal laws should be applied to all in the same situation and there should be no discrimination between one person and the other, if as regards the subject matter of the legislation their position is substantially the same.

35. In the aforesaid judgment, Hon'ble Apex Court has categorically held that classification must not be arbitrary but must be rational and it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled i.e. (1) classification must be founded on intelligible differentia, which distinguishes those that are grouped together from others left out and (2) that differentia must have a rational relation with the object sought to be achieved by the Act.

36. Object sought to be achieved by introducing provision of Exemption is/was not only to provide benefit of exemption to the *Himachali* students, who seek admission to MBBS/BDS courses in the colleges situate in the State but prime object of the same is/was to provide equal opportunity to those bonafide*Himachali* students, who on account of service of their parents, be it in Government or private sector are/were compelled to study in schools outside the State. *Himachali* students, who otherwise live or reside within the State of Himachal Pradesh are neither required to avail remedy of exemption from passing two examinations from the State of Himachal Pradesh nor they fall in that category because simply on account of their having studied in Himachal Pradesh and having passed two examinations from the schools situate in Himachal Pradesh, they are entitled to appear or compete for admission to MBBS/BDS courses in the State of Himachal Pradesh after having passed NEET.

37. At the cost of repetition, it may be stated that Article 14 forbids class legislation but does not forbid reasonable classification for the purpose of legislation, but as has been observed in the cases referred to herein above, classification must be founded on intelligible differentia which distinguishes those that are grouped together from others left out and that differentia must have a rational relation with the object sought to be achieved

by the Act. In the case at hand, prayer made on behalf of the petitioners is not to provide them reservation but they are aggrieved of the action of respondents, whereby benefit of Exemption, which was available to them prior to issuance of prospectus for Academic Session 2018-19, stands withdrawn. Though this Court is in agreement with the arguments advanced by the learned Advocate General that respondent-State being a policy-maker, can exclude or include any category in the interest of State, but, definitely, no discrimination can be made while making such classification. In the case at hand, benefit of exemption is made available to one category of students, who, by all means, are akin to students, whose parents are residing outside State of Himachal Pradesh on account of their employment in private sector. Classification, if any, done by the State is required to be founded on intelligible differentia, which distinguishes those that are grouped together from others left out and must have a rational relation with the object sought to be achieved by the Act.

38. This Court is not in agreement with the argument advanced by Mr. Ashok Sharma, learned Advocate General that the prime object sought to be achieved is to train doctors well conversant with the geographical and climatic conditions in the State of Himachal Pradesh because question of training doctors from colleges situate in State of Himachal Pradesh would arise later, whereas question of exemption from passing two examinations relates to or deals with pre-admission stage. Hence, prime object, if any, sought to be achieved by respondents by introducing scheme of benefit of exemption from passing two examinations is/was only to provide equal opportunity of admission in medical/dental colleges situate in the State of Himachal Pradesh to such students/children who live or reside in the State of Himachal Pradesh not by their choice but because of employment of their parents, be it in government sector or private sector.

39. Petitioners in the present petitions and other exempted category 3(ii), being one and the same form one group hence, denial of benefit of exemption to the petitioners can not be said to be based upon intelligible differentia. It amounts to creation of class within class and as such decision of the State can not be said to be free from arbitrariness and discrimination. There is nothing placed on record from where it can be inferred that the petitioners and persons falling under exempted category 3(ii) are distinct and separate and there is a reasonable nexus with the object sought to be achieved by deletion of category 3(iv).

40. Though, Mr. Ashok Sharma, learned Advocate General made a serious attempt to persuade this Court to agree with his contention that classification is based upon various considerations like topography of State, socio-economic conditions of its people, scarcity of good schools, tutors and coaching centres for the students studying in schools situate in the State, but this Court is not convinced with the aforesaid arguments of learned Advocate General. To substantiate his aforesaid argument, Mr. Ashok Sharma, learned Advocate General further argued that decision of the respondent-State to withdraw benefit of exemption from petitioners falling under category 3(iv) shall provide a level playing field to the candidates of Himachal Pradesh, but, I am afraid that aforesaid argument advanced by Mr. Ashok Sharma, learned Advocate General is tenable because it is not in dispute that benefit of Exemption is still available to other category i.e. children/students of persons retired/working under Central Government / other State Governments/ UTs and their autonomous bodies. Mr. Ashok Sharma, learned Advocate General argued that the petitioners are being benefited by better facilities of educational institutions because they are residing outside the State, but, aforesaid argument/reasoning advanced by Mr. Ashok Sharma, learned Advocate General can not be termed to be reasonable and plausible explanation as far as exclusion of petitioners from the categories otherwise entitled to benefit of exemption is concerned. There can not be any dispute that children of persons working under/retired from Central Government/ other State Governments/ UT's etc. are also

benefited by better facilities of educational institutions because they are residing outside the State and as such, there is no reasonable classification, as has been done in the present case by respondent-State by excluding category 3(iv) as a whole from the categories otherwise entitled to avail benefit of exemption from schooling condition.

41. Careful perusal of Clause 3 of Part IV(A) of prospectus for Academic Session 2018-19 provides that children of serving/retired employees of Central Government/ UT's and other State Governments and children of employees of autonomous bodies, semi-government bodies of Central Government/UT's and other State Governments, apart from children of employees of Himachal Pradesh Government undertakings, autonomous bodies, wholly owned or controlled by Himachal Pradesh Government, shall be entitled to the benefit of exemption from passing two examinations out of four from the schools situate in the State of Himachal Pradesh. Even retired employees of Central Government/ UT's and other State Governments, who after their retirement may have settled outside the State of Himachal Pradesh, have been held entitled to aforesaid benefit of exemption. Though this Court is fully convinced that there can not be any classification on the ground of employment either in government sector or private sector but, even if, for the sake of arguments, it is accepted that decision to withdraw benefit of exemption from petitioners' category has been taken to provide level playing field to the candidates of Himachal Pradesh, it is not understood that how children belonging to State of Himachal Pradesh or living within the State can be said to have facilities at par with the children living outside the State of Himachal Pradesh on account of service of their parents under Central Government/UT's or other State Governments.

42. Interestingly, children of bonafide *Himachalis*, who are in government service in any part of the country, be it Central Government, UT's or other State Government have been held entitled for benefit of exemption, whereas petitioners have not been allowed the benefit of exemption on the ground that children of bonafide *Himachalis,* who reside in Himachal are not benefited by better educational facilities in comparison to category 3(iv), which reasoning is absurd and not based upon intelligible differentia. Once benefit of exemption has been made available to other categories of children, whose parents are employees of Central Government/UT's and other State Governments, argument advanced by the respondent-State that decision has been taken to withdraw benefit of exemption from category 3(iv) to provide level playing field, is not tenable being fallacious.

43. Had respondent-State decided to withdraw benefit of Exemption from all the categories as prescribed under Clause 3 of Part IV(A), argument advanced with regard to providing of level playing field could be said to be tenable but, in the case at hand, respondent-State has created class within class to extend benefit of exemption to one category of students i.e. children of parents retired /working under Central Government/UT's/ other State Governments, which is definitely similar and akin to the category of persons residing outside State of Himachal Pradesh on account of their employment in private sector.

44. Otherwise also, I am unable to lay my hand to any document adduced on record by the respondents-State suggestive of the fact that decision to withdraw benefit of exemption available to the category of petitioners was taken on aforesaid grounds, rather, decision, if any, is taken on the objection of the Director, Medical Education, Himachal Pradesh, who otherwise had been opposing this since the Academic Session 2013-14. Exemption available to the category of petitioners stands withdrawn on the ground that this exemption would effectively mean that all bonafide *Himachalis* are entitled for admission, making schooling condition infructuous.

45. True, it may be that Director, Medical Education at the time of inclusion of category 3(iv) may have opposed the move but it is a matter of record that such exemption remained available to category 3(iv) till the Academic Session 2017-18 alongwith other category i.e. children of employees of Central Government/UT's/ other State Governments etc. There is no material on record suggestive of the fact that inclusion of category 3(iv) was ever objected on the ground that they are not similarly situate to the exempted category 3(ii), rather exclusion of the category of persons employed in private sector for the Academic Session 2018-19 is on flimsy grounds, which in no manner suggests that aforesaid persons can not be granted benefit as is available to category 3(ii). Category of wards of persons residing outside the State of Himachal Pradesh on account of their employment in private sector is similarly situate to category of children of employees working in government/public sector and they are on same footing, as such is an inseparable class for the purpose of considering eligibility of candidates for admission.

46. Hon'ble Apex Court in **Deepak Sibal**vs. **Punjab University** (1989) 2 SCC 145, has also held that Article 14 forbids class legislation but not reasonable classification. Whether classification is permissible under Article 14 or not, two conditions must be fulfilled i.e. (1) classification must be on the basis of intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that differentiation must have a rational nexus sought to be achieved in the legislation in question.

47. In the aforesaid judgment, it has been held that in order to consider question as to reasonableness of the classification, it is necessary to take into account objectives for said classification, if the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. It would be apt to take note of following paragraphs of judgment rendered by Hon'ble Apex Court in **Deepak Sibal** (supra) :

> "9. It is now well settled that Article 14 forbids class legislation, but does not forbid reasonable classification. Whether a classification is a permissible classification under Article 14 or not, two conditions must be satisfied, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question.
>
> 10. By the impugned rule, a classification has been made for the purpose of admission to the evening classes. The question is whether the classification is a reasonable classification within the meaning of Article 14 of the Constitution. In order to consider the question as to the reasonableness of the classification, it is necessary to take into account the objective for such classification. It has been averred in the written statement of Dr. Balram Kumar Gupta, Chairman, Department of Laws, Punjab University, the respondent No. 2, filed in the High Court, that the object of starting evening classes was to provide education to bona fide employees who could not attend the morning classes on account of their employment. The object, therefore, was to accommodate bona fide employees in the evening classes, as they were unable to attend the morning classes on account of their employment. Admission to evening classes is not open to the employees in general including private sector employees, but it is restricted to regular employees of Government/Semi-Government institutions etc., as mentioned in the impugned rule. In other words, the employees of Government/Semi-Government institutions etc. have been grouped together as a class to the exclusion of employees of private establishments.

14. It is difficult to accept the contention that the Government employees or the employees of Semi-Government and other institutions, as mentioned in the impugned rule, stand on a different footing from the employees of private concerns, in so far as the question of admission to evening classes is concerned. It is true that the service conditions of employees of Government/Semi-Government institutions etc, are different, and they may have greater security of service, but that hardly matters for the purpose of admission in the evening classes. The test is whether the employees of private establishments are equally in a disadvantageous position like the employees of Government/Semi-Government institutions etc. in attending morning classes. There can be no doubt and it is not disputed that both of them stand on an equal footing and there is no difference between these two classes of employees in that regard. To exclude the employees of private establishments will not, therefore, satisfy the test of intelligible differentia that distinguishes the employees of Government/Semi-Government institutions etc. grouped together from the employees of private establishments. It is true that a classification need not be made with mathematical precision but, if there be little or no difference between the persons or things which have been grouped together and those left out of the group, in that case, the classification cannot be said to be a reasonable one.

15. It is, however, submitted on behalf of the respondents that the employees of private establishments have been left out as it is difficult for the University to verify whether or not a particular candidate is really a regular employee and whether he will have a tenure for at least three years during which he will be prosecuting his studies in the Three-Year LL.B. Degree Course. It is submitted that in making the classification, the surrounding circumstances may be taken into account. In support of that contention, much reliance has been placed on the decision of this Court in Shri Ram Krishna Dalmia v. Justice S.R. Tendolkar[1]. In that case, it has been observed by Das, C.J. that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. It follows from the observation that surrounding circumstances may be taken into consideration in support of the constitutionality of a law which is otherwise hostile or discriminatory in nature. But the circumstances must be such as to justify the discriminatory treatment or the classification subserving the object sought to be achieved. In the instant case, the circumstances which have been relied on by the respondents, namely, the possibility of production by them of bogus certificates and insecurity of their services are not, in our opinion, such circumstances as will justify the exclusion of the employees of private establishments from the evening classes.

20. In considering the reasonableness of classification from the point of view of Article 14 of the Constitution, the Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. In the instant case, the foregoing discussion reveals that the classification of

> the employees of Government/Semi-Government institutions etc. by the impugned rule for the purpose of admission in the evening classes of Three-Year LL.B. Degree Course to the exclusion of all other employees, is unreasonable and unjust, as it does not subserve any fair and logical objective. It is, however, submitted that classification in favour of Government and public sector is a reasonable and valid classification. In support of that contention, the decision in Hindustan Paper Corpn. Ltd. v. Government of Kerala[4], has been relied on by the learned Counsel for the respondents. In that case, it has been observed that as far as Government undertakings and companies are concerned, it has to be held that they form a class by themselves, since any project that they may make would in the end result in the benefit to the members of the general public. The Government and public sector employees cannot be equated with Government undertakings and companies. The classification of Government undertakings and companies may, in certain circumstances, be a reasonable classification satisfying the two tests mentioned above, but it is difficult to hold that the employees of Government/Semi-Government institutions etc., as mentioned in the impugned rule, would also constitute a valid classification for the purpose of admission to evening classes of Three-Year LL.B. Degree Course. The contention in this regard, in our opinion, is without any substance.
>
> 23. The principle laid down in Chitra Ghosh's case[5] has been reiterated by this Court in a later decision in D.N. Chanchala v. State of Mysore[6]. It has been very clearly laid down by this Court that Government colleges are entitled to lay down criteria for admission in its own colleges and to decide the sources from which admission would be made, provided of course, such classification is not arbitrary and has a rational basis and a reasonable connection with the object of the rules. Thus, it is now well established that a classification by the identification of a source must not be arbitrary, but should be on a reasonable basis having a nexus with the object sought to be achieved by the rules for such admission."

48. Most importantly, in **Deepak Sibal** (supra) Hon'ble Apex Court held that classification of employees of government sector and private sector is impermissible in law for the purpose of deciding eligibility for admission.

49. If the aforesaid judgment rendered by the Hon'ble Apex Court is perused carefully, Hon'ble Apex Court, while dealing with contention of the University that Government employees or employees of same Government or other institutions, as mentioned in the impugned Rules stand on different footing from the employees of private concerns, observed that it is true that service conditions of government /semi-government institutions are different and they may have greater security of service but that hardly matters for the purpose of admission in the evening classes. The test is whether both, employees of private establishments and Government/Semi-Government institutions etc. are equally in a disadvantageous position in attending morning classes. There can be no doubt that both of them stand on an equal footing and there is no difference between these two classes of employees in that regard. To exclude the employees of private establishments will not, therefore, satisfy the test of intelligible differentia that distinguishes the employees of Government/Semi-Government institutions etc., grouped together from the employees of private establishments.

50. Hon'ble Apex Court, in judgment supra, held that it is true that a classification need not be made with mathematical precision but, if there be little or no

difference between the persons or things which have been grouped together and those left out of the group, in that case, the classification cannot be said to be reasonable one. If cases of the petitioners are examined in light of aforesaid judgment rendered by Hon'ble Apex Court, employees of private sector are equally in a disadvantageous position like employees of government institutions because both are residing out of the State of Himachal Pradesh on account of their service and as such to exclude category of persons living outside the State on account of employment in private sector from the category, to which otherwise benefit of exemption is available, shall not satisfy the test of intelligible differentia that distinguishes employees of government/ semi-government institutions, grouped together from the employees of private establishments. In the case at hand also, there is no difference between petitioners and persons of other category, which have been grouped together for availing benefit of exemption and as such classification made by respondents can not be said to be reasonable one.

51. Hence, this Court has no hesitation to conclude that decision of the respondent-State to exclude those petitioners, whose parents are residing outside the State on account of employment in private sector from availing benefit of exemption from passing two examinations out of four from the State, which is otherwise available to the students/candidates, whose parents reside outside the State on account of their service in government or public sector is not based upon intelligible differentia and has no reasonable nexus with the object sought to be achieved and same suffers from arbitrariness. Children of persons, who live or reside outside the State of Himachal Pradesh on account of their employment in private sector also deserve to be extended benefit of exemption which is made available to the children of government employees serving outside the State.

52. Though another argument having been advanced by Mr. Ashok Sharma, learned Advocate General that parents of petitioners are serving/residing outside the State on their own choice and as such, they can not claim benefit of exemption at par with persons of other category, who reside or live outside the State of Himachal Pradesh on account of their service, need not be dealt with by this Court in view of categorical findings returned in paragraphs supra, however, it may be noticed that no material whatsoever has been placed on record by respondent-State to substantiate aforesaid argument. Though none of the parties, be it petitioners or respondent-State made available on record data, if any, to demonstrate that parents of petitioners category are residing outside the State of Himachal Pradesh on their own or out of compulsion, but given the topography and limited resources of State, this Court can definitely take judicial note of the fact that government as well as private jobs in the State are very limited. It is also not in dispute that there are many fields, where State has no scope and as such, bonafide*Himachalis* having acquired qualifications in various spheres are compelled to take up jobs outside the State. Mr. Ashok Sharma, learned Advocate General was unable to dispute the fact that in the last one decade, majority of appointments in the State of Himachal Pradesh have been made on contract basis that too on a fixed salary. There is no industry in the State which provides sizeable employment to the bonafide*Himachalis*.

53. Pharmaceutical industry, which has come up in the State in a big way, though has provided jobs to local residents but even it (Pharmaceutical industry) has no jobs for the skilled category and as such, bonafide*Himachalis*, who are well qualified having acquired qualifications/degrees in various trades are compelled to take up private jobs outside the State. Otherwise also, in modern era, majority of jobs are available in Information Technology (IT) sector, scope of which is negligible in the State and as such, argument of Mr. Ashok Sharma, learned Advocate General can not be accepted that parents of petitioners have taken up jobs in private sector outside State on their own choice, rather

they are compelled to take up jobs in private sector out of State due to paucity of government or private jobs in the State.

54. Now, this Court would be dealing with another argument of Mr. Ashok Sharma, learned Advocate General that the decision of the respondent-State can not be interfered with by this Court being a policy decision. Learned counsel representing the parties placed reliance upon various judgments passed by Hon'ble Apex Court as well as this court in support of their contentions but before ascertaining correctness of aforesaid submissions having been made by the learned Advocate General, it would be profitable to take notice of judgment rendered in **Ranjan Singh** v. **State of Himachal Pradesh** AIR 2016 HP 101, wherein Division Bench of this Court taking note of various pronouncements of Hon'ble Apex Court has held that it cannot be doubted that the primary and central purpose of judicial review of the administrative action is to promote good administration. It is to ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent, and unbiased fashion, keeping in forefront the public interest. Division Bench of this court further held that scope of judicial review has expanded radically and it now extends well beyond the sphere of statutory powers to include diverse forms of 'public' power in response to the changing architecture of the Government. It is further held that courts may not interfere with exercise of discretion merely because they disagree with the decision or action in question; instead, courts intervene only if some specific fault can be established for example, if the decision so reached is procedurally unfair. It would be apt to take note of following paragraphs of the aforesaid judgment:

> "12. This Court in CWP No. 621 of 2014, titled **Nand Lal and another Vs. State of H.P.**, reported in **2014(2) HLR (DB) 982**, was dealing with identical issue, wherein the petitioners had called in question the decision made by the Government, whereby it decided to open a degree college at Diggal, District Solan, instead of Ramshaher (Nalagarh), District Solan and it was held that since it was a policy decision, the same was not open to judicial review. It is apt to reproduce the following observations:-
>
> > "4. Heard. The moot question for consideration in this writ petition is- whether the petitioners can question the decision made by the Government for opening a Government Post Graduate College at Diggal, District Solan?
> >
> > 5. During the process of consideration of the issue, the residents of various Gram Panchayats of Ramshehar area made resolution(s) and represented to the Government for sanctioning and opening a Degree College at Ramshehar (Nalagarh), District Solan, instead of at Diggal, District Solan. After considering all the documents and keeping in view the policy-norms, governing the field, the respondents made decision to open the said college at Diggal.
> >
> > 6. The petitioners are aggrieved for the reason that the State Government has not made decision in accordance with the facts, their contentions read with norms and policy.
> >
> > 7. It is a beaten law of land that Government decision and policy cannot be subject matter of a writ petition, unless its arbitrariness is shown in the decision making process.
> >
> > 8. It is averred that Panchayats of the area of Ramshehar have made demand for sanctioning and opening the said college at the said place, which is centrally located and is feasible also.

9. The Apex Court in SidheshwarSahakariSakharKarkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399; (AIR 2005 SC 1527), has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.

10. The Apex Court in a latest decision reported in Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616: (AIR 2013 SC (Civil) 1855), also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of the said decision as under:

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

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

> "10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and non-arbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to **Netai Bag v. State of West Bengal** [(2000) 8 SCC 262 : (AIR 2000 SC 3313)]."
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> 15. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court cannot sit in appeal and examine correctness of policy decision. The Apex Court in the case titled as Bhubaneswar Development Authority and another v. Adikanda Biswal and others, reported in (2012) 11 SCC 731: 2012 AIR SCW 3083 laid down the same principle. It is apt to reproduce para 19 of the judgment herein:
>
> > "19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority

exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."

13. Similar reiteration of law thereafter are found in decisions rendered by this Court in CWP No. 4625 of 2012, titled as **Gurbachan Vs. State of H.P. and others**, decided on 15.7.2014, CWP No. 3862 of 2014, (reported in AIR 2015 (NOC) 1093 (HP)). titled as **Surinder Kumar Vs. State of H.P. and others**, decided on 15.7.2015 and yet again in a recent decision in CWP No. 4044 of 2015, titled as GraminJanta Kalyan Samiti, Kuthera Vs. State of H.P. and others, decided on 28.3.2016.

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

"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.

24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.

25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of **Article 14 of the Constitution.** But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005) 13 SCC 287: (AIR 2006 SC 767) wherein a prayer was made before this Court to

issue directions for appropriate amendment in the **M.P. Municipal Corporation Act, 1956** so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp. 288-89, para 5): (p. 68, para 5 of AIR)

> "5..... In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court **Employees Welfare Assn. v. Union of India** (**1989) 4 SCC 187:(AIR 1980 SC 334)(SCC para 51**) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki, 1992 Supp (1) SCC 548:(AIR 1992 SC 1546). In A.K. Roy v. Union of India, (1982) 1 SCC 271:(AIR 1982 SC 710), it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."

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

28. In N.D. Jayal and Anr. V. Union of India &Ors.(2004) 9 SCC 362: (AIR 2004 SC 867), the Court has observed that in the matters of policy, when the Government takes a decision bearing in mind several aspects, the Court should not interfere with the same. In Narmada BachaoAndolan V. Union of India (2000) 10 SCC 664: (AIR 2000 SC 3751), it has been held thus: (**SCC p. 762, para 229)(p. 827, para 255 of AIR)**

> "229. "It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

29. In this context, it is fruitful to refer to the authority in **RusomCavasiee Cooper V. Union of India**, (1970) 1 SCC 248 : (AIR 1970 SC 564), wherein it has been expressed thus: (**SCC p. 294**, para 63): (p. 601, para 72 of AIR).

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

30. In **Premium Granites V. State of Tamil Nadu**, (1994) 2 SCC 691: (AIR 1994 SC 2233), while dealing with the power of the courts in interfering with the policy decision, the Court has ruled that: (**SCC p.715**, para 54): (P.249 para 52 of AIR)

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

31. In M.P. Oil Extraction and Anr. V. State of M.P. &Ors.(1997) 7 SCC 592: (AIR 1998 SC 145), a two-Judge Bench opined that: (**SCC p. 611**, para 41): (P. 156, para 41 of AIR)

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

32. In **State of M.P. V. Narmada BachaoAndolan&Anr**.(2011) 7 SCC 639: (AIR 2011 SC 1989), after referring to the State of Punjab V. Ram LubhayaBagga (1998) 4 SCC 117: (AIR 1998 SC 1703), the Court ruled thus: (SCC pp. 670-71, para 36): (P. 2004, para 34 of AIR).

"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies [pic] are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P., (2007) 6 SCC 44, VillianurIyarkkaiPadukappuMaiyam v. Union of India, (2009) 7 SCC 561: (2010 AIR SCW 4123) and State of Kerala v. Peoples Union for Civil Liberties, (**2009) 8 SCC 46.)"**

33. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons

or totally arbitrary and founded ipse dixit offending the basic requirement of **Article 14 of the Constitution.** In certain matters, as often said, there can be opinions and opinions but the Court is not expected to sit as an appellate authority on an opinion."

15. Notably, scope of judicial review was yet again subject matter of a very recent decision rendered by the Hon'ble Supreme Court in Center for **Public Interest Litigation Vs. Union of India** W.P.(C) No. 382 of 2014 (reported in AIR 2016 SC 1777), decided on 8.4.2016, wherein the spectrum usage charges granted to various telecom companies by the Government of India was questioned and it was held that unless a policy decision was found to be arbitrary, based on irrelevant considerations or malafide or against statutory provisions, the same does not call for any interference by the Court in exercise of powers of judicial review. It is apt to reproduce the following observations:-

"19. Such a policy decision, when not found to be arbitrary or based on irrelevant considerations or mala fide or against any statutory provisions, does not call for any interference by the Courts in exercise of power of judicial review. This principle of law is ingrained in stone which is stated and restated time and again by this Court on numerous occasions. In Jal Mahal Resorts (P) Ltd. v. K.P. Sharma, 2014 8 SCC 804 :(AIR 2015 SC (Supp)158), the Court underlined the principle in the following manner:

"116. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592 at p. 611: (AIR 1998 SC 145) has unequivocally observed that:

"41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The

democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields.

117. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision which is writ large on a particular activity at the instance of the State or any other authority connected with it, the Court should remain a passive, inactive and a silent spectator. What is sought to be emphasised is that there has to be a boundary line or the proverbial laxmanrekha while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation and diligence which do not reflect arbitrariness or illegality in its decision and execution. If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalisation wherein global players are also involved as per policy decision."

20. Minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well-equipped to fathom into such domain which is left to the discretion of the execution. It was beautifully explained by the Court in Narmada BachaoAndolan v. Union of India, (2000) 10 SCC 664: (AIR 2000 SC 3757) and reiterated in Federation of Railway Officers Assn. v. Union of India (2003) 4 SCC 289: (AIR 2003 SC 1344) in the following words:

"12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters."

21. Limits of the judicial review were again reiterated, pointing out the same position by the Courts in England, in the case of **G. Sundarrajan v. Union of India** [AIR 2013 SC (Supp) 615] [6] in the following manner: 15.1. Lord MacNaughten in **Vacher& Sons Ltd. v. London Society of Compositors** (**1913 AC 107**: (**1911-13) All ER Rep 241 (HL**) has stated:

"... Some people may think the policy of the Act unwise and even dangerous to the community. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."

15.2. In Council of Civil Service Unions v. Minister for the **Civil Service (1985 AC 374**, it was held that it is not for the courts to determine whether a particular policy or particular decision taken in fulfilment of that policy are fair. They are concerned only with the manner in which those decisions have been taken, if that manner is unfair, the decision will be tainted with what Lord Diplock labels as "procedural impropriety".

15.3 This Court in M.P. Oil Extraction v. State of M.P.(1997) 7 SCC 592: (AIR 1998 SC 145) held that unless the policy framed is absolutely capricious, unreasonable and arbitrary and based on mere ipse dixit of the executive authority or is invalid in constitutional or statutory mandate, court's interference is not called for.

15.4 Reference may also be made of the judgments of this Court in **Ugar Sugar Works Ltd. v. Delhi Admn**. (2001) 3 SCC 635: (AIR 2001 SC 1447), Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal (2007) 8 SCC 418: (AIR 2007 SC (Supp) 1365) and **Delhi Bar Assn. v. Union of India** (**2008) 13 SCC 628. 15.5 (AIR 2009 SC 693)**.

15.5 We are, therefore, firmly of the opinion that we cannot sit in judgment over the decision taken by the Government of India, NPCIL, etc. for setting up of KKNPP at Kudankulam in view of the Indo-Russian Agreement."

22. When it comes to the judicial review of economic policy, the Courts are more conservative as such economic policies are generally formulated by experts. Way back in the year 1978, a Bench of seven Judges of this Court in Prag Ice & Oil Mills v. Union of India and Nav Bharat Oil Mills v. Union of India, (1978) 3 SCC 459 :(AIR 1978 SC 1296) carved out this principle in the following terms:

"We have listened to long arguments directed at showing us that producers and sellers of oil in various parts of the country will suffer so that they would give up producing or dealing in mustard oil. It was urged that this would, quite naturally, have its repercussions on consumers for whom mustard oil will become even more scarce than ever ultimately. We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts."

23. Taking aid from the aforesaid observations of the Constitution Bench, the Court reiterated the words of caution in Peerless General Finance and Investment Co. Limited v. Reserve Bank of India, (1992) 2 SCC 343: (AIR 1992 SC 1033) with the following utterance:

"31. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good

> faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."
>
> 24. It cannot be doubted that the primary and central purpose of judicial review of the administrative action is to promote good administration. It is to ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent, and unbiased fashion, keeping in forefront the public interest. To ensure that aforesaid dominant objectives are achieved, this Court has added new dimension to the contours of judicial review and it has undergone tremendous change in recent years. The scope of judicial review has expanded radically and it now extends well beyond the sphere of statutory powers to include diverse forms of 'public' power in response to the changing architecture of the Government. (See : Administrative Law: Text and Materials (4th Edition) by Beatson, Matthews, and Elliott) Thus, not only has judicial review grown wider in scope; its intensity has also increased. Notwithstanding the same,
>
> "it is, however, central to received perceptions of judicial review that courts may not interfere with exercise of discretion merely because they disagree with the decision or action in question; instead, courts intervene only if some specific fault can be established for example, if the decision was reached procedurally unfair."
>
> 25. The raison d'etre of discretionary power is that it promotes decision maker to respond appropriately to the demands of particular situation. When the decision making is policy based judicial approach to interfere with such decision making becomes narrower. In such cases, in the first instance, it is to be examined as to whether policy in question is contrary to any statutory provisions or is discriminatory/arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters and is held to be valid, then the only question to be examined is as to whether the decision in question is in conformity with the said policy."

55. Recently, Hon'ble Apex Court in **Independent Thought** v. **Union of India** (2017) 10 SCC 800, has held that it is a well settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the Court will always raise a presumption of the constitutionality of the legislation. It is further held by Hon'ble Apex Court that the courts are reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. It would be apt to take note of following paragraphs of the judgment (supra):

> "161. It is a well settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the Court will always raise a presumption of the constitutionality of the legislation. The courts are reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. The Courts must show due deference to the legislative process.

162. There can be no dispute with the proposition that Courts must draw a presumption of constitutionality in favour of laws enacted by the legislature. In Sub-Divisional Magistrate v. Ram Kali[46], this Court observed as follows: (AIR p. 3, para 5)

> "5.....The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

163. Thereafter, in Pathumma&Ors. v. State of Kerala & Ors.[47], this Court held that the Court would interfere only when the statute clearly violates the rights of the citizens provided under Part III of the Constitution or where the Act is beyond the legislative competence or such similar grounds. The relevant observations are as follows:(SCC p.9, para 6)

> "6. It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same..."

164. In State of A.P. v. P. Laxmi Devi[48], this Court held thus: (SCC pp. 747-48, paras 66-67)

> "66. As observed by the Privy Council in Shell Co. of Australia v. Federal Commr. of Taxation[49] :(ALL ER p. 680 G-H)
>
> > '...unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will..."
>
> 67. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide Kedar Nath Singh v. State of Bihar[50]. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497....."

56. Having carefully perused aforesaid exposition of law rendered by Hon'ble Apex Court as well as this Court, it may be safely concluded that even policy decision being taken by State can be tested on the touchstone of Article 14 and if same is found to be violative of Article 14, court has power to set aside the same. No doubt, it is well settled that when policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is

inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters. Hon'ble Apex Court repeatedly has held that unless a policy decision is found to be arbitrary based on irrational consideration or malafide or against statutory provisions, same does not call for an interference by the Court in exercise of powers of judicial review but if policy decision is found to be arbitrary, based on irrational considerations or malafide or against statutory provisions, court has definite power to interfere and set aside the same.

57. In the case at hand, policy decision taken by the respondent-State is arbitrary, based upon irrational considerations and against the Constitution of India. Constitution provides that equal laws should be applied to all in the same situation and there should not be any discrimination between one person and the other, if as regards the subject matter of legislation, their position is substantially the same. Parents of the petitioners are also compelled to reside outside the State of Himachal Pradesh on account of their employment in private sector and as such, benefit of exemption from passing two examinations out of four from the schools situate in the State of Himachal Pradesh can not be withdrawn on account of their being employed in private sector, especially when such benefit is made available to other category under Clause 3(ii).

58. Consequently, in view of the detailed discussion made herein above as well as law laid down by Hon'ble Apex Court as also this Court, this Court has no hesitation to conclude that alleged policy decision taken by the respondent-State in withdrawing the benefit of exemption from condition of passing two examinations from the schools situate in the State of Himachal Pradesh affiliated to ICSE/CBSE/HP Board of School Education, from those petitioners, whose parents are residing outside the State of Himachal Pradesh on account of their employment in private sector is arbitrary, discriminatory, unconstitutional and there is no reasonableness in the decision of the respondent-State in withdrawing benefit of exemption from the aforesaid petitioners and allow same to other categories, which in no manner can be said to be different from the category of petitioners as such, decision taken in this regard though a policy decision can not be allowed to sustain.

59. Reference made to me is answered accordingly.

60. Since petitions at hand came to be placed before me on account of divergence of opinion between two esteemed Brothers sitting in the Hon'ble Division Bench, on the point of legality and validity of the decision taken by the respondent-State to withdraw benefit of exemption from condition of passing two examinations out of four from the schools situate in the State of Himachal Pradesh from the category of students, whose parents are residing outside State of Himachal Pradesh on account of their employment in private sector, I have adjudicated aforesaid issue only and as such, question, if any, with regard to admission of the persons falling in aforesaid category or only of those persons, who have participated in counselling for Academic Session 2018-19 in pursuance of order dated 29.6.2018 passed by the Hon'ble Division Bench, requires to be decided by the aforesaid Hon'ble Bench.

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

National Insurance Company Ltd. Through its Sr. Divisional Manager
....Appellant.

Versus

Om Parkash and others. ....Respondents.

FAO No 480 of 2010 with
CO No. 356 of 2011.
Decided on: 1.8.2018

Motor Vehicles Act, 1988- Sections 166 and 173- Motor Accident- Award - Appeal by insurer – Maintainability – Insurer not filing appeal against award of Tribunal passed in another claim application but arising out of same accident – Insurance Company choosing to file appeal only in one case and denying liability in toto on ground that driver of offending vehicle had no valid driving licence – Held, when one award arising out of same accident not challenged by Insurance Company on ground that driver of offending vehicle not having valid licence, then same insurer cannot be permitted to assail award passed by Tribunal in other Claim applications by way of appeal – Insurance Company is estopped from challenging award by its own act and conduct.

(Para-8)

For the appellant.	Mr. Deepak Bhasin, Advocate.
For respondent.	Mr. Y. Paul,Advocate, for respondent No.1 and also for Cross Objector. Mr. G.R. Palsra, Advocate for respondents No.2 and 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J*(Oral).*

By way of this appeal, appellant-National Insurance Company has challenged the award passed by learned Motor Accident Claims Tribunal (I), Mandi, in Claim Petition No. 65 of 2008, dated 31.08.2010, vide which learned Tribunal had passed the following award in favour of the claimants:-

> *" In view of the findings on issues above, the petition is allowed. The petitioner is held entitled to a sum of Rs. 5,39,100/- (Rs. Five lacs thirty nine thousand and one hundred only) by way of compensation from all the respondents with interest @ 9% per annum from the date of petition till realisation of the amount. Respondent No. 3 being insurer is directed to deposit the amount within 30 days from today. No costs. Memo of costs be prepared and file after due completion be consigned to Record room."*

2. Brief facts necessary for adjudication of present appeal are that respondent-claimant, Om Prakash, filed a petition for award of compensation on account of injury suffered by him in a vehicular accident. According to the claimant on 10.10.2016, he was riding a motorcycle bearing registration No. HP33A-6199. Amar Singh was the pillion rider. At around 6:20 p.m. when he reached Chakkar, the motorcycle was hit from behind by a tipper bearing registration No. HP58-1710, which was being driven in a rash and negligent manner by its driver, namely, Leela Parkash. As a result of the said accident, the claimant as well as pillion rider fell down. Both of them sustained injuries and were brought to Zonal Hospital, Mandi. Claimant remained admitted in Zonal Hospital, Mandi from 10.10.2016 to 13.10.2016 and thereafter he remained under treatment in various hospitals where he spent more than Rs. 3.00 lacs on his treatment. As per the claimant he was engaged in the activity of farming and his annual income was around Rs. 1.00 lac. He was also a Class-D Contractor and in said capacity he was earning an amount of Rs. 15,000/- per month. According to the claimant as a result of the accident he had sustained 50% disability. Compensation claimed by the claimant was to the tune of Rs. 15.00 lac. This claim petition stands allowed by the learned Tribunal in terms already mentioned herein above.

3. It is pertinent to mention here that the pillion rider Sh. Chaman Lal died in the accident.

4. Through this appeal, the impugned award has been challenged by the insurance company, inter alia, on the ground that learned Tribunal has erred in not appreciating that driver of the offending vehicle was not possessing a valid and effective driving license to drive the vehicle in issue. It is primarily on this ground that this appeal has been filed and arguments were addressed.

5. Learned counsel for the respondent claimant has argued that present appeal by the insurance company is not maintainable, as claim petition filed by the legal representatives of deceased Chaman Lal, stood allowed by the learned Motor Accident claims Tribunal (2), Mandi (i.e. MACT Case No. 38 of 2007, titled as Duni Chand and others Vs. Sh. Gautam Nath and others), vide award dated 19.1.2012 and the same was never challenged by the insurance company. He has further argued that award passed in MACT No. 38 of 2007 was challenged by S/Sh. Gautam Nath and Leela Prakash before this Court by way of FAO No. 120 of 2012, however, it is matter of record that said award was not assailed by the present appellant, i.e. National Insurance Company Limited and in the appeal filed by the owner, the award was modified by this Court by directing the insurer (present appellant-Insurance Company) to satisfy the award.

6. During the course of arguments, this Court has been apprised by the learned counsel for the appellant that the judgment passed by this Court in FAO No. 120 of 2012, dated 16.12.2016 has attained finality and the same was not challenged by the present Insurance Company by way of appeal.

7. In this background, the moot issue, which has to be decided by this Court as to whether the same Insurance Company which has not assailed the award passed by MACT, Mandi arising out of the same accident can be permitted to maintain this appeal, especially when the other award not challenged by Insurance Company stands upheld by this Court in FAO No. 120 of 2012, which was filed by the owner of the vehicle with partial modification in the same to the effect that Insurance Company was directed to satisfy the award.

8. In my view, taking into consideration the peculiar facts and circumstances of the case, this appeal cannot be allowed. Out of same accident two claim petitions were filed before the MACT. Vehicle involved in the accident is the same. Insured is the same and insurer is the same. In the claim petitions, separate awards stand announced by the learned Tribunal, holding claimant(s) entitled for compensation. When one award arising out of the same accident was not challenged by the Insurance Company at all, either on the ground that the driver of the offending vehicle was not having a valid license or otherwise, then the same Insurance Company cannot be permitted to assail the award passed by the learned Tribunal in the other claim petition by way of an appeal. Insurance Company is in fact estopped from challenging the award subject matter of this appeal because of its own act and conduct.

9. This Court has perused the record of FAO No. 120 of 2012. The award passed in MACT No. 38 of 2007 demonstrates that following issues were framed in the said claim petition:-

> *"(1) Whether the deceased Chaman Lal died due to rash and negligent driving of Tipper No. HP-58-1710 by respondent Leela Prakash as alleged? OPP.*
>
> *(2) If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, is so to what amount and from whom? OPP.*
>
> *(3) Whether there was breach of terms and conditions of insurance policy? OPR.*

(4) Whether the driver was not holding valid and effective driving license at the time of accident? OPR-3

(5) Relief."

10. The findings returned by learned Tribunal on said issues are quoted hereinbelow:-

"For the reasons recorded hereinafter, while discussing the issues for determination, my findings on the aforesaid issues are as under:-

Issue No. 1: Yes.

Issue No. 2: Yes.

Issue No. 3: Yes.

Issue No. 4: Yes.

Relief: Petition is allowed as per operative part of the judgment."

11. As already mentioned above, findings returned by the learned Tribunal on issues No. 3 & 4 have not been disturbed by this Court in FAO No. 120 of 2012, meaning thereby that the same stand upheld by this Court. As the award passed by learned Tribunal stands merged in judgment passed by this Court in the said FAO, in this view of the matter, when the present appellant has already accepted the judgment of this Court in FAO No. 120 of 2012, it is not in the interest of justice to permit the Insurance Company to challenge the award in the present appeal on the same ground, which stands settled in FAO No. 120 of 2012.

12. In this view of the matter, in my considered view, no interference is called with the award under challenge and this appeal is accordingly dismissed. No order as to costs.

Cross Objection No. 356 of 2011

13. Having heard learned counsel for the cross objector and learned counsel for the non cross objector, this Court is of the opinion that the award passed by learned Tribunal does not calls for any interference, as the amount awarded by learned Tribunal is just, fair and reasonable. Learned Tribunal has applied the multiplier of 14, taking into consideration the fact that the age of the claimant at the time of accident was 45 years. It has further assessed the loss to his estate to the extent of Rs. 2,000/- per month by taking the income of the claimant to be Rs. 3,000/- per month and reducing from the same 1/3rd, which amount as per learned Tribunal would have had spent by the claimant upon himself. On these bases, learned Tribunal assessed that loss of earning comes to Rs. 3,36,000/-. In addition, learned Tribunal has granted an amount of Rs. 50,000/- for the money spent on medicines and procedures and an amount of Rs. 33,000/- on other bills etc., including wages received by the attendant. Learned Tribunal has also awarded an amount of Rs. 21,000/- for taxi bills etc. and Rs. 40,000/- on account of pain and suffering. In addition, it has also awarded an amount of Rs. 50,000/- on account of 50% disability suffered by the claimant. Thus the amount as determined by learned Tribunal is just, fair and reasonable and does not call for any interference, as has been prayed by learned counsel for the cross objector. As this Court does not finds any merit in the cross objections, the same are accordingly dismissed.

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

Satinder Kumar .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr. Revision No. 241 of 2018
Decided on August 6, 2018

Code of Criminal Procedure, 1973- Section 439(2)- Cancellation of bail- Grounds – Police arresting accused for not complying with conditions imposed by High Court while granting anticipatory bail- Special Judge granting regular bail unmindful of conditions imposed and non-compliance thereof by accused since order of High Court not produced before him – Special Judge cancelling bail on ground of accused not approaching court with clean hands – Petition against – Held, Order of Special Judge cannot be declared illegal – However, on undertaking of father of accused of mortgaging his land towards amount due from his son, High Court set aside cancellation order – Investigation also complete and nothing to be recovered from accused – Special Judge directed to consider grant of bail subject to verification of revenue record of land sought to be mortgaged. (Paras-4 to7)

For the petitioner Mr. Maan Singh, Advocate.

For the respondent Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

By way of instant petition filed under Section 397 read with Section 401 CrPC, challenge has been laid to order dated 28.6.2018 passed by learned Special Judge-II, Kullu, Himachal Pradesh in CrMP No. 169/18//278/18, whereby bail granted to the petitioner on 25.6.2018, has been cancelled and he has been taken into custody.

2. Facts, as emerge from the record are that the petitioner had moved a bail petition under Section 438 CrPC being CrMP No. 840 of 2015 for grant of anticipatory bail in case FIR No. 32/15 dated 28.4.2015 under Sections 420, 406, 468, 471 and 120B IPC and Section 13(i)(d)ii) of Prevention of Corruption Act, registered at Police Station, HP CID, Shimla. This court vide order dated 14.7.2015 (Annexure P-1) granted anticipatory bail subject to certain conditions *inter alia* that bail petitioner shall deposit loan amount allegedly taken by him on or before 31.10.2015 with the bank concerned. Since petitioner failed to deposit the amount in terms of aforesaid order passed by this Court, he came to be arrested, whereafter, petitioner filed an application under Section 439 CrPC before the learned Special Judge, Kullu, praying therein for grant of regular bail and learned Special Judge-II, Kullu, vide order dated 25.6.2018 (Annexure P-4), released the petitioner on bail subject to certain conditions. However, the fact remains that respondent-State subsequently filed an application (Annexure P-7), praying therein for cancellation of bail granted by the learned Special Judge vide order dated 25.6.2018.

3. Respondent-State averred before the learned Court below that since petitioner failed to deposit loan amount in terms of order dated 14.7.2015 passed by this Court in CrMP(M) No. 840 of 2015, whereby this Court, while granting anticipatory bail, had specifically directed him to deposit entire loan amount on or before 31.10.2015, bail

petitioner could not be released on bail. Learned Special Judge, taking note of the averments contained in the application for cancellation of bail, cancelled the bail granted to the petitioner on 25.6.2018, on the ground that petitioner had not come before the Court with clean hands and concealed material facts with regard to order passed by this Court, whereby he was directed to deposit loan amount on or before 31.10.2015.

4. Though, having carefully perused impugned order dated 28.6.2018 (Annexure P-8), this Court finds no illegality or infirmity in the same because admittedly, factum with regard to passing of order dated 14.7.2015, wherein petitioner was granted bail subject to the condition of depositing entire loan amount before 31.10.2015, was never brought to the notice of the learned Special Judge, who subsequently on the basis of record as well as statement given by the learned prosecutor that investigation is complete and nothing is required to be recovered from him, proceeded to grant regular bail to the petitioner. However, this court taking note of the fact that investigation in the case is complete and nothing is required to be recovered from the bail petitioner, sees no valid reason to keep the petitioner behind the bars, especially when Shri Chobe Ram son of Shri Daya Ram, who happens to be father of present petitioner, has filed an affidavit before this Court stating therein that he is ready and willing to mortgage his land comprised in Khewat No. 36 (Share 15/32 measuring 0-01-66 H), KhewatNno. 3 (share 15/64 measuring 0-04-63 H) and Khewat No. 38 (share 5/6.4 measuring 0-00-82 H) total measuring 0-07-11 H, situate at MohalSoyal, Tehsil Kullu, District Kullu, Himachal Pradesh in favour of the Bank concerned. Chobe Ram, in his affidavit has categorically stated that he has no objection in case aforesaid property is mortgaged in lieu of loan amount advanced by Bank to the petitioner. It is not in dispute that Bank concerned has advanced a sum of Rs. 3.00 Lakh to the petitioner, whereas as per averments contained in para-3 of the affidavit, average value of land in question is Rs. 527 per square metre and total value of land sought to be mortgaged by Chobe Ram is 527x 711 = Rs. 3,74,697/-.

5. Mr. Dinesh Thakur, learned Additional Advocate General, having perused averments contained in the affidavit, fairly states that respondent-State has no objection to the aforesaid proposal made by petitioner but that would be subject to verification of revenue record pertaining to property mentioned in the affidavit.

6. Consequently, in view of above, present petition is allowed and order dated 28.6.2018 (Annexure P-8) passed learned Special Judge-II, Kullu, Himachal Pradesh in CrMP No. 169/18//278/18 is quashed and set aside and learned Special Judge-II, Kullu is directed to consider grant of bail to the petitioner, subject to verification of revenue record of land described herein above. In case property as mentioned by the Chobe Ram is found to be of the value as detailed in para-3, same may be mortgaged in the name of Bank concerned and petitioner be released on bail, subject to usual conditions. For the aforesaid purpose, let the matter be listed before the learned Special Judge-II, Kullu, Himachal Pradesh on **8.8.2018**. Learned counsel for the petitioner undertakes to cause presence of counsel in the court below and also to apprise it regarding passing of this order.

7. Registry of this Court to apprise the learned Court below about passing of the instant judgment, enabling learned Court below to do the needful expeditiously.

Pending applications, if any, are also disposed of.

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

Rajeev Sharma ...Appellant
Versus
Sanjeev Kumar Jain and another ...Respondents

Cr. Appeal No. 303 of 2016
Decided on: August 13, 2018

Negotiable Instruments Act, 1881- Section 138- **Code of Criminal Procedure, 1973-** Section311- Dishonour of cheque – Complaint –Trial Court dismissing complaint by holding that cheques in question obtained by him from accused at gun point –Trial court relying upon fact that FIR was registered against complainant for forcibly obtaining accused's signatures on cheques – Appeal against – Before High Court complainant seeking to adduce copy of judgment of Add. C.J.M. acquitting him in that case – On facts, High Court setting aside acquittal and remanding matter with direction to trial court to decide it afresh after taking into consideration judgment of acquittal of Add. C.J.M. and after affording opportunity to accused to lead evidence in rebuttal, if any. (Paras-6 to 8).

For the appellant: Mr. B.S. Attri, Advocate.
For the respondents: Mr. Subhash Sharma, Advocate, for respondent No.1.
Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Having regard to the nature of order this court proposes to pass in the instant proceedings, it is not necessary to give facts in detail, save and except that the appellant-complainant (hereinafter, 'complainant') filed a complaint under Section 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code in the court of Chief Judicial Magistrate, Una, District Una, Himachal Pradesh, against respondent-accused, which came to be registered as Case No. 299-1-2004 RBT No. 38-II-2012, alleging therein that he alongwith accused had been running a cable network business in Una town in the name and style of Shubh Cable Network, but since there was some financial dispute *inter se* partners, complainant as well as respondent entered into a written agreement dated 3.7.2004. As per agreement, respondent-accused handed over two cheques to the complainant bearing No. 972294 dated 3.7.2004 and No. 972295 post-dated 17.7.2004 for Rs.9.5 Lakh each, however, fact remains that on presentation both the aforesaid cheques were dishonoured and returned vide memo dated 20.11.2004 with the remarks that payment of cheques has been stopped by the accused. After having received aforesaid memo from the Bank concerned, complainant served upon respondent-accused a legal notice vide registered post on 23.11.2004, calling upon him to make payment good. Respondent-accused failed to make payment and as such, complainant was compelled to initiate proceedings under Section 138 of the Negotiable Instruments Act in the court of learned Chief Judicial Magistrate, Una, District Una, Himachal Pradesh. Respondent-accused tookdefence before the court below that signatures on the cheques in question were obtained by the complainant on gun point and as such, court below vide judgment dated 2.1.2013, acquitted the respondent-accused of the charges framed against him.

2. Being aggrieved and dissatisfied with the aforesaid judgment of acquittal passed by Chief Judicial Magistrate, Una, complainant preferred an appeal bearing No. 02 of

2013 in the court of learned Additional Sessions Judge(I), Una, District Una, Himachal Pradesh, under Sections 372 and 374 CrPC, however, the fact remains that same was dismissed being not maintainable, because, against order of acquittal, complainant ought to have filed appeal under Section 378(4) CrPC in this Court. In the aforesaid background, complainant has approached this Court, in the instant proceedings, seeking therein conviction of respondent-accused after setting aside judgment of acquittal recorded by learned Chief Judicial Magistrate, Una.

3. During proceedings of the case at hand, complainant filed an application under Section 311 read with Section 482 CrPC being CrMP No. 296 of 2018, seeking therein permission to place on record, judgment dated 18.10.2017 titled State of Himachal Pradesh vs. Rajeev Sharma, case RBT No. 150-II-16/05 passed by learned Additional Chief Judicial Magistrate, Court No.1, Una, District Una, Himachal Pradesh, whereby court below held present complainant Rajeev Sharma not guilty of having committed offences punishable under Sections 148, 452, 386, 324, 506 read with Section 149 IPC in FIR No. 771/04 dated 7.11.2004 registered at Police Station, Una, District Una, Himachal Pradesh and acquitted him of the aforesaid charges framed against him. Judgment dated 18.10.2017 passed by Additional Chief Judicial Magistrate, Court No. 1, Una, further reveals that FIR No. 771/04 dated 17.11.2004 came to be registered by Police Station, Una, District Una, Himachal Pradesh at the behest of respondent-accused namely Sanjeev Kumar Jain, who had alleged that present complainant had procured his signatures on cheques detailed herein above on gun point. Police, after completion of investigation, presented *Challan* in the court of learned Additional Chief Judicial Magistrate, Una, Himachal Pradesh, wherein complainant was charged with offences punishable under Sections 148, 452, 324, 506 read with Section 149 IPC, however, as has been noticed herein above, subsequently, learned Court below, on the basis of material adduced on record by respective parties, held present complainant Rajeev Sharma not guilty of having committed offences under aforesaid Sections and arrived at a definite conclusion that "evidence adduced on record by defence i.e. present complainant goes to show that respondent-accused had cooked up a story with regard to accused obtaining his signatures on stamp papers/agreement and cheques of Rs.19.00 Lakh on gun/revolver/knife point solely with a view to escape the liability of consequence of cheques of Rs.19.00 Lakh and agreement dated 3.7.2004 executed in favour of accused." (para-22 of judgment dated 18.10.2017, passed by Additional Chief Judicial Magistrate, Court No.1, Una).

4. Today, during proceedings of the case, Mr. Subhash Sharma, learned counsel representing the respondent-accused namely Sanjeev Kumar Jain, fairly stated that in view of judgment rendered by Additional Chief Judicial Magistrate, Court No.1, Una, dated 18.10.2017 in case RBT No. 150-II-16/05, matter needs to be remanded back for adjudication afresh. Mr. Sharma, fairly submitted that though he has no objection in case application having been filed by the complainant under Section 311 CrPC is allowed and judgment in question is taken on record, but, in that eventuality, respondent-accused is also required to be afforded with an opportunity to lead evidence in rebuttal, if any.

5. Mr. B.S. Attri, learned counsel representing the complainant stated that though he is not averse to the submission having been made by the learned counsel representing the respondent-accused but appellant-complainant is litigating in Courts since the year 2004 i.e. for the last fourteen years, for getting his own money as such, learned Court below may be directed to dispose of the complaint filed under Section 138 of the Negotiable Instruments Act in a time bound manner.

6. Consequently, in view of the facts and circumstances of the case narrated above as well as fair stand adopted by the learned counsel representing the parties,

Judgment dated 2.1.2013 passed by learned Chief Judicial Magistrate, Una, District Una, Himachal Pradesh in Case No. 299-1-2004 is quashed and set aside. Complaint is restored to its original number and position. Matter is remanded back to the court of learned Chief Judicial Magistrate, Una, District Una, Himachal Pradesh, for fresh adjudication in light of judgment dated 18.10.2017 rendered by learned Additional Chief Judicial Magistrate, Court No.1, Una, Himachal Pradesh in case RBT No. 150-II-16/05. Learned Court below is directed to decide the complaint having been filed by the complainant afresh taking into account judgment dated 18.10.2017 rendered by Additional Chief Judicial Magistrate, Court No.1, Una, Himachal Pradesh in case RBT No. 150-II-16/05.

7. Since evidence has already been led on record by the respective parties, learned Court below is only expected to take into consideration judgment dated 18.10.2017 passed by Additional Chief Judicial Magistrate, Court No.1, Una, in case RBT No. 150-II-16/05.

8. Needless to say, respondent-accused shall be afforded an opportunity of rebuttal, if any as far as judgment dated 18.10.2017 (supra) is concerned. This Court also can not lose sight of the fact that complainant had filed complaint under Section 138 of the Act *ibid* in the year 2004 i.e. fourteen years back as such, this Court hopes and trusts that learned Court below shall dispose of the complaint under Section 138 of the Act *ibid* expeditiously, preferably within a period of three months from today. Learned counsel undertake to cause presence of the parties on **21.8.2018**, before the learned Court below, enabling it to proceed with the matter as per this judgment. Parties shall render all necessary cooperation to the learned Court below, enabling it to do the needful within the stipulated time.

All pending applications, stand disposed of.

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

Shiv Kumar Sood ....Appellant

Versus

Gram Panchayat Dadahu and another ....Respondents

RSA No. 307 of 2017
Decided on: August 14, 2018

Indian Easements Act, 1882- Section 13- Right of way –Easement of necessity – Alternative Path – Existence of – Plaintiff claiming right of passage for himself and others through Panchayat land as easement of necessity – Trial Court dismissing suit and District Judge affirming decree in appeal – RSA– Field Kanungo, plaintiff's own witness clearly admitting existence of alternative path for plaintiff's hotel through road – Held, Necessary declaration qua easement by way of necessity cannot be given – Order of Collector directing recording of passage through disputed land since passed behind back of Panchayat not relevant – Concurrent findings of fact not being perverse cannot be interfered in second appeal. (Paras-12, 13 & 26)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161
Parminder Singh versus Gurpreet Singh, Civil Appeal No. 3612 of 2009, decided on 25.7.2017

For the appellant	Ms. Shashi Kiran, Advocate.
For the respondents:	Mr. Rajnish K. Lal, Advocate, for respondent No.1. Mr. Ashwani Sharma, Additional Advocate General, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral**):**

By way of instant Regular Second Appeal, challenge has been laid to judgment and decree dated 30.3.2017 passed by the learned District Judge, Sirmaur District at Nahan in Civil Appeal No. 78-CA/13 of 2016, affirming judgment and decree dated 19.7.2016 passed by the learned Civil Judge (Junior Division), Sirmaur District at Nahan, H.P. in Civil Suit No. 66/1 of 2013, whereby suit of the appellant-plaintiff (hereinafter, 'plaintiff') for decree of declaration and permanent prohibitory injunction came to be dismissed.

2. Succinctly, the facts as emerge from the record are that the plaintiff filed a suit for declaration to the effect that the land measuring 0-2 Biswa out of total land measuring 1-0 Bigha, comprised in KhataKhatauni No. 335 min/ 494 min, Khasra No. 1108/1069/977/874 min, situate at Mauza ChuliDadahu, Tehsil Nahan, District Sirmaur, Himachal Pradesh, is a *GairMumkin Rasta* as per letter dated 20.9.2012 of the Collector, Sirmaur District at Nahan and is being used by the plaintiff and general public for egress and ingress to their properties since times immemorial without any hindrance from anyone including defendants. Plaintiff also sought relief of permanent prohibitory injunction restraining the defendants not to interfere/ close said passage by erecting gate, which is likely to stop the passage of the plaintiff leading to his office M/s Ahuja Plastic, Hotel Devicos Plaza and house. Plaintiff further prayed that in case defendants succeed in raising construction of gate to close the path as detailed herein above, during the pendency of the suit, a decree of mandatory injunction may be passed. Plaintiff also averred that *GairMumkin Rasta* as detailed in letter dated 20.9.2012, issued by Collector, Sirmaur is being used by him as well as general public for ingress and egress to their properties and defendants have started interfering in the said path and made an attempt to close the same by erecting a gate, which is likely to stop the passage of the plaintiff leading to his office M/s Ahuja Plastic, Hotel Devicos Plaza and his house. Plaintiff further averred that there was no other passage available to him except the above said path. Allegedly on 27.9.2013, defendant No.1 started interfering in the passage by digging the same for raising construction of a gate. Since despite requests having been made by plaintiff, defendants failed to open the passage, plaintiff was compelled to file the suit.

3. Defendants by way of filing separate written statements refuted the aforesaid claim set up in the plaint. Defendant No.1 raised preliminary objections qua maintainability, non-joinder and mis-joinder of necessary parties, limitation, locus standi and suppression of material facts. On merits, Gram Panchayat, Dadahu, i.e. defendant No.1 claimed that it is not aware of the order passed by Collector on 20.9.2012, as it was not a party to the proceedings conducted by the Collector, Sirmaur. Defendant No.1 further claimed that there is no path being used by the general public for egress and ingress to their properties. It was

asserted that in fact in the year 2006, one Vineet Kumar filed CWP No. 374 of 2006 before this Court, wherein land comprised in Khewat No. 335 min, Khatauni No. 505, Khasra No. 1108/1069/977/874 min measuring 17 Biswa, consisting of godown, Gram Sewak Hut and parking was held to be the property of Gram Panchayat Dadahu and this Court ordered delivery of the property /land to the Gram Panchayat Dadahu from the plaintiff. After re-possession by Gram Panchayat, a gate was put at the entrance of the parking in the year 2009 and since then the Gram Panchayat has been using the said property for its exclusive use. It was further averred by defendant No.1 in the written statement that plaintiff opened his gate at the outskirt of the *Sehan* of his building and started parking his vehicle in the parking of defendant No.1. Defendant No.1 further averred that plaintiff, with a view to divest it of the right accrued in its favour by virtue of judgment dated 22.4.2008 passed by this Court in CWP No. 374 of 2006, procured an order regarding alleged path in connivance with the revenue officials, which does not confer any right upon the plaintiff because said order is not legally binding upon it. Defendant No.1 further averred in the written statement that in October, 2013, defendant leased out parking area to a private contractor for one year and in order to frustrate the act of defendant No. 1, plaintiff filed a frivolous suit as there was no public path being used at any point of time by the public at large including plaintiff. It was pleaded that since the gate stood erected in the year 2009, there is no question of causing any irreparable loss and material injury to the plaintiff. On these averments, dismissal of suit was sought by defendant No.1.

4. Defendant No.2, by way of a separate written statement sought dismissal of the suit for non-compliance of provisions of Order 7 Rule 3 CPC. On merits, it was pleaded that there is no such path /passage, which is being used by the general public for egress and ingress to their properties and instant suit has been filed just to grab the parking land of the Gram Panchayat. It was also averred that defendants never caused any interference to anyone unnecessarily. The Gram Panchayat raised /erected the gate of parking ground in the year 2009 over Khasra No. 1108/1069/977/874 measuring 1 Bigha immediately after the possession of this area of parking, Gram Sewak Hut and Godown was delivered to the Gram Panchayat as per judgment dated 22.4.2008 of this Court passed in CWP No. 374 of 2006. It was specifically denied that the plaintiff has no other path/passage available on the spot and the remedy was available with the plaintiff under the Easements Act. It was further denied by defendant No.2 that on 27.9.2013, defendants started any construction work for erecting the gate as the gate was already erected in the year 2009. In the year 2001, parking place, godown and Gram Sewak Hut of Gram Panchayat Dadahu situate over Khasra No. 977/874 measuring 0-17 Biswa were erroneously leased out to plaintiff through lease deed, which later-on was revoked and the possession of these was taken back by the Gram Panchayat vide Sub Division Collector, Nahan, order dated 7.11.2001. Rest of the averments made in the plaint were also denied.

5. On the basis of pleadings of the parties, learned trial Court, framed following issues on 5.3.2014:

"1. Whether the path is in existence on an area measuring two Biswas forming part of the suit land, as alleged? OPP

2. Whether the plaintiff is using the aforesaid passage for egress or ingress to his property since the time immemorial and he has no alternative passage to reach his property, as alleged? OPP

3. Whether the defendant no. 1 has erected gate and blocked the passage used by the plaintiff, as alleged? OPP

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

5. Whether the suit is not maintainable as Section 193 of the H.P. Panchayati Raj Act, 1994 and Judicial Officers Protection Act, 1950 and Section 73 of H.P. Panchayati Raj Act, has not been complied, as alleged? OPD

6. Whether the suit is bad for non-joinder and mis-joinder of necessary parties, as alleged? OPD

7. Whether the suit of the plaintiff is time barred, as alleged? OPD

8. Whether the suit of the plaintiff is liable to be dismissed for non-compliance of provisions of Order 7 Rule 3, CPC, as alleged? OPD

9. Whether the plaintiff has suppressed the material facts from the Court, as alleged? OPD

10. Whether the suit is not maintainable in the present form, as no relief of declaration based on easement rights has been sought, as alleged? OPD

11. Relief."

6. Subsequently, learned trial Court, vide judgment and decree dated 19.7.2016, dismissed the suit of the plaintiff. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiff preferred an appeal under Section 96 CPC before the learned District Judge, Sirmaur District at Nahan, which came to be dismissed vide judgment and decree dated 30.3.2017, as a consequence of which, judgment and decree passed by learned trial Court came to be upheld. In the aforesaid background, plaintiff has approached this Court, in the instant proceedings, praying therein to decree his suit, after setting aside the judgments and decrees passed by both the learned Courts below.

7. Since both the parties agreed for disposal of the appeal at hand at the admission stage, as stands recorded in order dated 18.6.2018, present appeal was taken up for hearing and is being disposed of accordingly.

8. Ms. Shashi Kiran, learned counsel representing the plaintiff, while referring to the impugned judgments and decrees passed by both the learned Courts below argued that same are not based upon correct appreciation of the evidence and as such not sustainable and may be set aside. Ms. Shashi Kiran vehemently argued that bare perusal of the judgments and decrees passed by learned Courts below clearly suggests that there is misreading and misappreciation of evidence adduced on record and as such, impugned judgments and decrees can not be allowed to sustain. While inviting attention of this Court to order dated 20.9.2012, passed by Collector Sirmaur at Nahan, Ms. Shashi Kiran strenuously argued that once revenue authority had specifically concluded that there exists a path over the suit land, learned Courts below had no option but to decree the suit for declaration as well as injunction having been preferred by the plaintiff.

9. However, this court, after having carefully examined evidence adduced on record by the respective parties, be it ocular or documentary, is not persuaded to agree with the aforesaid contention of the learned counsel representing the plaintiff, rather this Court is convinced and satisfied that both the learned Courts below have dealt with each and every aspect of the matter meticulously. Both the learned Courts below have appreciated the evidence in its right perspective, as such, it can not be concluded that there is misreading or misinterpretation of evidence led on record by the respective parties by the learned Courts below, while adjudicating the suit having been filed by the plaintiff. Plaintiff, who tendered his evidence Ext. PW-1/A deposed that the defendants erected a gate for stopping the passage to his hotel M/s Ahuja Plastic, Hotel Devicos Plaza and house and there is no alternative passage except the aforesaid path, which is being blocked by the defendants. It has further come in his evidence that on 27.9.2013, defendants started interfering in the

passage by way of raising construction of gate over the passage and despite the requests of the plaintiff, defendants did not pay any heed to the same. However, in his cross-examination, he admitted that he has not arrayed general public as party in the suit. Though in his cross-examination he deposed that there is no alternative path, but plaintiff admitted in his cross-examination that the suit land belongs to Gram Panchayat Dadahu. He denied the suggestion put to him that he being an influential person wanted to grab the land but admitted that one Vineet Kumar had filed a petition before this Court regarding this path and this property alongwith other parking, Gram Sewak Hut, one government store and forest Department quarters was handed over to the Gram Panchayat through Collector, in terms of judgment rendered by this Court. He further admitted that since then the Gram Panchayat is in possession of this property. Though in the suggestion put to him this witness denied that gate was constructed in the year 2009 but categorically admitted that property in question is being used by Gram Panchayat after passing of order by this Court in CWP No. 374 of 2006. He feigned ignorance that gate was constructed in the year 2009 by Gram Panchayat by spending Rs.10,712/-.

10. PW-2 Ravinder Gupta, who tendered his evidence by way of affidavit, Ext. PW-2/A, admitted in his cross-examination that these days, Pradhan of Gram Panchayat is one Shri Manesh Kumar, who has contested elections against him. He feigned ignorance qua the fact that gate was erected in the year 2009, however, he admitted that the property in question is being used by the Gram Panchayat. He also admitted the factum with respect to passing of judgment by this Court in the Civil Writ Petition.

11. PW-3 Farid Khan brought the record of the office order dated 20.9.2012, Ext. PW-3/A and letter which was addressed to SDM Nahan, Tehsildar and Naib Tehsildar, Dadahu. This letter is not addressed to the Gram Panchayat.

12. PW-4 Shamsher Singh, Kanungo, prepared letter No. 218 dated 17.9.2013 Ext. PW-4/A and this letter was sent to Pradhan, Gram Panchayat as per dispatch No. 217 dated 17.9.2013. In his cross-examination, this witness deposed that he had visited the spot on 9.9.2013 by the order of the Tehsildar Nahan. He deposed further that the suit land was in possession of the Gram Panchayat, Dadahu. He feigned ignorance qua judgment of this Court in case titled Vineet Kumar vs. State of Himachal Pradesh, vide which the property was ordered to be handed over to the Gram Panchayat through Collector. He further feigned ignorance qua the fact that gate was erected in the year 2009. In his cross-examination, he admitted that there is an alternative path to the Hotel of plaintiff from the road, which version put forth by this witness is in total contradiction to the statements made by PW-1 and PW-2, wherein they have stated that there is no alternative path to the property of the plaintiff.

13. In the case at hand, plaintiff claimed path through the land of the Gram Panchayat on the ground that there is no alternative path but it stands duly proved on record from the statement of Kanungo PW-4 Shamsher Singh that there is an alternative path to the Hotel of the plaintiff from road.

14. There is yet another interesting fact in the case at hand that the plaintiff claimed that path from the land comprising in KhataKhatauni No. 375/4945, Khasra No. 1108/1069/977/874 measuring 1 Bigha, out of which land measuring 0-2 Biswa is *GairMumkin Rasta*, is blocked by Gram Panchayat in the year 2009, but the fact remains that the suit at hand came to be filed in the year 2013 and it is not understood that in case path was blocked in the year 2009 and there being no other alternative path to the property of the plaintiff, then which path was being used by the plaintiff to access his property.

15. DW-1 Mahesh Kumar, Pradhan, Gram Panchayat, deposed that suit land is in possession of the Gram Panchayat, possession whereof was delivered to it by the judgment of this Court in CWP No. 374 of 2006. This witness categorically stated that the gate was constructed at the entrance of the parking in the year 2009 and since then Gram Panchayat is using property in question peacefully for the purpose of parking. This witness further stated that thereafter plaintiff opened his gate at the outskirt of the *Sehan* of his building and started parking his vehicle in the parking of the defendants in order to divest the right accrued to the Gram Panchayat by judgment dated 22.4.2008, passed by this Court in CWP No. 374 of 2006. This witness further stated that plaintiff in connivance with the revenue officials, procured order of path from the revenue agency for ousting the Gram Panchayat. This witness also deposed that there is no path for ingress and egress to M/s Ahuja Plastic, Hotel Devicos and house over suit land being used by the plaintiff and there is an alternative path available to the aforesaid property. DW-2 Vineet Kumar also tendered his affidavit Ext. DW-2/A and corroborated the version of DW-1. He also placed on record copy of judgment dated 22.4.2008 passed in CWP No. 374 of 2006.

16. DW-3 Sandeep Kumar Walia has also tendered his evidence by way of affidavit as Ext. DW-3/A and corroborated the version put forth by other defence witnesses and categorically stated that there is an alternative path. Careful perusal of cross-examination conducted on these witnesses, nowhere suggest that plaintiff was able to shatter their testimony because all the defence witnesses stuck to their statements made in their examination-in-chief.

17. DW-4 Chaman Lal brought record with regard to the construction of gate at parking i.e. entries in the cash book Ext. DW-4/A, which were recorded in the Panchayat record. He also brought bills of construction of gate Exts. DW-4/B to DW-4/E. In his cross-examination, this witness deposed that the gate was constructed in the parking.

18. DW-5 Manoj Gupta stated that he had issued bills Exts. DW-4/B to DW-4/C and had supplied the material. This witness though admitted that he did not know where the material was to be used by the Gram Panchayat but denied the letter Ext. PW-3/A.

19. Dinesh Sharma, Advocate, while tendering copy of judgment passed by this Court, Ext. DX deposed that suit property came in occupation and possession of defendant No.1 after passing of judgment by this Court in CWP No. 374 of 2006.

20. Perusal of aforesaid judgment, Ext. DX suggests that father of the plaintiff was directed to hand over vacant and peaceful possession of entire property comprising of Gram Sewak Hut and Godown to the Deputy Commissioner as he was not held entitled to occupy the same and as such, learned Courts below rightly arrived at a conclusion that plaintiff has no right, title or interest over the suit property. Moreover, in the case at hand, plaintiff has failed to prove on record that cause of action, if any, accrued in his favour in the year 2013, rather it stands duly proved on record that gate was erected on the suit property in the year 2009, as has been stated by all the defence witnesses. Defendant No.1 by producing ample evidence, be it ocular or documentary, successfully proved on record that construction material was purchased in the year 2009 and same was utilized for the erection of gate on the suit property. Photographs, Mark A to H further corroborate the version put forth by the defence witnesses and falsifies the stand of the plaintiff that gate in question came to be erected in the year 2013. It stands duly proved on record that the plaintiff is having an alternative path and as such, relief sought by him by way of decree of declaration can not be granted. So far communication dated 20.9.2012 passed by Collector, Sirmaur, is concerned, same is of no relevance in view of the judgment rendered by this Court in CWP No. 374 of 2006, wherein admittedly father of the plaintiff was declared to be an encroacher and was directed to hand over the vacant and peaceful possession of entire

property consisting of Gram Sewak Hut and Godown to the Deputy Commissioner. Otherwise also, if the aforesaid letter is read and perused carefully, it suggests that the Tehsildar Nahan, District Sirmaurvide communication dated 15.9.2012 apprised the Collector, Sirmaur at Nahan that the path measuring 2 Biswa on Khasra No. 1108/1069/977/874 measuring 1 Bigha exists and same is being used by the concerned persons since times immemorial. He further informed the Collector that though land is recorded as *Banjar Kadeem* and is in the ownership of the Government of Himachal Pradesh, but same may be recorded as path in the revenue record to avoid any dispute in future. On the basis of aforesaid recommendations made by Tehsildar, Nahan, Collector Sirmaur, without associating defendant No.1, Gram Panchayat Dadahu, ordered 2 Biswa of land in aforesaid Khasra number to be recoded as path. Though the record suggests/reveals that communication dated 20.9.2012 was brought on record by the plaintiff but otherwise it has no relevance, especially in view of findings recorded by this Court in CWP No. 374 of 2006, whereby land comprising of Khewat No. 335 min Khatauni No. 505 Khasra No. 1108/1069/977/874 min measuring 17 Biswa was ordered to be delivered to the Gram Panchayat, Dadahu. Finding given by this Court in CWP No. 374 of 2006 has attained finality because, admittedly, no appeal whatsoever has been filed against the same.

21. This court has no hesitation to conclude that both the learned Courts below have appreciated evidence in its right perspective and there appears to be no error of law, if any, committed by the learned Courts below, in passing the impugned judgments and decrees and no question of law much less substantial question of law arises in the present appeal for determination/adjudication by this Court.

22. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the defendants with regard to maintainability and jurisdiction of this Court, while examining concurrent findings returned by both the Courts below. Mr. Rajnish K. Lal, Advocate, invited the attention of this Court to the judgment passed by Hon'ble Apex Court in **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***(p.269)***

23. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record.

24. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in ***Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161*** wherein the Court held:

> "35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)
>
> "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
>
> (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
>
> (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.
>
> (iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."
>
> We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same."(pp.174-175)

25. The Hon'ble Apex Court in **Parminder Singh** versus **Gurpreet Singh**, Civil Appeal No. 3612 of 2009, decided on 25.7.2017, has held as under:

> "14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings

are binding on this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal.

15) It is more so when these findings were neither found to be perverse to the extent that no judicial person could ever record such findings nor these findings were found to be against the evidence, nor against the pleadings and lastly, nor against any provision of law."

26. It is quite apparent from aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned Courts below can not be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by learned Courts below, rather same are based upon correct appreciation of evidence as such, deserve to be upheld.

27. Consequently, in view of detailed discussion made herein above, I find no merit in the appeal at hand, which is accordingly dismissed. Judgment and decree 30.3.2017 passed by the learned District Judge, Sirmaur District at Nahan in Civil Appeal No. 78-CA/13 of 2016 are upheld.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Amit Kumar. .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 602 of 2017
Date of decision : 16.8.2018.

Indian Penal Code, 1860- Sections 363, 366, 375 and 376 (before Amendment) – Kidnapping and rape – Age of victim- Determination – Trial Court convicting and sentencing accused of kidnapping and rape – Appeal against – On facts (i) record of school where victim initially admitted not produced to prove her date of birth, (ii) Her mother stating on oath victim's age at 16 ½ years on date of occurrence (iii) Radiological age of prosecutrix found to be between 17-18 years, (iv) Pariwar Register showing different date of birth of victim than what recorded in school certificate, (v) Love letters showing victim being in love with accused and interested in marrying him, (vi) on date of occurrence while going to school, she had taken extra clothes in her bag – Held, being case of elopement and sexual act not being against her will or without consent, offences of kidnapping and rape not made out – Appeal allowed – Conviction and sentence set aside – Accused acquitted (Paras-22 to 33).

Cases referred:

State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393
Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635
Vimal Suresh Kamble Vs. ChaluverapinakeApal S.P. and another, (2003) 3 SCC 175
Ramesh Sharma versus State of Himachal Pradesh, 2013(3) Shim.LC 1386

For the appellant : Mr. Harish Kumar Verma, Advocate.

For the respondent : Mr. R.P. Singh, Dy. Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, *J. (Oral)*

Appellant herein is a convict (hereinafter referred to as 'accused'). He has been convicted for the commission of offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of two years and to pay Rs.2000/- as fine for the commission of offence punishable under Section 363 of the Indian Penal Code, to undergo rigorous imprisonment for a period of two years and to pay Rs.2000/- as fine under Section 366 of the Indian Penal Code and to undergo rigorous imprisonment for a period of seven years and Rs.5000/- as fine under Section 376 of the Indian Penal code. His Co-accused Arpan Kumar, however, has been acquitted of the charge framed against him under Section 368 of the Indian Penal Code.

2. The prosecution case in a *nut shell* is that in the year 2008, the prosecutrix was studying in SaheedMakhan Singh Government Senior Secondary School, Pathankot. She had love affair with accused Amit Kumar. Arpan Kumar, his co-accused, was their common friend.

3. Pritam Chand (PW2), the father of prosecutrix, a resident of village Gagwal, Tehsil Nurpur, District Kangra at the relevant time was working as SDO in I&PH department at Indora. On 22.5.2008, PW2 was away to Gurgaon in connection with the treatment of his son there. On the next day i.e. 23.5.2008 around 5.00 a.m. he received a message over telephone from his wife that the prosecutrix (PW1) has not returned from the school. On hearing this PW2 returned to his house on the next day i.e. 24.5.2008. He searched the prosecutrix every where, however, could not be traced out. Ultimately, he came to know that she was seen in the company of accused Amit Kumar at Jassur. PW2 visited the house of the accused. He was also not found present in the house. This had raised suspicion that it is the accused who may have kidnapped the prosecutrix. Therefore, PW2 had lodged the report in Police Station, Nurpur which was registered as FIR No. 144 of 2008.

4. The investigation was taken in his own hand by SI/SHO Daya Sagar (PW20) of Police Station, Nurpur. The prosecutrix was recovered on 24.5.2008 itself from bus stand Shahpur while in the company of the accused and his co-accused Arpan Kumar. On Inquiry, she disclosed that accused Amit Kumar was known to her for the last 2-3 months. On 22.5.2008, he called her over telephone that she should meet him on 23.5.2008 at Jassur. Accordingly, she went to school at Pathankot on 23.5.2008. She, however, went to the house of her friend and changed her dress there. Thereafter, she went to Jassur by bus where accused Arpan Kumar, a friend of accused Amit Kumar, met her at the bus stand. He told that accused Amit Kumar is waiting for her at Railway Station, Jassur. Consequently, the prosecutrix accompanied by accused Arpan Kumar went to Railway Station, Jassur. Accused Amit Kumar met them there. On the allurement of solemnization of marriage given to her by accused Amit Kumar she accompanied him to Pathankot. They traveled from Jassurto Pathankot by train. At Pathankot they booked two rooms in Ved Lodge situated at Railway road Pathankot. While Accused Amit Kumar and the prosecutrix stayed in room No. 106, Arpan Kumar in Room No. 104. During the night accused Amit Kumar subjected the prosecutrix, allegedly minor, to sexual intercourse. On the next day i.e. 24.5.2008 they went to Shahpur where apprehended by the police.

5. The prosecutrix and accused were identified to the police by her father PW2 Pritam Singh in the presence of Vijay Kumar PW9 and one Malkiat Singh vide memo Ext.PW2/B. An application Ext.PW15/A was thereafter made to Medical Officer, civil

hospital, Nurpur for medical examination of the prosecutrix. She was medically examined by PW15 Dr. Neerja Gupta. Since in her opinion the vagina was found admitting two fingers loosely, the prosecutrix was referred to gynecologist for further examination.

6. She was also referred to Radiologist and on seeing the report, she opined that the radiological age of the prosecutrix was between 17 to 18 years. The undergarments and vaginal slides etc. preserved by her were sealed and sent to Forensic Science Laboratory for analysis. The prosecutrix was examined by PW22 Dr. Arti Gupta, the Gynecologist, Christian Medical College Ludhiana (Punjab). Though on her examination she did not notice any injury present over perineal region and the hymen not torn, however, was congested and vagina admitting two fingers loosely. In her opinion, she formed on the basis of the physical examination of the prosecutrix, the possibility of sexual assault was not ruled out but when cross-examined she has admitted that there was no evidence of sexual assault.

7. The accused Amit Kumar was also examined by by Dr. P.K. Aluwalia PW10 on an application submitted for his medical examination Ext.PW10/A and found capable of performing sexual intercourse. His MLC is Ext.PW10/B. Dr. Raman Sharma is the Radiologist. He conducted X-ray of shoulder, hip, elbow, wrist joints, knee joints and ankle point of the prosecutrix vide skiagrams Ext.PW21/B1 to Ext.PW21/B6 and formed the opinion that the prosecutrix was 17 to 18 years of age at that time. He has proved his opinion Ext.PW21/C.

8. The prosecutrix after medical examination was entrusted to the custody of her father in the presence of witnesses vide memo Ext.PW1/B. PW5 Harish Ralhan, owner of Ved Lodge was associated during the investigation who had handed over the extract of Ved Lodge reservation register Ext.PW5/A. The same was taken into possession vide seizure memo Ext.PW4/A in the presence of witnesses. PW11 Ajeet Singh, Secretary, Gram Panchayat, Gagwal had handed over the date of birth certificate of the prosecutrix Ext.PW11/A from the Birth and Death register in which the date of birth of the prosecutrix was recorded as 10.11.1991. The hotel at Pathankot was identified to the police by both the accused vide memos Ext.PW19/A and Ext.PW19/B. They both have also identified the rooms where they stayed vide memo Ext.PW19/C. The location map prepared by the I.O. is Ext.PW19/D. The site plan where the prosecutrix recovered in the company of both the accused is Ext.PW20/A. Accused Arpan Kumar was also got medically examined. The application made to the Medical Officer, CH, Nurpur is Ext.PW20/B.

9. On receipt of the report from State Forensic Science Laboratory Ext.PA and on the completion of the investigation the report against both the accused was filed in the Court.

10. Learned trial Judge on going through the police report and hearing learned Public Prosecutor as well as learned defence Counsel has prima-facie concluded that a case for the commission of offence punishable under Sections 363, 366 and 376 IPC is made out against accused Amit Kumar whereas under Section 368 IPC against his co-accused Arpan Kumar. They were charged accordingly. They both, however, pleaded not guilty. This has led in recording the prosecution evidence.

11. The material prosecution witnesses are PW1 (name withheld) the prosecutrix, her father the complainant PW2 Pritam Chand and mother Santosh Kumari PW3. PW5 Harish Ralhan is the owner of Ved Lodge, Railway Road Pathankot. PW11 Ajeet Singh is the Secretary, Gram Panchayat Gagwal who has produced the date of birth certificate Ext.PW11/A before the police which was taken in possession vide recovery memo Ext.PW7/A. PW14 Yashpal Singh, Clerk, DAV, Public School, Bagni, Nurpur has been

examined to show that the date of birth of the prosecutrix in school record was entered as 10.11.1992.

12. The remaining prosecution witnesses are formal because PW4 and PW6 S/Shri Santosh Singh and Malkiat Singh remained associated with the investigation of the case at Pathankot in Ved Lodge which allegedly was identified in their presence. PW7 Narinder Singh, Secretary, Gram Panchayat, Toki stated that in his presence the certificate Ext.PW11/A was taken in possession vide memo Ext.PW7/A. PW8 C. Sushil Kumar is a witness to the recovery of the extract of Visitor's register Ext.PW5/A as it was taken in possession vide memo Ext.PW4/A in his presence and also in the presence of Santosh Singh. PW9 Vijay Kumar is the Uncle of the prosecutrix. It is in his presence she was recovered at Shahpur while in the company of both accused and entrusted to the custody of her father PW2. Dr. P.K. Aluwalia had examined the accused vide MLC Ext.PW10/A. PW12 GulwantSingh, Ex-Pradhan of Gram, Panchayat, Hatli has not supported the prosecution case qua he having made disclosure statement and as such, turned hostile to the prosecution. PW13 HC Suman working at the relevant time as Lady Constable general duty at police station, Shahpur was deputed in search of the prosecutrix along with other police officials who was recovered at Shahpur. PW15 Dr. Neerja Gupta had conducted the medical examination of the prosecutrix at Civil Hospital, Nurpur and issued MLC Ext.PW15/B. PW16 HHCPurshottamDass the then MHC, Police Station, Shahpur had entered the rapatrojnamcha Ext.PW16/A qua missing of the prosecutrix and ran away towards Shahpur side with the accused. PW17 Bir Singh, MHC Police Station, Nurpur has supported the prosecution case qua deposit of case property with him and forwarded the same to Forensic Science Laboratory, Junga through HHC Pawan Kumar PW18. PW19 Dujesh Kumar has partly investigated the case as according to him the disclosure statement Ext.PW19/A made by accused Amit Kumar was recorded by him. He has also prepared the identification memo Ext.PW19/C of room Nos. 104 and 106 in Ved Lodge, Pathankot. PW20 Daya Sagar is the Investigating Officer whereas PW21 Dr. Raman Sharma, Radiologist and PW22 Dr. Arti Gupta, the Gynecologist.

13. On the other hand both accused in their statements recorded under Section 313 Cr.P.C. have denied all the incriminating circumstances appearing against them in the prosecution evidence being incorrect. In their defence they both pleaded that they are innocent and have been implicated in this case falsely.

14. Learned trial Judge on appreciation of the evidence oral as well as documentary and hearing learned Public Prosecutor as well learned defence Counsel has concluded that the charge under Section 368 IPC is not made out against accused Arpan Kumar. He, as such, has been acquitted of the charge so framed against him.

15. Accused Amit Kumar has, however, been held guilty of the commission of offence punishable under Sections 363, 366 and 376 IPC while arriving at a conclusion that the prosecutrix a minor has been enticed away by him from the lawful guardianship of her parents at the pretext of solemnizing marriage with her and subjected to sexual intercourse in Room No. 106 of Ved Lodge, Railway road, Pathankot (Punjab). He has been accordingly convicted and sentenced as pointed out in this judgment at the very outset.

16. Accused Amit Kumar has assailed the impugned judgment on several grounds, however, mainly that various omissions, contradictions and improvements as appeared in the prosecution evidence has lost sight of the learned trial Judge. The evidence has not been appreciated in its right perspective. There being no cogent and reliable evidence suggesting that the prosecutrix at the time of occurrence was below 16 years of age has not been appreciated in its right perspective and to the contrary the findings of conviction recorded mechanically and without application of mind. It has been pointed out

that as per own statement of the prosecutrix and that of her mother as well as father she was above 16 years of age at the time of occurrence. Also that even as per the radiological age, the prosecutrix was 17-18 years of age at the relevant time. Her conduct amply demonstrate that she was not enticed away and kidnapped and rather was a consenting party to her elopement with the accused. The factum of she had been in love with the accused has also lost sight of learned trial Judge. Ext.D1, a love letter, she wrote to the accused, is also erroneously ignored. In a *nut shell* the complaint is that the oral as well as documentary evidence available on record has not been appreciated in its right perspective and as a result thereof the findings of conviction recorded against the accused are vitiated. The impugned judgment, as such, being legally unsustainable has been sought to be quashed.

17. On hearing Mr. Harish Kumar Verma, Advocate on behalf of the appellant-accused and Mr. R.P. Singh, learned Deputy Advocate General on behalf of the respondent-State only question which need determination in this appeal is that the prosecutrix was major above 16 years of age on the date when allegedly assaulted sexually and that being a consenting party to her elopement with the accused and also the sexual intercourse no offence under Section 363, 366 and 376 IPC is made out against the accused.

18. Before coming to the factual matrix and also re-appraisal of the evidence available on record, it is desirable to take note as to under what circumstances it can be inferred that the prosecutrix, a minor has been kidnapped from the lawful guardianship of her parents and under what circumstances she can be said to have been subjected to forcible sexual intercourse. A bare perusal of Section 361 IPC reveals that if a female under 18 years of age is enticed away by a person from her lawful guardianship without the consent of her guardian, such person can be said to have committed the offence of kidnapping. The essential ingredients to constitute an offence of kidnapping, therefore, is enticing away a minor form her lawful guardianship without the consent of her guardian or any other person legally authorized to consent on behalf of such guardian of minor. Such person can be said to have committed an offence of kidnapping punishable under Section 363 of the Indian Penal Code. Similarly an offender can be said to have committed an offence punishable under Section 366 IPC if proved on record that the prosecutrix was kidnapped/abducted by the accused intentionally and deliberately to compel her to solemnize marriage with her against her will or forced to have illicit intercourse with him.

19. Now if coming to the commission of offence punishable under Section 376 of the Indian Penal Code in a case of minor, the commission of such an offence can be inferred once it is established that the prosecutrix has been subjected to sexual intercourse and such an act may be with her consent. However, in a case where the prosecutrix is not minor, the prosecution is required to plead and prove beyond all reasonable doubt that such carnal intercourse with her was against her will and without her consent.

20. Now if coming to the legal principles attracted in a case of this nature, in ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393***, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in ***Vimal Suresh Kamble*** Vs. ***ChaluverapinakeApal S.P. and another, (2003) 3 SCC 175***. While placing reliance on

this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> *"15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."*

21. It is again well settled at this stage that in a case of this nature the age aspect of the prosecutrix assumes considerable significance.

22. Now if coming to the facts of this case, the prosecution claims the date of birth of the prosecutrix as 10.11.1992. To substantiate this part of its case the prosecution has placed reliance on the secondary school examination certificate Ext.PW20/D. This is a photocopy of the certificate. In this document her date of birth is entered as 10.11.1992. It is the IO PW20 the then SI/SHO, Police Station, Nurpur has proved this documents in his statement. The only witness examined in this behalf is PW14 Yashpal Singh. As per his version 10.11.1992 is the date of birth of the prosecutrix recorded in the school record. He further tells us that such age of prosecutrix has been recorded on the basis of school leaving certificate issued by the school where she was previously studying. The record of that school where initially the prosecutrix was admitted has, however, not been produced. Interestingly enough, her mother while in the witness box as PW3 has stated that at the time of alleged occurrence the prosecutrix was 16 and ½ years of age. Such is her statement in examination-in-chief. Not only this, but her father PW2 has also stated that while the age of his son at the relevant time was 19 years, the daughter (prosecutrix) was of 16 years. Significantly the radiological age of of the prosecutrix as opined by Dr. Raman Sharma PW21 was 17-18 years at the relevant time.

23. Above all there is nothing on record to suggest as to who has produced Ext.PW20/D before the police. It is the I.O.PW20 who has tendered the same in evidence while in the witness box. As a matter of fact, the evidence as to who has produced this document and when taken into possession by the Investigating Officer should have been produced. The same was required to be taken in possession vide seizure memo and in presence of the witnesses. For want of such evidence this document cannot be believed as legal and acceptable evidence. PW14 Yashpal Singh has simply stated that as per the school record the date of birth of the prosecutrix is 10.11.1992. As per his further testimony the same was entered in the record on the basis of school leaving certificate issued by the previous school. This witness is also of no help to the prosecution. The certificate Ext.PW20/D, as such, cannot be taken as a valid proof qua the date of birth of the prosecutrix. It has been held by this Court in ***Ramesh Sharma*** versus **State of Himachal Pradesh, 2013(3) Shim.LC 1386** that in order to determine the age of a person with the assistance of the school record it is the admission register and admission form filled up at the time of admission of a child in the school where he or she is initially admitted, an authentic proof thereto. This judgment reads as follow:

> "24. Hon'ble Apex Court in ***State of Chhatisgarh Vs. Lekhram, AIR 2006 SC 1746***, has held that the register maintained in a school is admissible evidence to prove the date of birth of the person concerned, if it is proved that the same has been maintained by the authorities in the

discharge of their public duty and there is evidence to show as to who had disclosed the date of birth of such person at the time of his/her admission in the school."

24. If coming to the another date of birth certificate Ext.PW11/A issued by PW11 Secretary Gram Panchayat, Gagwal the date of birth of prosecutrix therein has been recorded as 10.11.1991. PW11 in his examination-in-chief has stated that he has issued this certificate on the basis of the entries made in the Birth and Death register. Therefore, as per this document the date of birth of the prosecutrix is not 10.11.1992 as claimed by the prosecution and rather 10.11.1991. Therefore, the prosecution itself has produced contradictory evidence qua this aspect of the matter. On the other hand the judgment in *Ramesh Sharma's* case, cited supra, qua this aspect reads as follows:

"26. In Birad Mal Singhvi v. Anand Purohit [(1988 Supp. SCC 604], this Court held:

"To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

27.Similar is the ratio of the judgment again that of Hon'ble Apex Court ***Madan Mohan Singh and others*** *Vs.* ***Rajni Kant and another, AIR 2010 SC 2933***, which reads as follows:

"18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram &Ors. Vs. Dawalatshah&Anr. AIR 1971 SC 681; Harpal Singh &Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; BablooPasi Vs. State of Jharkhand &Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh &Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases."

25. In view of what has said supra, on the basis of the documentary evidence produced by the prosecution it cannot be believed by any stretch of imagination that the prosecutrix is born on 10.11.1992.

26. Therefore, as per radiological age also, the age of the prosecutrix at the relevant time was 17-18 years. The present, as such, is not a case where it is proved beyond all reasonable doubt that the prosecutrix at the time of her elopement with the accused was minor below 18 years of age for the purpose of commission of offence punishable under Section 363 and 366 IPC and 16 years for that under Section 376 IPC.

27. On the other hand, as per her own admission she was in love with accused Amit Kumar. She admit letter Ext.D1 when put to her in cross-examination having been written by her to the accused. As per this letter, she was not only with love with the accused but interested in solemnizing marriage also with him. Her conduct that on 23.5.2008 when went to school she had taken extra clothes in her bag, she went to the house of her friend, changed her school dress there and worn the clothes she had taken with her show that she had gone with every preparation to flee away with the accused. At Jassur she acted as advised by accused Arpan Kumar and accompanied by him she went to Railway Station there. The principal accused Amit met her there and she went to Pathankot in the company of both accused in a train. She lived there during night in the company of accused Amit Kumar in room No. 106 of Ved Lodge. There is no denial thereto and rather it is the own case of the prosecution that she cooperated with the accused at each and every stage after her elopement with him. Therefore, when it is held that she was not below 16 years of age, the present is not a case where it can be believed that she was enticed away by the accused and rather a consenting party to her elopement with them. Therefore, even if it is believed that she was subjected to sexual intercourse during that night by accused Amit Kumar, such an act was with her consent and as per her will and not forcible.

28. The medical evidence if perused though PW22 Dr. Arti Gupta in her examination-in-chief has not ruled out the possibility of sexual intercourse with the prosecutrix, however, when cross-examined the suggestion that there was no evidence of sexual assault committed upon the prosecutrix has been admitted as correct. Above all both doctors PW15 and PW22 have not noticed any injuries or mark of struggle on the person of the prosecutrix. Therefore, even if she was subjected to sexual intercourse such an act was not forcible or against her will and without her consent and rather a consensual act.

29. The present is a case where the age of the prosecutrix at the relevant time was above 16 years which as per the medical evidence may even be 17-18 years. The accused was also of tender age being 19 years old at that time. They both were also in love with each other.

30. As already noticed the remaining prosecution witnesses being formal qua the recovery of the prosecutrix, entrustment of her custody to PW2 and qua identification of Ved Lodge and the rooms where the accused and prosecutrix allegedly stayed are formal and there evidence at the most could have been used as link evidence had the prosecution otherwise been able to bring guilt home to the accused beyond all reasonable doubts.

31. Similarly the official witnesses are also formal having remained associated with the investigation of the case in one way or the other. Therefore, looking the present case from any angle, the involvement of the accused in the commission of alleged offence is not established beyond all reasonable doubt. Learned trial Judge has failed to appreciate the evidence available on record in its right perspective and got swayed by passion and also for the reason that the offence is against a woman and the accused had subjected the prosecutrix, allegedly a minor girl to sexual intercourse. The findings so recorded being based on surmises and conjectures are, however, neither legally nor factually sustainable. The above poser, therefore, is answered accordingly.

32. The upshot of the discussion hereinabove would therefore be that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The accused, therefore, is entitled to benefit of doubt and ultimately acquittal.

33. In view of what has been stated hereinabove, the present appeal is accepted and the impugned judgment set aside. Consequently, the conviction of the accused is also quashed and set aside. During the pendency of the case in the trial Court, he was on bail and after his conviction and sentence by learned trial Court is in judicial custody and serving out the sentence for the last more than eight months. Therefore, he is ordered to be set free forthwith, if not required in any other case.

34. The appeal is accordingly allowed and stands disposed of.

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

Bimla Devi and others .....Petitioners

Versus

Financial Commissioner (Appeals) and another .....Respondents

CMPMO No. 118 of 2016
Reserved on 11.07.2018
Decided on: 20.08.2018

Limitation Act, 1963- Section 5- Delay- Condonation – Grounds – Financial Commissioner condoning delay of 30 years in filing revision – Petition against – Order of Financial Commissioner condoning inordinate delay unreasoned – Petition allowed – Matter remanded with direction to Financial Commissioner to consider averments, documents and other material on record afresh and dispose it of by reasoned order. (Paras-8 and 9)

For the petitioners: Mr. Lovneesh Kanwar, Advocate.

For the respondents: Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals, for respondent No. 1.

Mr. G.S. Rathore, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge.

The present petition, under Article 227 of the Constitution of India, has been maintained by the petitioner, against the order dated 30.11.2015, passed by learned Financial Commissioner, Shimla, H.P, whereby an application, No. 22 of 2016, under Section 5 of the Limitation Act, read with Section 151 CPC, filed by respondent No. 2 in Revision Petition No. 17 of 2015, has been allowed and the delay of more than 30 years has been condoned.

2. Briefly stating facts giving rise to the present petition are that respondent No. 2 filed an application before the learned Financial Commissioner (Appeals), Shimla, H.P., under Section 5 of the Limitation Act, read with Section 151 CPC, for condonation of delay in filing the revision petition. Wherein it has been averred that being one of the legal heir of

the trustee, he was not aware about the said trust and he only came to know about that fact on 02.11.2014, when he got the photocopy of trust deed in the old wooden box of his father, while searching some other documents. Thereafter he applied for the copy of mutation, which was obtained on 29.12.2014 and filed the revision petition without any further delay. Thus, the delay cannot be said to be intentional and a prayer to condone the same has been made.

3. In reply to the application, it has been averred that the respondent No. 2 has no locus standi to file the present application, as he is a stranger to the land in dispute and has misused the judicial process by filing the same. It has been denied that respondent No. 2 was not aware about the mutation No. 384, as the management was contesting the said issue before different Courts. Lastly, it has been prayed that as the application is hopelessly barred by limitation and no sufficient cause has been shown by the petitioner for condonation of delay, the same be dismissed with heavy costs.

4. However, learned Financial Commissioner (Appeals), Himachal Pradesh, vide order dated 30.11.2015 condoned the delay in filing the revision petition and after admitting the case, listed the same for arguments on 29.03.2016, hence the present petition.

5. Learned counsel for the petitioners has argued that the order passed by the learned Financial Commissioner (Appeals) is without jurisdiction and has been passed in cursory manner. He has further argued that the learned Financial Commissioner has not taken into consideration the delay, laches and merits of the case, which was required to be taken into consideration while allowing the application for condonation of delay. He has argued that the facts on record clearly show that there are many other tenants, who had also been given proprietary rights and those have become final, as in case of the present petitioner, but for some extinguish reasons the application has been maintained by respondent No. 2 and the learned Financial Commissioner has condoned the extraordinary delay of more then 30 years for entertaining the revision petition. On the other hand, learned counsel for respondent No. 2 has argued that the learned Financial Commissioner has powers to entertain the revision petition at any time and so the impugned order is as per law and needs no interference. In rebuttal, learned counsel for the petitioner has argued that the delay was required to be condoned, if it should be explained reasonably and sufficiently, however the learned Financial Commissioner without any reasons has condoned the delay of more then 30 years and the order passed is without any jurisdiction.

6. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail.

7. The ground taken by respondent No. 2 before the learned Financial Commissioner for condonation of delay are that earlier he was not aware about the fact that he was legal heir of the trustee and only came to know about said fact on 02.11.2014, when he got the photocopy of trust deed in the old wooden box of his father. Thereafter he applied for the copy of mutation and filed the revision petition alongwith application for condonation of delay.

8. While considering the application for condonation of delay, learned Financial Commissioner (Appeals) has taken into consideration the fact that there is no period of limitation prescribed to entertain the revision petition and it can be entertained at any time. Learned Financial Commissioner while coming to the conclusion that there is prima facie illegality in the mutation order, has not discussed what is the material before him to come to this conclusion. At the same point of time, learned Financial Commissioner has not given any findings why he has condoned the delay of more then 30 years in moving the application

and without there being any evidence on record on behalf of respondent No. 2, the application has been allowed.

9. This Court finds that as there are no reasons given by the learned Financial Commissioner while allowing the application, the present petition is required to be allowed to some limited extent, i.e. learned Financial Commissioner (Appeals) is directed to take into consideration the documents, averments and other material on record afresh and after getting the averments made by respondent No. 2 before him to be substantiated by some documents/evidence, pass a reasoned order. Ordered accordingly. Parties are directed to appear before the learned Financial Commissioner (Appeals) on **10th September, 2018**.

10. The petition, so also pending miscellaneous application(s), if any, stands disposed of.

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

Prem Singh through his LR Parsino Devi .....Petitioner
Versus
Kuldeep Singh .....Respondent

CMPMO No. 538 of 2017
Reserved on 01.08.2018
Decided on: 20.08.2018

Code of Civil Procedure, 1908- Order VI Rule 17- Order VIII Rule 1- Amendment of Plaint – Written statement to amended plaint- Filing of – Whether can be denied? –Held-No- After remand, trial court fixing suit for final arguments – Defendant seeking to file written statement to amended plaint – Trial Court refusing prayer on ground that no such concession given to defendant in remand order of District Judge – Petition against – Held, when Court allows party to amend plaint, defendant has right to file written statement to amended plaint – Otherwise it would prejudice right of defendant – Petition allowed – Order set aside – Matter remanded – Defendant directed to file written statement to amended plaint within specific time.

(Paras- 8 and 9)

For the petitioner: Mr. Romesh Verma, Advocate.
For the respondent: Mr. Ashwani Kaundal and Mr.Rahul Thakur, Advocates.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge.

The present petition, under Article 227 of the Constitution of India, has been maintained by the petitioner, against the order dated 10.10.2017, passed by learned Senior Civil Judge, Court No. 1, Hamirpur, in Civil Suit No. 92 of 2005, with a prayer to quash and set aside the same, being illegal and wrong and petitioner/defendant (hereinafter to be called as "the defendant") may be permitted to file amended written statement to the amended plaint.

2. Briefly stating facts giving rise to the present petition are that the respondent/plaintiff (hereinafter to be called as "the plaintiff") filed a suit under Order 7, Rule 1 and Sections 9, 26 of CPC and Sections 34, 38 and 39 of the Specific Relief Act for demarcation with consequential relief of permanent prohibitory injunction, on the ground that he is owner in possession of the land comprised in Khata No. 58, Khatauni No. 213, Khasra No. 1046/292, area 333.75 square meter and the defendant has no right to raise any kind of construction, destroy the boundary and to cause any obstruction in getting the boundary redefined.

3. The defendant, in written statement specifically submitted that the plaintiff has no cause of action to file the present suit. It has been alleged that the plaintiff has suppressed the material facts from the Court, as the land was jointly purchased by both the parties, but the same was partitioned before raising construction by the defendant. The defendant has raised construction in accordance with the site plan approved by the competent authority and even proper set backs has been left and the suit land is covered by a boundary wall. It has been denied by the defendant that plaintiff has ever used any path over his land. Lastly, it has been prayed by the defendant that as he has raised construction within the four walls of the boundary, there is no question of re-defining the boundary, as the same are fixed at the time of partition/settlement and the suit deserves dismissal.

4. Learned trial Court, vide judgment dated 25.03.2013, decreed the suit of the plaintiff. Feeling dissatisfied, the defendant preferred an appeal before the learned first Appellate Court, which was allowed and the judgment and decree passed by the learned trial Court has been set aside/remanded, with a direction to record findings on all the issues afresh and the parties were directed to appear before the learned trial Court on 10.10.2017. However, on the said date, learned counsel for the defendant sought an opportunity to file amended written statement to the amended plaint, but the prayer made by the learned counsel for the defendant has been declined and the case was fixed for hearing/arguments on 14.12.2017. Hence the present petition.

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

6. Learned counsel for the petitioner has argued that the learned trial Court has committed grave illegality in not allowing the defendant to file amended written statement when the plaint was amended and thus, the impugned order deserves to be set aside. On the other hand, learned counsel for the respondent has argued that the defendant never made a prayer to file amended written statement and so the learned trial Court has not committed any illegality while passing the order.

7. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail.

8. The learned trial Court while dismissing the prayer of the defendant in not allowing him to file amended written statement to the amended plaint has only taken the view that since the appeal has been remanded for disposing of the matter afresh and there is no order to allow the defendant to file amended written statement to the amended plaint, so it cannot be granted. However, this was not the correct view, when the Court has allowed the party to amend the plaint, the defendant has right to file amended written statement to the amended plaint, as otherwise it would prejudice the right of the defendant, which would not be in the interest of justice.

9. Accordingly, the present petition is allowed and impugned order is set aside and learned trial Court is directed to grant two weeks' time to the petitioner-defendant to file amended written statement to the amended plaint and thereafter dispose of the matter in

accordance with law. However, in case the amended written statement is not filed within the aforesaid period, the right of the petitioner-defendant to file the same will automatically stands closed and the learned trial Court will proceed with the matter on the basis of written statement already on record. No order as to costs. Parties are directed to appear before the learned trial Court on **10th September, 2018**.

10. The petition, so also pending miscellaneous application(s), if any, stands disposed of accordingly.

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

Shyam Lal .....Appellant
Versus
Rattan Lal through LRs and another .....Respondents

RSA No. 44 of 2006
Reserved on: 08.08.2018
Decided on: 20.08.2018

Service Law- Shri Naina Devi Ji Employees Service Bye Laws, 1994 (Bye Laws)- Second Schedule - Appointment of Electrician – Bye Laws prescribing appointment to post of Electrician by way of selection i.e. direct recruitment – Trust however making appointment by promotion on basis of report of Departmental Promotion Committee - Held appointment wrong being contrary to bye Laws. (Para-14).

Service Law- Shri Naina Devi Ji Employees Service Bye Laws, 1994 (Bye Laws)- Second Schedule- Plaintiff not fulfilling eligibility criteria for appointment as Electrician - Whether can challenge appointment of promoted candidate? – Held- Yes – Bye Laws provide for direct recruitment to post of electrician, but when Trust promoted junior official in relaxation of bye laws, plaintiff has right to challenge such appointment particularly when he was working as Electrician Helper since decade. (Para-15).

For the appellant : Mr. Bimal Gupta, Senior Advocate with Mr. Vineet Vashistha and Ms. Rubeen Bhatt, Advocates.
For the respondents : None for respondents No. 1(a) to 1(c), though served.
Mr. Rajiv Rai, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge

The present regular second appeal has been maintained by the appellant, who was defendant No. 2 before the learned trial Court (hereinafter to be called as "defendant No. 2"), laying challenge to the judgment and decree, dated 21.11.2005, passed by learned District Judge, Bilaspur, H.P., in Civil Appeal No. 8 of 2003, whereby the judgment and decree, dated 31.10.2002, passed by learned Sub-Judge 1st Class, Bilaspur, H.P, in Civil Suit No. 116/1 of 1998, was affirmed, wherein suit of the plaintiff/Rattan Lal was decreed.

2. Briefly, the facts, which are necessary for determination and adjudication of the present appeal are that respondent No. 2 (herein)/plaintiff (hereinafter to be called as "the plaintiff") filed a suit for declaration to the effect that the order of the Chairman-cum-Sub Divisional Magistrate, Temple Trust Shri Naina Devi Ji, District Bilaspur, H.P., dated 28.06.1998 is illegal and not binding upon the plaintiff, with a further prayer to restrained defendant No. 2 from functioning as Electrician. The plaintiff is his plaint has averred that on 14.04.1981, he was appointed as Electrician Helper as per seniority list, dated 31.03.1998 (Ext. P-12) and his name is shown at serial No. 6 in the list. Whereas, defendant No. 2 was appointed as Electrician on daily wages about 12 years ago, however his name has not been shown in the seniority list circulated amongst the employees. It has been further averred in the plaint that defendant No. 1 with a malafide intention to help defendent No. 2, ignored the seniority of the plaintiff and issued order of appointment on 28.06.1998 (Ext. P-13), vide which, defendant No. 2 was promoted as Electrician in the pay scale of Rs. 950-1800/-, therefore, the same is illegal and not binding upon the plaintiff, hence he filed the present suit.

3. The suit of the plaintiff was contested by the defendants by filing joint written statement, wherein appointment of the plaintiff as Electrician has been denied and It has been pleaded that initially the plaintiff was appointed as Langri (Helper) in the Temple Trust and the alleged seniority list is not a seniority list of the specific trade, but it is stated to be the seniority for all the employees of the Temple. It has been further pleaded that initially the plaintif was appointed as a Langri (Helper) in the langer of the Temple, whereas defendant No. 2 was appointed as Assistant Electrician on 06.01.1993, as defendant No. 2 was matriculate and the diploma holder in the trade of electrician, on the other hand, the plaintiff was primary pass, therefore, he was not qualified for the appointment against the pst of Electrician. Certain preliminary objections qua maintainability, non-joinder of necessary parties and estoppel were also raised by the defendants.

4. By filing replication, the contents of the plaint were reiterated. The learned trial Court on 06.01.2000 framed the following issues for determination and adjudication:

"**1. Whether the order of Chairman-cum-S.D.M., Bilaspur, H.P. as Temple Trust, shri Naina Devi Ji, District Bilaspur, H.P., dated 28.06.1998 vide which defendant No. 2 has been promoted as Electrician is illegal, wrong and without jurisdiction? OPP**

2. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP

3. Whether the suit is not maintainable in the present form?OPD

4. Whether the plaintiff is not eligible for the post of Electrician, so he has no right to challenge the order dated 28.06.1998?OPD

5. Whether the suit is bad for non-joinder of necessary parties?OPD

6. Whether the plaintiff is estopped to file the present suit by his act, conduct, ommission and deeds? OPD

7. Relief."

5. Learned trial Court after deciding issues No. 1 & 2 in affirmative, issue No. 4 partly yes and issues No. 3, 5 and 6 in negative, decreed the suit of the plaintiff. Subsequently, defendant No. 2 maintained an appeal before the learned first Appellate Court, which was 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 question of law:

"Whether the plaintiff himself being not eligible and qualified for appointment to the post against which respondent Rattan Lal had been appointed, could not have lawfully challenged his appointment and hence the suit was not maintainable?

6. Mr. Bimal Gupta, learned Senior Counsel appearing on behalf of the appellant has argued that the appellant was promoted as per rules, whereas the plaintff was not at all eligible to be appointed as Electrician, as he was not qualified for the said post and the learned Courts below have failed to consider this aspect, so the appeal is required to be allowed. On the other hand, Mr. Rajiv Rai, Advocate, has argued that defendant No. 2 has accepted the judgments, passed by the learned Courts below and, therefore, the present appeal be dismissed. No one has put in appearance on behalf of the legal representatives of deceased respondent No. 1, Rattan Lal, despite service, i.e. after bringing them on record. In rebuttal, learned Senior Counsel appearing on behalf of the appellant has argued that the written statement filed before the learned Court below was joint of the appellant/defendant No. 1 and respondent No. 2/defendant No. 1, therefore, respondent No. 2 cannot go behind the written statement having filed by it.

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

8. Plaintiff, Rattan Lal, has appeared in the witness box as PW-1. According to him, he was working as electrician w.e.f. 14.04.1981, however, on 31.03.1998 a seniority list was circulated, in which, his name was figured at serial No. 6. As per the plaintiff, Shyam Lal, defendant No. 2, has been working as Electrician Helper on daily wages and is 12 years junior to the him. According to the plaintiff, his services were regularized in the year 1996 and as per the seniority, plaintiff was to be promoted, however, defendant No. 2 was promoted as Electrician by ignoring the bye laws. In his cross-examination, the plaintiff has admitted that he was initially appointed as Langri and is not having any diploma in electrician trade. He denied that defendant No. 2 was having electrician diploma. He has also denied that prior to 1998, defendant No. 2 was working as Electrician.

9. The plaintiff has also placed on record Ext. P-1 to Ext. P-30. Ext. P-1 is regularisation office order dated 05.07.1996. Ext. P-2 to Ext. P-11 are the letters written by the Temple Incharge to the plaintiff from time to time, wherein the designation of the plaintiff has been mentioned as Electrician Helper. Ext. P-12 is the seniority list of the employees of the Trust. Ext. P-15 to Ext. P-17 are the notice, receipt and acknowledgement respectively. Ext. P-25 is the photo copy of the middle standard certificate of Rattan Lal, Plaintiff. Ext. P-13 is the office order, dated 28.06.1998 issued by the Chairman, Temple Trust, whereby on the recommendation of the DPC, defendant No. 2, Electrician Helper was promoted as Electrician in the pay scale of Rs. 950-1800/- plus allowances on the terms and conditions as contained in the office order.

10. The defendants have not appeared in the witness box. However, they filed the Bye Laws pertaining to the Temple, i.e. Shri Naina Devi Ji Employees Service Bye Laws, 1994.

11. It is evident from the records that the plaintiff, Rattan Lal was regularized in the pay scale of Rs. 750-1410/-, w.e.f. 01.01.1996, vide Ext. P-1, office order dated 05.07.1996, wherein his name was entered at serial No. 6. Ext. P-12, seniority list, pertaining to Class-IV employees of Shri Naina Devi Ji Temple Trust, wherein plaintiff has been shown as Electrician Helper at Serial No. 6 and his date of appointment is mentioned as 14.04.1981 and his educational qualification was primary class. Whereas, name of defendant No. 2 has been shown at serial No. 61, as Electrician Helper and his date of

appointment has been shown as 08.01.1993 and his educational qualification is stated to be matriculate with diploma in electrician trade.

12. Part-II of Bye-Laws deals with Number, Character, Classification of posts and Appointment and Rule 6 of these bye laws deals with Qualifications for mode of recruitment as specified in the Second Schedule which reads as under:

> **"If qualification for recruitment to a post or class of posts, the method by which a post or class of posts may be filled the proportion of vacancies to be filled by each such method and in case of recruitment by promotion the class of employees who and the conditions subject to which they shall be eligible for such promotion shall be such as are specified in the Second Schedule."**

13. Second Schedule of Part-II of Rule 6 of Bye Laws deals with mode of recruitment. In the Second Schedule Part-II of Rule 6 the post of Electrician has been mentioned at Sr. No. 17, as Grade-III post, in the scale of Rs. 950-1800/- and is a selection post. Mode of appointment has been mentioned by direct recruitment and qualification in column No. 6 of the Schedule for such direct appointment has been mentioned and essential qualification has been fixed matriculation with certificate of successful completion of training in the trade from recognised I.T.I.

14. In view of Rule 6 of Second Schedule, the appointment to the post of Electrician in the pay scale of Rs. 950-1800/- as per Bye Laws has to be made by the direct recruitment, not by the promotion. However, in the present case, defendant No. 2 has been promoted as Electrician in the pay scale of Rs. 950-1800/- plus allowances on the recommendation of DPC, which itself appears to be against the Bye Laws. Accordingly, while passing the order, Ext. P-13, the Chairman of Temple Trust Shri Naina Devi Ji has ignored the relevant provisions of the Bye Laws and has wrongly promoted defendant No. 2 as Electrician.

15. The seniority list shows the plaintiff as Electrician Helper. Meaning thereby, that the plaintiff was also having legitimate expectancy to be promoted as Electrician, if the post was to be filled up by promotional basis, as he was working as Electrician Helper (meaning thereby that he was performing the duties of the Electrician for decade) and promoting another person by ignoring the rules, when the rules provides for direct recruitment to the post of Electrician, has resulted into injustice to the plaintiff. Accordingly, substantial question of law is answered holding that though the plaintiff himself was not eligible and qualified for appointment to the post of defendant No. 2, however when defendant No. 2, being his ten years junior was promoted and when the plaintiff was also working as Electrician Helper for decade, he was also having expectancy to be promoted, in case the promotion had to be made by relaxing of rules, therefore, the plaintiff has cause to challange the appointment of defendant No. 2 and the substantial question of law is answered accordingly.

16. Before parting, this Court after giving deep thought to the present facts and circumstances of the case, finds that, as the appellant is working on the post of Electrician from many years, to remove him at this moment, will not be appropriate and at the same point of time, respondent No. 1, deceased Rattan Lal, who was having right to be promoted if the post was to be filled up on the basis of promotion in relaxion of rules (which otherwise provides for direct recruitment), has a preferential right to appellant. So, at this stage, this Court finds that as respondent No. 1/Rattan Lal has expired, it will be appropriate to allow appellant/Shyam Lal to continue with the post of Electrician with consequential benefits from the date of the death of respondent No. 1/Rattan Lal. However, as the promotion of appellant/Shyam Lal was against the Rules, he will be paid the salary of Electrician Helper

till the date of death of respondent No. 1/Rattan Lal and after his death all the consequential benefits of the post of Electrician and deceased Rattan Lal be paid the salary of the post of Electrician with consequential benefits from the date of Shyam Lal was promoted, till he expires.

17. With these observations, the present appeal stands disposed of. Leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

LAC Parvati Hydro Electric Project ....Appellant.
Versus
Jeet Ram and others ....Respondents

RFA Nos. 155 to 162 of 2012 with Cross Objections No. 38 of 2018 in RFA No. 156 of 2012, Cross Objections No. 37 of 2018 in RFA No. 157 of 2012, Cross Objections No. 39 of 2018 in RFA No. 159 of 2018, Cross Objections No. 852 of 2012 in RFA No. 162 of 2012
Date of Decision 21st August, 2018.

Land Acquisition Act, 1894- Sections 18 & 23-Acquistion of Land alongwith structures-Compensation of structures etc. –Reference – Determination - Land and built-up structures acquired for public purpose – Supplementary awards passed by Collector with respect to buildings on basis of assessment done by Public Works Department (PWD) –Reference Court enhancing compensation by giving increase of 25% towards hike in cost of construction on valuation of structures assessed by PWD- RFA- PWD determining value of structures by making deductions towards depreciation on actual assessment but without considering inflation in cost of construction- Held -After calculating cost of construction at rates prevalent at time of notification or working out present value of material, there is no scope of further deductions- valuation of structures done by PWD by making deduction towards depreciation on actual assessment, is wrong – Award of reference court set aside – High Court allowed compensation on basis of assessment of valuation done by District Rural Development Authority. (DRDA). (Paras 16 & 17)

Cases referred:

Narendra and others vs. State of Uttar Pradesh (2017)9 SCC 426
Union of India vs. Savji Ram (2004)9 SCC 312
Reserve Bank of India Balgalore vs. S. Mani and others (2005)5 SCC 100
Anvar P.V. vs. P.K. Basheer and others (2014)10 SCC 473
Laxmi Bai vs. Bhagwant Bua ((2013)4 SCC 97
Gian Chand and others vs. State of Haryana (2013)14 SCC 420
Basawaraj and another vs. Special Land Acquisition Officer (2013)14 SCC 81

For the Appellant(s): Mr.K.D.Shreedhar, Sr. Advocate with Ms.Shreya Chauhan, Advocate, for appellants in RFA No. 155 of 2012 to 162 of 2012.

For the Cross Objector(s):	Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate for cross objectors in Cross Objections No. 37, 38, 39 of 2018 and Mr. Sunil Mohan Goel, Advocate, for cross objectors in Cross Objections No. 852 of 2012.
For the Respondent(s):	Mr. Sunil Mohan Goel, Advocate, for respondents in RFA No. 155, 158, 162 of 2012 and Mr. Bimal Gupta, Sr. Advocate with Mr.VineetVashishat, Advocate for respondents in RFA Nos. 156, 157, 159 to 161 of 2012.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

These appeals and cross objections, arising out of awards dated 12.5.2011, passed by the Reference Court in the land reference petitions No. 84, 85, 86, 87, 88, 89, 90, 91 of 2008, are being decided together as common question of law and facts are involved in these cases.

2. Land acquisition proceedings for acquiring the land and structures standing thereon for the purpose of constructing Parvati Hydro Electric Project were initiated by issuing notification dated 22.3.2003 under Section 4 of the Land Acquisition Act (in short 'the Act') and after completing the proceedings, vide award Nos. 19 and 20 dated 6.1.2005 announced by the Land Acquisition Collector under Section 11 of the Act compensation for lands only was awarded. Thereafter on the basis of assessment carried on by the Land Acquisition Collector supplementary awards Nos. 21-A and 22-A dated 28.2.2007 were announced qua structures standing on the land acquired vide awards No. 19 and 20 supra.

3. It is undisputed fact that during exercise being undertaken by the Land Acquisition Collector for evaluation of structures, the assessment of the value of the structures was assessed by HPPWD through its Executive Engineer, which was objected by claimants by filing the application before Deputy Commissioner, Kullu who, in response thereto, had directed the District Rural Development Authority (DRDA) to carry out the assessment of the structures in question. In pursuant to the said directions, DRDA, through its Assistant Engineer (SDO) had carried out the assessment of the structures in question. Pending evaluation by Land Acquisition Collector, re-assessment of extra cost of these structures on prevailing market rates on the date of notification under Section 4 of the Act was also carried out through Executive Engineer PWD and after considering the assessment as well as re-assessment, Land Acquisition Collector had awarded the compensation to the owners/claimants.

4. Aggrieved by the compensation awarded by the Land Acquisition Collector, owners/claimants had preferred the land reference petitions before the Reference Court. These reference petitions were consolidated in two sets by the Reference Court and evidence was led only in two main lead reference petitions which is identical in nature. In reference petition(s) preferred against Award No. 21-A, claimants have examined PW1 Dinesh Sain Draftsman DRDA, PW2 Tilak Raj Assistant Engineer DRDA, PW3 Ridhi Singh District Revenue Accountant from DC Office and two claimants PW4 Jeet Ram (Claimant in RFA No. 155 of 2012, reference petition No. 82 of 2008) and PW5 Yagya Dev (claimant in RFA No. 158 of 2012, reference petition No. 87 of 2008) and claimants have also placed reliance on evaluation reports Ext.PA, Ext.PB, Ext.PC, Ext.PD and Ext.PE by the same on record in evidence through statements of their counsel and also placed reliance on assessment report

Ext.PW1/B, whereas in reference petition(s) preferred against award No. 22-A, witnesses PW1, PW2 and PW3 are the same persons with identical deposition and claimant PW4 Lal Chand (claimant in RFA No. 156 of 2012 and reference petition No. 85 of 2008) has been examined and reliance has also been placed on evaluation reports Ext.PA, Ext.PB and Ext.PC by placing the same on record. Evidence in both set of reference petitions is identical in nature.

5. The beneficiary has not chosen to lead any evidence except tendering the valuation reports Ext.DA and Ext.DB i.e. assessment carried out by X-En PWD in evidence.

6. Learned counsel for the appellant has canvassed that learned Additional District Judge, Fast Track Court, Kullu has committed mistake in awarding 25% enhancement to the valuation of the structures assessed by Executive Engineer PWD as the said enhancement is without any basis and ignoring the fact that Land Acquisition Collector, at the time of passing the supplementary award, had already assessed the compensation after making the addition of 10% extra cost on the market rate prevailing at the time of issuance of notification under Section 4 of the Act.

7. Learned counsel for the claimants/cross objectors submit that though learned Additional District Judge has awarded 25% enhancement on the value of structures assessed by X-En PWD on the ground that value of the houses has been assessed by PWD after making deduction on the actual assessment made by Executive Engineer and also that as the construction cost has increased after 2000, no extra cost has been added in the total amount assessed by PWD, however, there is no basis restricting the said enhancement at the rate of 25% particularly when another official and reliable assessment is on record and therefore award of compensation by the Land Acquisition Collector on the basis of assessment of Executive Engineer (PWD) cannot be maintained for the evidence led by claimants before the Reference Court and further that there is difference in the value of structures assessed by PWD and DRDA and no evidence in support of assessment carried out by Executive Engineer (PWD) has been led by the beneficiary, whereas claimants have examined PW1 Dinesh Saini Draftsman, PW2 Tilak Raj as well as PW3 Ridhi Singh District Revenue Accountant for substantiating the valuation carried out by DRDA, and thus amount of compensation cannot be based on the assessment carried out by Executive Engineer (PWD), but the award deserves to be modified by granting compensation on the basis of assessment carried out by DRDA.

8. It is further convassed that one of nine claimants, namely Kiran Rekha Sood, whose structure was also acquired along with present claimants, had also assailed award announced by Land Acquisition Collector, wherein learned Additional District Judge, Fast Track Court Kullu in reference petition No. 93 of 2008 vide award dated 6.8.2010 had awarded the compensation on the basis of assessment carried out by DRDA and said award has been upheld by this High Court in RFA No. 415 of 2010 and as the land as well as structures belonging to Kiran Rekha Sood were acquired along with present claimants in pursuant to the one and the same notification dated 23.3.2003 issued under Section 4 of the Act, situated in one and the same area for the same purpose, the claimants are also entitled for identical method of valuation for awarding compensation for their structures.

9. For awarding compensation on the analogy of Kiran Rekha Sood's case, claimants have also relied upon pronouncement of the Apex Court passed in ***Narendra and others vs. State of Uttar Pradesh*** reported in ***(2017)9 SCC 426*** specially referring following observations:-

> ***"6. The matter can be looked into from another angle as well, viz., in the light of the spirit contained in Section28A of the Act. This provision reads as under:***

> ***"28-A Re-determination of the amount of compensation on the basis of the award of the Court-(1) Wherein an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section II, the persons interested in all the other land covered by the same notification under Section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under Section 18, by written application to the Collector within three months from the date of the award of the court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court……"***

7.It transpires from the bare reading of the aforesaid provision that even in the absence of exemplars and other evidence, higher compensation can be allowed for others whose land was acquired under the same Notification.

8) The purpose and objective behind the aforesaid provision is salutary in nature. It is kept in mind that those land owners who are agriculturist in most of the cases, and whose land is acquired for public purpose should get fair compensation. Once a particular rate of compensation is judicially determined, which becomes a fair compensation, benefit thereof is to be given even to those who could not approach the court. It is with this aim the aforesaid provision is incorporated by the Legislature. Once we keep the aforesaid purpose in mind, the mere fact that the compensation which was claimed by some of the villagers was at lesser rate than the compensation which is ultimately determined to be fair compensation, should not be a ground to deny such persons appropriate and fair compensation on the ground that they claimed compensation at a lesser rate. In such cases, strict rule of pleadings are not be made applicable and rendering substantial justice to the parties has to be the paramount consideration. It is to be kept in mind that in the matter of compulsory acquisition of lands by the Government, the villagers whose land gets acquired are not willing parties. It was not their voluntary act to sell of their land. They were compelled to give the land to the State for public purpose. For this purpose, the consideration which is to be paid to them is also not of their choice. On the contrary, as per the scheme of the Act, the rate at which compensation should be paid to the persons divested of their land is determined by the Land Acquisition Collector. Scheme further provides that his determination is subject to judicial scrutiny in the form of reference to the District Judge and appeal to the High Court etc. In order to ensure that the land owners are given proper compensation, the Act provides for 'fair compensation'. Once such a fair compensation is determined judicially, all land owners whose land was taken away by the same Notification should become the beneficiary thereof. Not only it is an aspect of good governance, failing to do so would also amount to discrimination by giving different treatment to the persons though identically situated. On technical

grounds, like the one adopted by the High Court in the impugned judgment, this fair treatment cannot be denied to them.

9) No doubt the judicial system that prevails is based on adversarial form of adjudication. At the same time, recognising the demerits and limitations of adversarial litigation, elements of social context adjudication are brought into the decision making process, particularly, when it comes to administering justice to the marginalised section of the society.

10) History demonstrates that various forms of conflict resolution have been institutionalized from time to time. Presently, in almost all civil societies, disputes are resolved through courts, though the judicial system may be different in different jurisdictions. Traditionally, our justice delivery system is adversarial in nature. Of late, capabilities and method of this adversarial justice system are questioned and a feeling of disillusionment and frustration is witnessed among the people. After all, what is the purpose of having a judicial mechanism – it is to advance justice. Warren Burger once said:

> ***"The obligation of the legal profession is... to serve as healers of human conflict...(we) should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."***

11. Prof. (Dr.) N.R. Madhava Menon explains the meaning and contour of social justice adjudication as the application of equality jurisprudence evolved by the Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the socio-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Court has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. The Courts, in such situations, generally invoke the principle of fairness and equality which are essential for dispensing justice. Purposive interpretation is given to subserve the ends of justice particularly when the cases of vulnerable groups are decided. The Court has to keep in mind the 'problem solving approach' by adopting therapeutic approaches to the maximum extent the law permits rather than 'just deciding' cases, thereby bridging the gap between law and life, between law and justice. The notion of access to justice is to be taken in a broader sense. The objective is to render justice to the needy and that means fair solutions to the conflict thereby providing real access to 'justice'.

12. Justice is a core value of any judicial system. It is the ultimate aim in the decision making process. In post-traditional liberal democratic theories of justice, the background assumption is that all humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as 'Reflective

Equilibrium'. The method of Reflective Equilibrium was first introduced by Nelson Goodman in 'Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the concept of 'Justice as Fairness'. While on the one hand, we have the doctrine of 'justice as fairness', as propounded by John Rawls and elaborated by various jurists thereafter in the field of law and political philosophy, we also have the notion of 'Distributive Justice' propounded by Hume which aims at achieving a society producing maximum happiness or net satisfaction. When we combine Rawls's notion of 'Justice as Fairness' with the notions of 'Distributive Justice', to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for achieving just results for doing justice to the weaker section of the society.

13. From the human rights perspective, persons belonging to the weaker sections are disadvantaged people who are unable to acquire and use their rights because of poverty, social or other constraints. They are not in a position to approach the courts even when their rights are violated; they are victimized or deprived of their legitimate due. Here lies the importance of access to justice for socially and economically disadvantaged people. When such people are denied the basic right of survival and access to justice, it further aggravates their poverty. Therefore, even in order to eliminate poverty, access to justice to the poor sections of the society becomes imperative. In the instant case, it is the poverty which compelled the appellants to restrict the claim to Rs.115/- per sq. yard, as they were not in a position to pay the court fee on a higher amount."

10. Claimants have also placed on record the assessment carried out by private valuator i.e. SukritVastu, Architects who issued reports Ex.PA to Ext.PE in cases related to award No. 21-A and Ext.PA to Ext.PC in cases related to award No. 22-A, but to substantiate the valuation stated therein, no evidence has been led by the claimants and therefore, the same cannot be taken into consideration for determining the amount of compensation to be awarded to the claimants for the structures in question.

11. In the impugned award Reference Court has rightly observed that value of houses assessed by PWD was determined by making deduction on the actual assessment made by Executive Engineer and thereafter extra cost has been added but the construction cost increased after the year 2000 has not been considered and relying upon ***Union of India vs. Savji Ram*** reported in ***(2004)9 SCC 312*** he also rightly observed that after calculating cost of construction at the rate of rate prevalent at time of fixing compensation or working out present value of material, there is no scope for further deduction and in the assessment made by PWD premium on the enhanced rate of construction has not been given. But thereafter how and on what basis he has quantified the said enhancement as 25% was awarded by him is not clear. There is no material or discussion on record in this regard. Therefore, award passed by the Reference Court deserves to be interfered with.

12. On the question arises on what basis the amount of compensation of the structures of the claimants is to be determined, there are two valuation reports on record having significant variance therein. Initially, the PWD has determined the value of structures on the basis of HP Schedule Rates 1999, whereas the structures were acquired in the year 2003. Thereafter, pending consideration acquisition proceedings before the Land

Acquisition Collector, re-assessment was carried out for adding the extra cost at the rate of 10% on the prevailing market rates on the date of notification under Section 4 of the Act.

13. The claimants were not satisfied from the valuation carried out by PWD and thus had approached the Deputy Commissioner,under whose directions DRDA had carried out the assessment of the structures on the basis of prevailing rates at the time of acquisition.

14. In reference petitions, claimants have specifically asserted their claim on the basis of DRDA report, whereas it has been opposed by the beneficiary with averments that assessment carried out by PWD is true and correct. It is settled position that stand/case of a party to lis is constructed by pleadings and same has to be proved by leading evidence. Pleadings are not substitute of proof as same has to be proved by leading relevant and admissible evidence. In absence of evidence, unproved pleadings cannot be basis for decision of the case. ***(See para 19 of Manager, Reserve Bank of India Balgalore vs. S. Mani and others (2005)5 SCC 100 and para 1 of Anvar P.V. vs. P.K. Basheer and others (2014)10 SCC 473).***

15. Claimants have examined PW1 Dinesh Singh and PW2 Tilak Raj who, being Draftsman and Assistant Engineer of DRDA, remained closely associated in exercise undertaken for valuation of the structures in question and they have corroborated the said fact in their deposition. In cross examination, there is no suggestion put to them that they were not associated in process of assessment of structures of the claimants, rather there are suggestions put to these witnesses, which have though been denied, but suggesting that the preparation of assessment by these witnesses has not been disputed. In evidence of these witnesses, letter Ext.PW1/A written by the Deputy Commissioner to Assistant Engineer DRDA for carrying assessment and assessment report Ext.PW1/B along with list of house owners Ext.PW1/C sent by concerned SDO to the Deputy Commissioner in pursuant to letter Ext.PW1/A have been proved on record. The said documents have not been disputed in the cross examination to these witnesses or otherwise leading contrary evidence. Appellant has placed on record the valuation reports Ext.DA and Ext.DB, but the concerned Executive Engineer or any other official of PWD associated with preparation thereof has not been examined nor any material to substantiate the basis of assessment made in Ext.DA and Ext.DB has been placed on record. Also, there is no material on record to discard the assessment carried out by DRDA. Non-cross examination on a point deposed by witness amounts to admission/acceptance of that version. ***(See para 40 of Laxmi Bai vs. Bhagwant Bua ((2013)4 SCC 97, para 14 of Gian Chand and others vs. State of Haryana (2013)14 SCC 420)***

16. To rebut the claims of claimants on the basis of parity with ***Kiran Rekha Sood's case*** learned counsel for the beneficiary has relied upon ***Basawaraj and another vs. Special Land Acquisition Officer*** reported in ***(2013)14 SCC 81*** wherein it is held that it is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases as the said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated.

17. In present case, claim of the claimants, based upon any assessment carried out by themselves, has already been discarded. Now there are two evaluation reports based on assessment by PWD as well as DRDA made on the directions of Land Acquisition Collector and directions of the Deputy Commissioner respectively and there is nothing on record to reflect that any fraud has been committed at the time of assessing the value of

structures of claimants or the same has been obtained by misrepresentation. Rather, assessment of DRDA has been admittedly beneficiary itself by accepting the award passed in RFA No. 415 of 2012 based upon the said report and therefore, it cannot be said that relying upon the said assessment of DRDA will amount to perpetuate illegality.

18. There is another aspect that the award in favour of Kiran RakhaSood, one of the structure owners/claimants has been awarded compensation of the structure on the basis of report of DRDA. Her structure was also acquired in pursuant to the same notification under Section 4 of the Act and structure belonging to her was also assessed by Executive Engineer PWD as well as DRDA along with structures of the present claimants. In fact all the structures including her, were assessed together in one and the same assessment report prepared by Executive Engineer (PWD) as well as DRDA.

19. The judgment in Kiran Rekha Sood's case in RFA No. 415 of 2010 was announced on 21.6.2017 and as informed no appeal against the said judgment has been preferred till date i.e. even after more than one year of passing of the same and even amount of compensation determined thereon also stands released in favour of the said claimant. Observations of the Apex Court in ***Narendra and others vs. State of Uttar Pradesh and others*** reported in ***(2017)9 SCC 426*** are squarely covering these appeals.

20. In view of above discussion, the finding of the Reference Court with regard to the entitlement of the enhancement of the claimants is maintained, however, the same is modified to the extent that instead of compensation on the basis of assessment carried out by HPPWD with 25% addition, the structure owners/claimants are entitled for compensation on the basis of assessment carried out by DRDA along with all consequential statutory benefits like ***Kiran Rekha Sood's case***. The appeals as well as cross objections are disposed of in aforesaid terms. Record be sent back forthwith.

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

Oriental Insurance Company Ltd. .....Appellant.
Versus
Shri Ranjeet Singh & Others. .....Respondents.

FAO No. 523 of 2017
Reserved on: 9.8.2018
Decided on: 23.8.2018.

Motor Vehicles Act, 1988- Sections 149 & 166- Claim Application – Defences – Drunken driving – Held- Drunken driving not statutorily available defence to insurer – It cannot exculpate its liability on ground that driver of offending vehicle was in an inebriated condition at time of accident. (Para-2).

Motor Vehicles Act, 1988- Section 166- Motor Accident- Claim application – Compensation – Assessment – Deduction towards income tax – Held, deduction towards income tax from established income bound to be in variant figures depending upon income –No inflexible rule of making 30% deduction from established income towards income tax in every case. (Para-5).

Cases referred:

Khem Chand vs. Smt. Uma Devi &Ors, Latest HLJ 2010 (HP)1

Jitendra Khimshankar Trivedi and others versus KasamDaudKumbhar and others, (2015) 4 Supreme Court Cases 237

For the Appellant:	Mr. Ashwani K Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For the Respondents:	Mr. Surender Verma, Advocate, for respondents No. 1 to 4. Ms. Meenakashi Sharma, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, is, directed against the award of 12.7.2017, pronounced by the learned Motor Accident Claims Tribunal, Bilaspur, H.P. in Claim Petition No. 26/2 of 2016, whereunder an apt indemnificatory liability stands fastened, upon, the insurer of the offending vehicle/ appellant herein, to, pay compensation amount constituted in a sum of Rs.8,36,200/- alongwith interest at the rate of 7.5% per annum, vis-a-vis, the claimants'/ respondents No. 1 to 4 herein.

2. The learned counsel for the appellant, does not contest, the affirmative findings returned upon the issue appertaining, to, the relevant mishap being caused by the rash, and, negligent manner, of, driving, of, the offending vehicle, by its driver. However, the learned counsel for the appellant, has, contended that with the driver of the offending vehicle, being at the relevant time hence inebriated, whereupon the apt breaches, of, terms and conditions of the insurance policy rather evidently surfaced, whereupon, the, fastening of an apt indemnificatory liability, upon, the insurer rather being inapt . However, the aforesaid contention is rudderless, given this Court in a decision rendered in a case titled as ***Khem Chand***vs. ***Smt. Uma Devi &Ors***, reported in Latest HLJ 2010 (HP)1, mandating, qua the inebriated condition, of, the driver of the offending vehicle, especially, at the relevant time, being statutorily unespousable, by, the Insurance company, as, an apt exculpatory ground.

3. The learned counsel for the insurer, has contended, (i) that the learned Tribunal while computing the per mensem salary of the deceased in a sum of Rs. 6,000/-, has rather apparently hence wandered astray, from, the apt evidence existing on record, wherein the aforesaid factum, remains un-disclosed, besides un-echoed by the claimants/witnesses concerned. Even though, the aforesaid submission has immense vigor, however in the larger interest of justice, and, for ensuring determination, of, just, fair and adequate compensation, this Court proceeds to place reliance, upon, a decision rendered by the learned Apex Court in ***Jitendra Khimshankar Trivedi and others*** versus ***KasamDaudKumbhar and others***, reported in (2015) 4 Supreme Court Cases 237, wherein the Hon'ble Apex Court in paragraphs No. 10 to 13, paragraphs whereof are extracted hereinafter, (i) has therein, vis-à-vis, the dependents of the deceased, home makers' concerned, visibly also hereat, hence, computed the apt pecuniary computation, to stand borne in a sum of Rs. 3000/-, conspicuously, workable vis-à-vis, her contribution towards, the, apt estate (i) and, upon her demise, with loss, hence befalling upon her dependents, thereupon, the latter being enjoined to be monetarily recompensed. Apparently, any purported succor, as, drawn therefrom, is, visibly workable only, upon, demise, of, a housewife, and, is reiteratedly hence hereat patently workable, qua, her dependants/claimants. Consequently, in consonance therewith, the, computation of Rs. 6000/- as per mensem income, of the deceased, is, modified to, a, sum of Rs. 3,000/- per mensem, and, is assessed,towards, her contribution vis-a-vis her estate, and, is enjoined to

be assessable, upon, her dependents'. Further more, the hikes and accretions worked against future prospectus, vis-a-vis, the aforesaid figure of per mensem purported income, of, the deceased is rather enjoined to be invalidated given (a) it not being her per mensem income, whereupon alone, the apt hikes are enjoined to be meted.

> *"10. Even assuming Jayvantiben Jitendra Trivedi was not self-employed doing embroidery and tailoring work, the fact remains that she was a housewife and a homemaker. It is hard to monetize the domestic work done by a house-mother. The services of the mother/wife is available 24 hours and her duties are never fixed. Courts have recognized the contribution made by the wife to the house is invaluable and that it cannot be computed in terms of money. A housewife/homemaker does not work by the clock and she is in constant attendance of the family throughout and such services rendered by the homemaker has to be necessarily kept in view while calculating the loss of dependency. Thus even otherwise, taking deceased Jayvantiben Jitendra Trivedi as the homemaker, it is reasonable to fix her income at Rs. 3000/- per month.*
>
> *11. Recognizing the services of the homemaker and that domestic services have to be recognized in terms of money, in Arun Kumar Aggarwal vs.National Insurance Co. Ltd, this Court has held as under: (SCC p.246, paras 62-63)*
>
> > *"62, The alternative to imputing money values is to measure the time taken to produce these services which are commercially viable. One has to admit that in the long run, the services rendered by women in the household sustain a supply oflabour to the economy and keep human societies going by weaving the social fabric and keeping it in good repair. If we take these services for granted and do not attack any value to this, this may escalate the unforeseen costs in terms of deterioration of both human capabilities and social fabric.*
> >
> > *63. Household work performed by women throughout India is more than US$612.8 billion per year (Evangelical Social Action Forum and Health Bridege, p.17).We often forget that the time spent by women in doing household work as homemakers is the time which they van devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to women's high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems. The courts and the Tribunals should do well to factor these considerations in assessing compensation for housewives who are victims of road accidents and quantifying the amount in the name of fixing 'just compensation'."*
>
> *12. The Tribunal has awarded Rs. 2,24,000 as against the same, the claimants have not field any appeal. As against the award passed by the Tribunal when the claimants have not filed any appeal, the question arises whether the income of the deceased could be increased and compensation could be enhanced. In terms of Section 168 of Motor Vehicles Act, the courts/the Tribunals are to pass awards determining the amount of compensation as to be fair and reasonable and accepted by the legal standards. The power of the Courts in awarding reasonable compensation was emphasized by this Court in Nagappa vs. Gurudayal Singh Oriental Insurance Co. Ltd vs. Mohd. Nasir and Ningamma V. Union of India Insurance Co.Ltd. As against the award passed by the Tribunal even though the*

claimants have not field any appeal, as it is obligatory on the part of Courts/the Tribunals to award just and reasonable compensation, it is appropriate to increase the compensation.

13. In order to award just and reasonable compensation income of the deceased is taken as Rs, 3000/- per month, Deducing 1/3rd for personal expenses contribution of the deceased to the family is calculated at Rs. 2000 per month. At the time of her death deceased Jayvantiben was aged about 22 years, proper multiplier to be adopted is 18. Adopting multiplier of 18, total loss of dependency is calculated at Rs. 4,32,000 (Rs. 2000x12x18). With respect to the award of compensation under conventional heads, the Tribunal has awarded Rs. 5000 towards loss of estate and Rs. 3000 towards funeral expenses totaling Rs. 8000. The High Court has awarded conventional damages of Rs. 15,000/- i.e. Rs. 10,000 towards loss of estate and Rs. 5000 towards funeral expenses. The courts below have not awarded any compensation towards loss of consortium and towards love and affection. In Rajesh v Rajbir Singh and JijuKuruvila v. Kunjujamma Mohan, this Court has awarded substantial amount of Rs. 1,00,000 towards loss of consortium and Rs. 1,00,000 towards loss of love and affection to the minor children. Toward loss of estate and funeral expenses, award of compensation of Rs. 15,000 awarded by the High Court is maintained. Thus, the claimants are entitled to a total compensation of Rs. 6,47,000/-".

4. For the foregoing reasons, the appeal is modified to the extent above. In order to award just and reasonable compensation, the, income of the deceased is taken as Rs.3000/- per mensem. Deducting 1/3rd therefrom towards her personal expenses hence the contribution of the deceased towards her family, is calculated at Rs. 2000/- per mensem. At the time of her death the deceased was aged 48 years, hence thereon the proper multiplier, to be adopted, is 13. Adopting, the multiplier of 13, the total loss of dependency, is calculated at Rs. 2000 x 12 x 13 = 3,12,000/-. In addition to the aforesaid amount of Rs. 3,12,000/-/- claimants, are, nowat also entitled, under, conventional head, namely, funeral expenses and loss of estate, in a sum of Rs.25,000/-, and, Rs. 15,000/- respectively and, as such, the total compensation whereto the claimants are entitled, comes to 3,12,000+25,000+15,000= Rs. 3,52,000/-

5. Accordingly, the appeal is modified to the extent above. Accordingly the claimants, are held entitled to a total compensation of Rs. 3,52,000/- alonwith interest @ 7.5% per annum, from the date of filing of petition till realization of awarded amount. Compensation amount be apportioned amongst the claimants in the hereinafter extracted manner:-

Claimant No.1	25%
Claimant No.2	25%
Claimant No.3	25%
Claimant No.4	25%

6. The amount of interim compensation, if awarded, be adjusted against the aforesaid compensation amount, at the time of final payment. All pending applications also stand disposed of. Records be sent back forthwith. All pending application(s), if any, are also disposed of.

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

Ravinder Kumar ...Petitioner

Versus

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

CWP No. 569 of 2001
Reserved on : 2.8.2018
Decided on : 23.8.2018

Land Acquisition Act, 1894(Act)- Sections 4 and 48- Withdrawal from acquisition – Procedure – Necessity of publication of Notification –Hon'ble Single Bench directing State to acquire petitioner's land found in their possession – Review also dismissed –In compliance, State issuing Notification Under section 4 of Act and also filing Letters Patent Appeal – Hon'ble Division Bench setting aside judgment of Hon'ble Single Bench by observing on basis of demarcation report that State might not be in possession of petitioner's land and remanding matter to Hon'ble Single Bench –State issuing notification under Section 48 of Act – Notification contested by petitioner on ground that it was never published in official gazette – Held, provisions of Section 48 of Act are sparked by holistic purpose- Persons whose lands contemplated to be brought to acquisition for public purpose, have to be afforded reasonable opportunity to make representation to Authorities against de-acquisition-Withdrawal from acquisition can be done only by issuing notification in official gazette – Notification issued under Section 48 of Act without publication in official gazette set aside – State directed to elicit participation of aggrieved public and then make fresh decision. (Paras-5 to 7).

Case referred:

Shanti Sports Club and another versus Union of India and others, 2009(15) Supreme Court Cases 705

For the petitioner : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

For the respondent : Mr. Hemant Vaid, Additional Advocate General with Mr. Yudhvir Singh Thakur, Deputy Advocate General, for the respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant writ petition has been received by this Court, after remand, vis-à-vis it, under orders pronounced by the Principal Division Bench, of, this Court, upon LPA No. 275 of 2011.

2. A coordinate Bench of this Court, had, pronounced a direction, upon, the contesting respondents, to, initiate statutory proceedings, for, bringing to acquisition, the, property, embodied in the lis at hand. However, subsequent thereto, the aggrieved respondent instituted a review petition, before the Coordinate Bench of this Court, yet the latter proceeded to decline relief therein, vis-à-vis, the aggrieved respondents. Thereafter, the aggrieved respondents, instituted LPA bearing No. 275 of 2011, before the Principal Division Bench of this Court, wherein, the verdict recorded by a Coordinate Bench of this Court, on 27.4.2007, upon, the instant writ petition, and, also the dis-affirmative orders pronounced, upon the review petition, preferred-herebefore, by the aggrieved respondents, were both hence cast a conjoint challenge. Upon the aforesaid LPA, the Principal Division Bench of this Court, rather pronounced a verdict, disconcurrent, vis-a-vis, the verdict pronounced by the coordinate Bench of this Court, and, thereuner, it, remitted the matter, to the learned

Single Judge concerned, for his proceeding, to, in view of the directions meted therein, rather make a fresh decision, upon, the extant writ petition.

3. The learned counsel appearing, for the petitioner has contended, that, since the contesting respondents, in their reply, meted to the extant petition, are hence rearing grounds, qua theirs acquiring title, by adverse possession, vis-à-vis the property, in the lis, at hand, (a) hence perse, thereupon, the, reflections borne in Annexure P-1, and, in Annexure P-2, qua the Education department of the State of H.P., rather holding possession of the property, as embodied in the lis, hence acquiring conclusivity, (b) also he contends that *ipso-facto*, on anvil thereof, the echoings borne in the demarcation report, initially appended with the extant petition, and, also all the unfoldments, occurring in the demarcation report, furnished to this Court, in pursuance, to, orders, recorded, on 31.8.2016, (c) with communications borne therein rather, holding leaning(s), qua the Education department, not holding possession of the property, embodied in the lis, at hand, also getting effaced, (d) nor hence any capital, being derivable therefrom, by the contesting respondent, rather the respondents being amenable, for, a direction qua the apt withdrawal(s) from acquisition, rather requiring being set aside. However, vigor, if any, of the aforesaid submission addressed before this Court, by the learned counsel for the petitioner, is rendered nugatory, in the apparent face, of, the Principal Division Bench, of, this Court in paragraph-5, thereof, para whereof stands reproduced hereinafter:

> "In our opinion therefore, neither the fact that the State Authorities had taken a plea to oppose writ petition of having become owners of the property, referred to in the writ petition, by way of adverse possession nor the fact that the review petition was barred by limitation, would come in the way of this Court, to set aside both the decisions and relegate the parties for full, complete and effectual decision in the matter. We are inclined to do so also because if the State Authorities are justified in asserting that the land, referred to in the writ petition was not in possession of the State Authorities, as has been evidenced from the demarcation proceedings, the question of acquiring the said land on the assumption that the school building has been constructed on the land, owned and possessed by the petitioner, would not survive and will be a non-issue. The concomitant of that finding would be that the respondent would be unfairly benefited due to forcible acquisition of the property to be done by the State, which is not required by the State Authorities in public interest and it would also be substantial loss to the State exchequer to the extent of over two crores, as is the value of the land estimated."

(e) rendering a clear mandate qua the propagation, of, the contesting respondent, qua theirs acquiring title by prescription, vis-à-vis, the property, borne in the lis at hand, rather not, forestalling, it, to set aside the verdict previously recorded, by the Coordinate Bench, of this Court, (f) besides, the, aforefinding, is apparently nursed, on anvil of, the Principal Division Bench, in preceding thereof apt paragraph-4, also erecting an inference, qua the plea reared by the contesting respondents, qua theirs' acquiring title by prescription, vis-à-vis, the property embodied in the lis being, rather, standing reared, under a mistaken belief, c) the Principal Division Bench, meteing credence, vis-à-vis, the demarcation report, with, clear candid unfoldments, borne therein, vis-à-vis, the possession of the land in dispute, rather not being held by the Education department, of, the State of H.P.

4. Be that as it may, the only permissible, vista, left open, for this Court, in its proceeding to mete an adjudication upon, the extant petition, (a) is comprised in this Court proceeding to take, into account, events subsequent, to, meteings, of, an adjudication, upon, the writ petition, by the Coordinate Bench of this Court. A perusal, of, the records reveals,

that in the interregnum, since, the, Coordinate Bench, of this Court, recorded its verdict, on 27.4.2007, upon, writ petition No. 569 of 2001, and, the apt verdict being quashed by the Principal Division Bench of this Court, under, a pronouncement rendered, on 21.10.2013, upon LPA No. 275 of 2011, (b) the respondents proceeding, to, mete compliance with the mandate, recorded by the Coordinate Bench of this Court. Apt compliance with the mandate recorded, by the Coordinate Bench, of this Court, stands comprised in (c) a notification, being issued on 29.2.2008, for hence bringing, to, acquisition, the land in dispute (d) a notification drawn, under Section 17 (e), read with Section 9 of the Land Acquisition Act, standing issued, on 1.11.2008, by the State Government, (f) the apt award, sealed and signed by the Land Acquisition Collector, being sent by the latter, to the District Collector, on 23.9.2009. However, subsequent thereto, the respondents, while exercising the apt powers, engrafted under Section 48, of, the Land Acquisition Act, rather proceeded, to, on 31.7.2010, hence notify the apt withdrawal, from, hence putting to apt acquisition, the lands in dispute. Visibly, hence all the aforesaid events rather occurred, subsequent, vis-a-vis, a verdict standing recorded by the Coordinate Bench of this Court, and, its reversal by the Principal Division Bench of this Court, under, a verdict, rendered on 21.10.2013, upon LPA NO. 275 of 2011, (g) NONETHELESS, with events/evidence subsequent, vis-à-vis, the apt verdict standing recorded, by a Coordinate Bench of this Court, rather comprising the apt reserved visible vista, by the Principal Division Bench, for hence this Court, thereupon making a decision afresh, after, remand of the lis, qua it, (h) thereupon, the legality of invocation, by the contesting respondents, vis-à-vis, the statutory powers vested, under, Section 48 of the Land Acquisition Act, is enjoined, to be tested.

5 The learned counsel appearing, for the petitioner, has contended with vigor, (i) that with the respondents, issuing a notification, under, Section 17 of the Land Acquisition Act, also theirs' taking the apt possession, of, the lands, in dispute, hence the withdrawal, from, acquisition by the respondents, (ii) as sparked, from theirs' exercising, the, statutory powers, borne, in Section 48 of the Land Acquisition Act, rather being impermissible. The aforesaid contention is rested, upon, a verdict rendered by the Hon'ble Apex Court in case, titled as **"Collector of Land Acquisition and others versus Andaman Timber Industries**" reported in 2014(16) SCC, 780, relevant paragraph-9 whereof stands extracted hereinafter:

> "Besides, it has to be pointed out that the Government after taking possession pursuant to the notification under Section 17 of the Act cannot withdraw itself from acquisition even under Section 48 of the Act. This Court in the very same decision in Satendra Prasad Jain case has dealt with this aspect. The relevant paragraph of the judgment is extracted below: (SCC pp. 373-74, para 14)
>
> "14. There are two judgments of this Court which we must note. In Rajasthan Housing Board v. Shri Kishan it was held that Government could not withdraw from acquisition under Section 48 once it had taken possession of the land. In Lt. Governor of H.P. v. Avinash Sharma it was held that SCC p. 152, para 8)
>
> '8...after possession has been taken pursuant to a notification under Section 17(a) the land is vested in the Government, and the Clauses Act, nor can the notification be withdrawn in exercise of the powers under Section 48 of the Land Acquisition Act. Any other view would enable the State Government to circumvent the specific provision by relying upon a general power. When possession of the land is taken under Section 17(1), the land vests in the Government. There is no provision by which land statutorily vested in the Government reverts to the original owner by mere cancellation

of the notification."

For the aforesaid contention standing validated, by this Court, enjoins trite display(s),standing borne in the apt material , qua (i) the respondents evidently holding possession of the lands, in dispute, and qua therewith assessed compensation, rather remaining un-disbursed. However, as aforesaid, with the Principal Division Bench, negating, the objections, reared by the respondents, qua theirs acquiring title, by prescription, vis-à-vis, the suit land, rather it, meteing credence, vis-a-vis the demarcation report, (i) and with the latter making a clear pronouncement, vis-à-vis, the respondents rather holding possession of the lands, in dispute, (ii) thereupon the initial preemptory condition, borne in paragraph (supra), of, the judgment rendered by the Hon'ble Apex Court, is, un-recoursable, by the learned counsel for the petitioners, for his hence laying any dependence thereon.

6. Be that as it may, though, their exists material, on record, with clear echoing(s) therein, qua after application of mind by the authorities concerned, (i) theirs proceeding to initiate, the apt statutory processes(es) for hence bringing to acquisition, the, land in dispute, (ii) yet the statutory powers, vested in the respondents, for, theirs thereafter recoursing the provisions borne, in Section 48 of the Land Acquisition Act, cannot be either abridged nor trammeled, unless the notification, drawn under Section 48 of the Land Acquisition Act, remains un-published, in the official gazette. The necessity, of, the publication, of, the notification, in the official gazette, drawn under the provisions of Section 48, of the Land acquisition Act, is sparked by a holistic purpose, and, is rather meant for ensuring qua the public at large, who may be interested, in the accomplishment, of, the public purpose, in respect whereof the apt lands, stood contemplated to be brought to acquisition, being hence afforded rather a reasonable opportunity, to make representation(s), to, the authorities concerned, against its de-acquisition, or its acquisition, as the case may be, b) for preempting unscrupulous land-owners, their agents, and, wheeler-dealers, concerned from pulling strings, in power corridors, for getting the acquired land released. The aforesaid expostulation of law stands enunciated in a judgment rendered, by the Hon'ble Apex Court in case titled as "**Shanti Sports Club and another versus Union of India and others**", reported in 2009(15) Supreme Court Cases 705, relevant paragraphs 37 and 38 whereof stands extracted hereinafter:

> "37. In the light of the submissions made by the learned counsel for the parties, we shall now consider whether the note dated 8.6.1999 recorded by the then Minister for Urban Development can be treated as a decision of the Government to withdraw from the acquisition of land in question in terms of Section 48(1) of the Act, which lays down that:
>
> "48. Completion of acquisition not compulsory, but compensation to be awarded when not completed_(1)Except in the case provided for in Section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken."
>
> Although, the plain language of Section 48(1) does not given any indication of the manner or mode in which the power/discretion to withdraw from the acquisition of any land is required to be exercised, having regard to the scheme of Parts II and VII of the 1894 Act, which postulates publication of notification under Section 4(1), declaration under Section 6 and agreement under Section 42 in the Official Gazette as a condition for valid acquisition of the land for any public purpose or for a company, it is reasonable to take the view that withdrawal from the acquisition, which may adversely affect the public purpose for which, or the company on whose behalf the acquisition is proposed, can be done only by issuing a notification in the Official Gazette."

> "38. The decision to acquire the land for a public purpose is preceded by consideration of the matter at various levels of the Government. The Revenue Authorities conduct survey for determining the location and status of the land and feasibility of its acquisition for a public purpose. The final decision taken by the competent authority is then published in the Official Gazette in the form of a notification issued under Section 4(1) of the Act. Likewise, declaration made under Section 6 of the Act is published in the Official Gazette. The publication of notifications under Section 4(1) has two fold objectives. In the first place, it enables the landowner(s) to lodge objections against the proposed acquisition. Secondly, it forewarns the owners and other interested persons not to change the character of the land and, at the same time, make them aware that if they enter into any transaction with respect to the land proposed to be acquired, they will do so at their own peril. When the land is acquired on behalf of a company, consent of the appropriate Government is a must. The company is also required to execute an agreement in terms of Section 41 of the Act which is then published in the Official Gazette in terms of Section 42 thereof. As a necessary concomitant, it must be held that the exercise of power by the Government under Section 48(1) of accomplishment of the public purpose for which the land is acquired or the company concerned may question such withdrawal by making representation to the higher authorities or by seeking court's intervention. If the decision of the Government to withdraw from the acquisition of land is kept secret and is not published in the Official Gazette, there is every likelihood that unscrupulous landowners, their agents and wheeler-dealers may pull strings in the power corridors and clandestinely get the land released from acquisition and thereby defeat the public purpose for which the land is acquired. Similarly, the company on whose behalf the land is acquired may suffer incalculable harm by unpublished decision of the Government to withdraw from the acquisition."

7. A perusal of the records, makes candid bespeaking(s) (i) that the apt notifications, drawn under Section 48 of the Land Acquisition Act, remaining un-published, in, the Official Gazette, whereupon the aforesaid expostulation of law, borne, in judgment (supra), obviously remained un-meted apt compliance therewith.

8. For the aforesaid reasons, the notification drawn, under Section 48 of the Land Acquisition Act, is quashed and set aside, and, respondents are directed to elicit, the, participation of the aggrieved public, and, thereafter, make a fresh decision, vis-à-vis the imperative necessity, of bringing to acquisition the land, in dispute, or, hence the statutory provisions borne in Section 48 of the Land Acquisition Act, rather enjoin re-coursing thereto or compatible therewith provisions' borne, in, The Right to Fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The apt decision be recorded, within three months, hereafter.

9. In view of this, the instant writ petition stands 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.

Roshan Lal (deceased) through LRs. .....Petitioners

Versus

State of H.P. & others. .....Respondents.

CWP No. 2335 of 2009
Reserved on : 1.8.2018
Date of decision 23.8.2018

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 118- Sanction – Absence of - Vestment of property in Government for want of sanction – Propriety – On complaint, Competent Authority conducting inquiry and ordering vestment of land owned by petitioner "R" alongwith double storey building in State Government free from all encumbrances- Competent Authority observing that land though recorded in ownership and possession of "R" but it being in actual possession of respondent No.3, who found raising construction over it without obtaining sanction - Challenge thereto – On facts, High Court found that though land recorded in ownership and possession of 'R', but 'R' admitting before Competent Authority of his not spending money on said construction – Also acquiescing that money spent on construction by R3 – Agreement to sell though in favour of R3 – But his request for sanction to purchase, still pending with Government – Held, orders of Competent Authority not illegal – Petition dismissed. (Para-4 to 7).

For the petitioner: Mr. Atul Jhingan, Advocate
For the Respondents: Mr. Hemant Vaid, Additional Advocate General, for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The writ petitioners, are, seeking, the, quashing of order borne in Annexure P-6, and, also espouse relief for the respective quashing, of, Annexure P-8, and, of Annexure P-10, (i) whereunder(s) the writ property was ordered, to vest, free from all encumbrances, in, the State of Himachal Pradesh, vestment whereof, is, sparked by a two storied building, existing upon khasra No. 744/238, (ii) without prior thereto, the, apt statutory permission, as enjoined by Section 118, of, the H.P. Tenancy and Land Reforms Act, being sought by respondent No.3, (iii) the respondent No.3 expending money, for, raising construction, and, his being in possession thereof. 2. One Roshan Lal is reflected, in the revenue records, to be the owner in possession of land, measuring 3 biswas, borne in khasra No. 744/238, and, in respect thereof, he had entered into an agreement/contract of sale, with respondent No.3, agreement whereof, is borne in Ext. RW1/A, exhibit whereof is borne, upon, the records of the authorities concerned. There occurs a clear disclosure, therein, qua only subsequent to a valid apt permission being granted, by the statutory authority concerned, (iv) thereupon alone, respondent No.3, evidently a non-agriculturist, being statutorily empowered, to, execute a registered deed of conveyance, vis-a-vis, the land borne, in, khasra No. 744/238, with, one Roshan Lal, (v) there is also a clear display therein, that till the apt statutory permission stands granted, thereupto, the, physical possession, of, land borne in Ext. RW1/A, being rather retained by aforesaid Roshan Lal, (vi) however, with respondent No. 3's application, for statutory permission being granted, vis-a-vis, him for the relevant purpose, being, still pending, one Dharamvir, made, a complaint before the statutory authority concerned qua the land borne, in the apt khasra number, rather standing subjected to construction, and, thereupon the mandate, of, Section 118, of, the H.P. Tenancy and Land Reforms Act, provisions whereof stands extracted hereinafter:-

"[118. Transfer of land to non-agriculturists barred. - (1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this chapter, no transfer of land (including transfer by a decree of a civil court or for recovery of arrears of land revenue) by way of sale, gift, will, exchange, lease, mortgage with possession, creation of a tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist.

Explanation. - For the purpose of this sub-section, the expression "transfer of land" shall not include -

i) transfer by way of inheritance;

ii) transfer by way of gift made or will executed, in favour of any or all legal heirs of the donor or the testator, as the case may be;

(iii) transfer by way of lease of land or building in a municipal area;

but shall include -

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist; and

(b) an authorisation made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land.]

(2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-

(a) a landless laborer; or

(b) a landless person belonging to a Scheduled Caste or Scheduled Tribe; or

(c) a village artisan; or

(d) a landless person carrying on an allied agricultural pursuit; or

[(dd) a person who, on commencement of this Act, worked and continues to work for gain in a estate situated in Himachal Pradesh; for the construction of a dwelling house, shop or commercial establishment in a municipal area, subject to the condition that the land to be transferred does not exceed -

(i) in case of a dwelling house-500 square meters; and

(ii) in the case of a shop or commercial establishment-300 square meters:

Provided that such person does not own any vacant land or a dwelling house in a municipal area in the State.]

(e) the State Government or Central Government, or a Government Company as defined in section 617 of the Companies Act, 1956, [or a Company incorporated under the Companies Act, 1956 for which land is acquired through the State Government under the Land Acquisition Act, 1894] or a statutory body or a corporation or a board established by or under a statute and owned and controlled by the State of Central Government; or

[(f) a person who has become non-agriculturist on account of -

(i) acquisition of his land for any public purpose under the Land Acquisition Act, 1894; or

(ii) vestment of his land in the tenants under this Act; or]

(g) a non-agriculturist who purchases or intends to purchase land for the construction of a house or shop, or purchases a built up house or shop, from the [Himachal Pradesh Housing and Urban Development Authority, established under the Himachal Pradesh Housing and Urban Development Act, 2004, or from the Development Authority constituted under the Himachal Pradesh Town and Country Planning Act, 1977 or from any other statutory Corporation set-up for framing and execution of house accommodation schemes in the States under any State or Central enactment]; or

(h) a non-agriculturist with the permission of the State Government for the purposes that may be prescribed:

Provided that a person who is non-agriculturist but purchase 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 be a non-agriculturist for the purpose of the 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 the 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 user for any other purpose or transfer by way sale, gift or otherwise, the land so purchased by him shall, in the prescribed manner, vest in the State Government free from all encumbrances.

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1):

Provided that the Registrar or the Sub-Registrar may register any transfer -

(i) where the lease is made in relation to a part or whole of a building; or

(ii) where the mortgage is made for procuring the loans for construction or improvements over the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government.

[(3A) Where -

(a) the Registrar or the Sub-Registrar, appointed under the Indian Registration Act, 1908, before whom any document pertaining to transfer of land is presented for registration, comes to know or has

reason to believe that the transfer of land is in contravention of sub-section (1); or

(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.

(3B) The person aggrieved by the findings recorded by the Collector, that a particular transfer of land is in contravention of the provisions of sub-section (1), may, within 30 days from the date on which the order recording such findings is made by the Collector or such longer period as the Divisional Commissioner may allow for reasons to be recorded in writing, file an appeal to the Divisional Commissioner, to whom such Collector is subordinate, and the Divisional Commissioner may, after giving the parties an opportunity of being heard and, if necessary, after sending for the records of the case from the Collector [***] reverse, alter or confirm the order made by the Collector [and the order made by the Divisional Commissioner shall be final and conclusive].

[(3C) (a) The Financial Commissioner may, either on a report of a Revenue Officer or on an application or of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Revenue Officer subordinate to him and in which no appeal lies thereto, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and may pass such order in relation thereto as he may think fit.

(b) No order shall be passed under this sub-section which adversely affect any person unless such person has been given a reasonable opportunity of being heard.]

(3D) Where the Collector of the District under sub-section (3A), in case an appeal is not made within the prescribed period, or the Divisional Commissioner in appeal under sub-section (3B), or the Financial Commissioner in [revision] under sub-section (3C), decides that the transfer of land is in contravention of the provisions of sub-

section (1), such transfer shall be void ab initio and the land involved in such transfer together with structures, buildings or other attachments, if any, shall in the prescribed manner, vest in the State Government free from all encumbrances; and]

(4) It shall be lawful for the State Government to make use of the land which is vested or may be vested in it under sub-section (2) or sub-section [(3D)] for such purposes as it may deem fit to do so.

[Explanation I. - For the purpose of this section, the expression "land" shall include -

(i) land recorded as "Gair-mumkin", "Gair-mumkinMakan" or any other Gair-mumkin land, by whatever name called in the revenue records; and]

(ii) land which is a site of a building in a town or a village and is occupied or let out not for agricultural purposes or purposes subservient to agriculture [but shall not include a built-up area in the municipal area;]

[Explanation II. - For the purpose of this section the expression "municipal area" means the territorial area of a Nagar Panchayat, Cantonment Board, Municipal Council or a Municipal Corporation constituted under any law for the time being in force.]"

hence standing visibly infringed (vii) whereupon, under, the impugned annexures, the writ property hence stood ordered to be vested, free from all encumbrances, in, the State of Himachal Pradesh.

3. A show cause notice, borne, in Annexure P-4, was, served upon the litigants concerned, and, thereafter, under Annexure P-6, rendered, on 7.5.2005, and, under Annexure P-8, rendered, on 6.9.2008, and, ultimately under Annexure P-10, rendered, on 2.6.2009, hence concurrent verdicts for vestment, of, land measuring 3 biswas, borne in Ext. RW1/A, in the State of Himachal Pradesh, free from all encumbrances, rather stood pronounced, (i) apparently for hence in the aforesaid manner, infractions being meted, vis-a-vis, the mandate of Section 118 of the H.P. Tenancy and Land Reforms Act, (ii) provisions whereof, hence pointedly cast a statutory interdiction against making, of, any transfer(s), through, any mode, vis-a-vis, any non-agriculturist (iii) unless, prior thereto, the, apt statutory permission is accorded, vis-a-vis, a non-agriculturist, and, (iv) furthermore, transfer(s), under, any benami agreement being also barred, (v) AND effect of infractions thereof rather visiting, upon, the violator concerned, the ill-consequences, of, the apt land rather enjoining, its, vesting in the State of Himachal Pradesh, hence free from all encumbrances.

4. Nowat, the effect of the revenue records, making, a clear display, of, the vendor one Roshan Lal, being displayed therein to be the owner in possession of the apt property, (i) and, also with disclosures borne therein, hence enjoying a presumption of truth, rather reiteratedly enjoin theirs' standing construed, alongwith the apt statements rendered before the authorities concerned, (ii) whereupon the latter stood coaxed to record, the, impugned annexures, against, the petitioners, and, also against respondent No.3.

5. The apt presumption of truth assignable, vis-a-vis, the entries borne in the revenue records, with, a pointed display therein qua one Roshan Lal being reflected therein, to be, the owner in possession of the suit property, is, concerted to be shred of their efficacy, (i) besides the apt presumption of truth imputed thereto, is, concerted to be dislodged, on anvil of one Dhyan Singh, making a testification, borne in his examination-in-

chief, with, acquiescences therein, (ii) qua, at the time, whereat he visited the relevant property, the respondent No.3 being found to raise construction, on, land measuring 3 biswas, borne on khasra number 744/238. However, no tenacity is assignable, vis-a-vis, the afore rendered testification given (iii) his evidently not preparing/conducting any valid demarcation, of, the relevant property, whereas, his holding the demarcation, of, the relevant property, was rather imperative, for his being enabled to render a formidable deposition, qua, upon the writ property, the apt construction being raised, by respondent No.3, (iv) his making acquiescences, in his cross-examination, qua in the latest jamabandi, and, in the gardwari, one Roshan Lal, standing, disclosed to be the owner in possession of the writ property, (v) his not ascertaining, qua, the water and electricity connections, installed inside the relevant building, being obtained by respondent No.3, (iv) in the fag end of his cross-examination, his, testifying qua his not recording the statement, of Dharamvir, on the spot, nor it being appended with the apposite file, (v) his failing to issue notice either to Roshan Lal or to respondent No.3, for theirs' recording their presence, at the relevant site. Furthermore the Kanoongo concerned has rendered a deposition, in his examination-in-chief, with echoings thereon, qua at the time, he visited the site, his discovering qua thereat, the son of respondent No.3, hence monitoring, the construction work, being carried, upon, khasra number 744/238. However, even the aforestated deposition is contradicted, by PW-1 given the latter in his cross-examination, not, rendering the aforestatedbespeakings (vi) rather in his cross-examination, his, acquiescing qua his unawareness qua the identity, of, the son of respondent No.3, (vii) his, in his cross-examination, acquiescing, vis-a-vis, no demarcation being carried, at the relevant site, for hence determining qua the construction, if any, as carried, standing carried, upon, khasra number 744/238, (viii) thereupon it is befitting to conclude, qua the construction, if any, carried it being not carried upon khasra number 744/238, (ix) his, in corroboration, vis-a-vis, PW-1 making a deposition qua the Naib Tehsildar, not, at the relevant site, rather recording the statement, of, one Dharamvir, (x) the effect of the aforestated inter-se corroboration, occurring, in the testifications of PW-1, and, of PW-3, are, qua no firm inference being drawable qua the construction, if any, as carried, rather being carried, upon land measuring 3 biswas, hence borne in khasra number 744/238, (xi) with the aggrieved being not associated in the relevant inquiry, hence, the report, if any, prepared by PW-1, PW-2, and, by PW-3, in sequel to theirs purportedly, visiting the relevant site, being not amenable for any reliance being placed thereon, it, infracting the principles, of audi-alteram partem.

6. The Naib Tehsildar, stepped into the witness box, as PW-2, and, he has acquiesced qua the relevant demarcation report, not, standing appended with the file(s) effect whereof, being hence no apt demarcation being carried, at the relevant site, (a) thereupon, it is befitting to conclude qua construction, if any, raised rather being raised, not, upon land measuring 3 biswas borne, in khasra number 744/238. The effect of no tenacity being ascribable, vis-a-vis, the testification(s) of PW-1, PW-2, and, of, PW-3, is, qua the presumption of truth, assignable to the entries, borne in the revenue records, with, pointed disclosure(s) therein qua Roshan Lal, being the owner in possession of the suit land, rather prima facie remaining intact, (b) whereupon hence prima facie conclusivity is to be ascribed, vis-a-vis, them. Even though Roshan Lal has acquiesced qua the electricity connection, installed inside the relevant property, standing obtained by him, and, when PW-2, metes corroboration thereto, (c) nonetheless with Roshan Lal, at the fag end, of his testification, making acquiescences qua his not expending money, for construction being raised, upon, the apt land, (d) thereupon on anvil thereof, the, presumption of truth assignable, to the entries, borne in the relevant records, wherein one Roshan Lal stands displayed to be the owner, in possession of the writ property, does stand firmly rebutted, (e) besides therefrom, respondent No.3 can be concluded, to, without a valid permission being granted, prior to, his proceeding to assume possession, of, the property, and, (f) despite the

relevant sale agreement as executed inter-se him, and, Roshan Lal, agreement of contract of sale whereof, is, borne in RW1/A, rather carrying recitals qua "only until", and, upon the apt statutory permission standing meted, vis-a-vis, respondent No.3, thereupto, the, possession of the apt land being retained by Roshan Lal, and, (g) obviously, thereupon the vacant land as borne therein also was thereupto hence unamenable, for, any construction being raised thereon. In sequel, respondent No.3, cannot obviously, even if he has taken possession of land, measuring 3 biswas borne on khasra number 744/238, especially, when prior thereto, no valid apt statutory permission, stands granted qua him, rather draw any leverage, from, Section 53 (A) of the Transfer of Property Act, provisions whereof stand extracted hereinafter

> "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."

nor he can contend, qua hence his becoming owner, by way of part performance, (i) conspicuously, when it is settled law qua the mandate engrafted in Section 53A, of, the Transfer of Property Act being un-amenable, for espousal, imperatively, when hence it would beget, the, untenable scuttling, of, the aforesaid imperative statutory mechanism. However, even if there is permissive construction, if any, raised by respondent No.3, vis-a-vis, the land in respect whereof Ext. RW1/A stood executed inter-se him, and, deceased Roshan Lal, and, (ii) when Roshan Lal acquiesces qua respondent No.3, expending money, for raising construction, upon, the apt property borne in the apt khasra number, thereupon at this stage it would not be appropriate, to quash the impugned annexures, for the reasons (a) with the contract of sale standing executed, inter-se, deceased Roshan Lal, and, respondent No.3, being, vis-a-vis, the apt vacant land, (b) thereupon it being unamenable for any construction being raised thereon, (c) unless prior thereto, the, statutory permission stood granted, whereas, with the apt permission rather remaining unmeted, vis-a-vis, respondent No.3, thereupon it would be insugacious to quash the impugned annexures, (d) moreso when thereupon it would sequel the ill-result, of, validating the assumption, of, apt invalid possession, by respondent No.3, despite, his prior thereto not obtaining, the preemptory statutory permission, (e) besides, it hence untenably presenting, the statutory authorities concerned, with a *fiat accompli,* for theirs hence, proceeding, to untenably accord, the apt permission, vis-a-vis, respondent No.3, despite, respondent No.3, holding an invalid possession, under, a benami transaction, (f) nor it would be appropriate, to pronounce a mandate, upon, the authorities concerned, for, theirs' processing respondent No.3s' application, for statutory permission being granted, vis-a-vis, him.

7. In view of the observations made hereinabove, the present writ petition is dismissed. Pending applications, if any, also stand disposed of.

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

Ranjeet Singh (since deceased) through LRs. ...Appellants.

Versus

The Land Acquisition Collector & Another. ...Respondents.

RFA No. 390 of 2010 along with RFA Nos. 370, 391 to 400, 407 to 413, 443 to 475 of 2010 and 182 to 190 of 2011
Judgment Reserved on: 20.8.2018
Date of Decision: 24.8.2018.

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Reference – Market value– Determination – Held, when land is acquired for purpose of single use having no relevance with nature and classification of land vis-s-vis its agricultural potentiality, its value not to be determined on basis of nature and classification, but to be assessed on basis of purpose for which it is to be put in utilization after acquisition- Entire land to be taken as single unit, resulting in awarding uniform rate to all kind of lands acquired. (Para- 9).

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Reference- Market value – Determination - Deductions towards development charges – Permissibility – Held- Deductions from determined market value of acquired land towards development charges, not warranted when no development required to be made for implementation of public purpose, for which land acquired. (Para- 22).

Land Acquisition Act, 1894- Sections 18, 23 & 25- Acquisition of land for public purpose – Reference – Market value– Determination – Held, Reference Court cannot determine value of acquired land at rate lesser than rate awarded by Land Acquisition Collector –Sale deeds relied upon by beneficiary by which value of acquired land becomes lesser than highest value determined by collector, have no relevance. (Paras-8, 11 & 12).

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference - Market value – Determination – Sale transactions between close relations and involving no exchange of consideration are sham and cannot be relied upon. (Para- 14).

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference - Market value – Determination – Previous award – Held, Award of Reference Court relating to same village of similar land with same quality and potentiality offers base for determination of compensation. (Para- 15).

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference- Market value – Determination – Exemplar sale deeds of adjoining villages – Relevance- Held, in absence of sale transactions of same village, exemplar sale deeds of adjoining villages can be taken into consideration if there is similarity of nature, utility and potentiality of land, then same value of land can be taken as market price – If there is no evidence with regard to similarity of nature, utility and potentiality, exemplar transactions of adjoining villages can be taken into consideration and value of land can be determined after making appropriate deductions. (Para-16).

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of land for public purpose – Reference-Market Value – Determination - Land acquired by State for ACC for mining – High Court setting aside Award of Reference Court and remitting matter with direction to

determine market value of land on basis of potentiality and not its nature – District Judge ignoring previous awards though pertaining to same village on ground of those awards being based on nature of land – Held, Reference Court justified in ignoring those awards for determining market value. (Para-17).

Land Acquisition Act, 1894- Sections 4, 18 & 23- Land acquired for public purpose – Reference - Market value of land – Determination – Exemplar sale deed – Held, sale transaction having no proximity in time with notification under Section 4 of Act has no relevance. (Para-13).

Land Acquisition Act, 1894- Sections 4, 18 & 23- Land acquired for public purpose – Reference– Market value – Determination – Exemplar sale of small area – Held, while determining market value of large chunk of land when sale deeds of larger parcels not available, value of smaller piece of land can be taken into consideration after making proper deductions – Exemplar sale deed not shown to be sham – Land acquired for extraction of lime stone – No development charges involved – Land having great potentiality in view of purpose of acquisition – 15% increase allowed on established income towards potentiality of land – However, in view of exemplar sale deed being of small area and no development charges involved, High court permitted deductions of 25% on market value assessed on basis of such sale deed. (Paras-23 & 27 to 29).

Cases referred:

Dadu Ram Vs. Land Acquisition Collector and others (2016) 2 ILR 636 (HP)

H.P. Housing Board Vs. Ram Lal and others, 2003 (3) Shim.L.C. 64

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

Executive Engineer and another Vs. Dila Ram, Latest HLJ 2008 (HP) 1007)

Special Land Acquisition Officer Kheda and another Vs. Vasudev Chandrashankar and another, (1997) 11 SCC 218)

Jai Prakash and others Vs. Union of India (1997) 9 SCC 510

Kanwar Singh and others Vs. Union of India (1998) 8 SCC 136

Manoj Kumar Vs. State of Haryana 2017 SCC Online SC 1262

BhikulalKedarmalGoenka Vs. State of Maharashtra and another (2016) 14 SCC 279

Land Acquisition Officer Revenue Divisional Officer, Chittor Vs. L. Kamalamma (Smt.) dead by LRs and others K. Krishnamachari and others, (1998) 2 SCC 385

Atma Singh (dead) through LRs. and others Vs. State of Haryana and another (2008) 2 SCC 568

Trishala Jain Vs. State of Uttranchal (2011) 6 SCC 47

Vithal Rao and another Vs. Special Land Acquisition Officer (2017) 8 SCC 558

The Collector of Lakhimpur Vs. Bhuban Chandra Dutta, AIR 1971 SC 2015

Kaushalya Devi Bogra and others etc. Vs. Land Acquisition Officer Aurangabad and another, AIR 1984 SC 892,

State of H.P. and another Vs. Sanjeev Kumar and another 2010(2) S.L.J. (HP) 1225,

Maya Devi (D) through LRs and others Vs. State of Haryana & Another JT 2018 (1) SC 495

RFA Nos. 390, 370, 391 to 400, 407 to 413 of 2010

For the Appellant(s):	Mr. G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.
For the Respondent(s):	Mr.Shiv Pal Manhans, Additional Advocate General with Mr.Raju Ram Rahi, Deputy Advocate General, for respondents-State.
	Mr.K.D. Sood, Senior Advocate with Mr.ShubamSood, Advocate, for respondent-ACC Limited, Barmana.

RFA Nos. 443 to 475 of 2010

For the Appellant(s): Mr.K.D. Sood, Senior Advocate, with Mr.ShubhamSood, Advocate.

For the Respondent(s): Mr.Shiv Pal Manhans, Additional Advocate General with Mr.Raju Ram Rahi, Deputy Advocate General, for respondents-State.
Mr.G.D. Verma, Senior Advocate with Mr.Romesh Verma &Mr.Tara Singh Chauhan, Advocates, for private respondents.

RFA Nos. 182 to 190 of 2011

For the Appellant(s): Mr.Tara Singh Chauhan, Advocate.

For the Respondent(s): Mr.Shiv Pal Manhans, Additional Advocate General with Mr.Raju Ram Rahi, Deputy Advocate General, for respondents-State.
Mr.K.D. Sood, Senior Advocate with Mr.ShubamSood, Advocate, for respondent-ACC Limited, Barmana.

The following judgment of the Court was delivered:

Vivek Singh Thakur Judge

All these appeals arising out of award dated 3.9.2010 passed by learned District Judge, Bilaspur (herein after referred to as the Reference Court) in land Reference Petition Nos. 1 of 1987, 49 of 1987, 3 of 1987, 13 of 1987, 18 of 1987, 20 of 1987, 22 of 1987, 23 of 1987, 43 of 1987, 44 of 1987, 45 of 1987, 50 of 1987, 53 of 1987, 2 of 1987, 9 of 1987, 41 of 1987, 42 of 1987, 47 of 1987, 55 of 1987, 4 of 1987, 6 of 1987, 8 of 1987, 10 of 1987, 16 of 1987, 21 of 1987, 24 of 1987, 25 of 1987, 26 of 1987, 27 of 1987, 28 of 1987, 29 of 1987, 31 of 1987, 39 of 1987**,** have been heard together and are being decided by this common judgment, as common question of fact and law, to be considered on the basis of common evidence, is involved.

2. State of Himachal Pradesh, for public purpose, i.e. for mining lime stone by ACC Limited Company, Gagal for production of cement, had initiated acquisition proceedings under Land Acquisition Act (herein after referred to as 'the Act') for acquisition of land in various villages including village Panjgain and Baloh in District Bilaspur by issuing notification dated 7.10.1978 under Section 4 of the Act, which was published in official Gazatte on 21.10.1978. After completing the process under the Act, Land Acquisition Collector assessed the market value of the acquired land as under:

"Classification of land	Rate per Bigha
1. Anderli Aval	Rs.7500.00
2. AnderliDoem	Rs.6900.00
3. Bahrli Aval	Rs.6200.00
4. BahrliDoem.	Rs.3700.00
5. Khadyater, Banjar Etc. (un-cultivated.)	Rs.1200.00"

3. Being aggrieved and dissatisfied with the value of acquired land determined by Land Acquisition Collector, land owners had preferred Reference Petitions under Section 18 of the Act, which were decided by learned Reference Court vide award dated 7.11.1998, 4.3.1999 and 6.3.1999. The said awards were assailed before this High Court, which were

set aside by this High Court in appeals vide judgment dated 30.11.2009, remitting the same back for decision afresh with observation that compensation in these cases cannot be determined on the basis of agricultural quality of land, but has to be adjudicated on the basis of potentiality. Thereafter Reference Court has decided the Reference Petitions afresh vide common impugned award dated 30.9.2010, awarding compensation at a uniform rate of Rs.25,000/- per bigha, irrespective of nature and classification of the land along with all consequential statutory benefits, which has now been assailed by land owners and beneficiary ACC Limited in present appeals. ACC Limited is aggrieved by enhancement of compensation, whereas land owners are claiming that enhanced value of land is still inadequate.

Appeals of land owners

4. There are two sets of appeals preferred by land owners for enhancement of compensation. In one set of appeals, RFA Nos. 370, 390 to 400 and 407 to 413 of 2010, enhancement has been prayed mainly on the ground that Reference Court has completely failed to consider the finding recorded by this High Court in remand order dated 30.11.2009, whereby it has specifically been held that since land in question has been acquired for commercial purpose, therefore, the land in question was to be assessed according to its commercial potentiality and not on the basis of assessment carried out as agricultural land and further that Reference Court has committed an error by determining the amount of compensation after deducting 30% from the average value arrived at on the basis of sale deeds Ex. PW-4/A and Ex. PW-8/A, as where no development activity is to be undertaken by the beneficiary for utilization of land, no deduction for development charges is permissible and in villages of land owners, facility of modern amenities like road, electricity, telephone, education institutions, health etc. are already available much prior to 1978.

5. In another set of appeals RFA Nos.182 to 190 of 2011, preferred by land owners, enhancement has been sought on the ground that on the basis of sale deed Ex. PW-8/A, value of land becomes Rs.40,000/- per bigha and the land owners, keeping in view the commercial potentiality of the land, are entitled for the same rate and therefore, Reference Court has committed an error by determining the value of land on the basis of average value of sale deeds Ex. PW-4/A and Ex. PW-8/A, that too after making deduction of 30% and further that Reference Court has failed to taken into account the potentiality of the land, more particularly commercial value of the land under acquisition.

Appeals of ACC Limited.

6. ACC Limited, in its appeals bearing RFA Nos. 462 of 2010 to 475 of 2010, has assailed the impugned award on the ground that retail price cannot be considered for determining the wholesale price i.e. price of small chunk of land cannot be the price for large chunk of land and sites of buildings could not be of the same potentialities of land, which is ghasni, barron, rocky and hilly in nature and there is no reliable and trustworthy exemplars transaction on record, so as to determine the value of acquired land @ 25,000/- per bigha, particularly when potentiality of land had already been taken into consideration by the Reference court in another case, wherein flat rate of Rs.15000/- per bigha was awarded and further that the sale transactions Ex. PW-4/A and Ex. PW-8/A are created sale deeds for establishing the higher value of land after gaining knowledge about the possibility of acquisition of land for survey being conducted by ACC Limited to obtain prospective mining lease in the area and that the awards of different villages announced by the Reference Court cannot be taken into consideration for determination of value of land in present case. Further that the Reference Court has also failed to take into consideration the fact that apart from compensation, one member from the family whose land had been acquired, has been given employment by ACC Limited by way of additional compensation, besides providing medical and other facilities such as roads, schools, quarters etc. and finally that

Reference Court has failed to appreciate the evidence on record and its findings are based on misreading and mis-appreciation of evidence.

7. Learned District Judge has passed the impugned award after considering the entire evidence lead by parties in various land reference petitions. Land owners have relied upon sale deeds Ex. PW-4/A, Ex. PW-6/A (in reference petition No. 42 of 1987, Devjani Vs. LAC), Ex. PW-7/A, Ex. PW-8/A, Ex.PX and Ex.P-1 (in land reference petition No. 4 of 1987, Mari Devi Vs. LAC) and Ex. P-5 (in land reference petition No. 42 of 1987, Jagannath through LRs. Dev Jani Vs. LAC) and have also put reliance upon awards Ex. PZ, Ex. PZ/1, Ex. PA (in land reference petition No. 4 of 1987, Mari Devi Vs. LAC), Ex. P-1 and Ex. P-7. Geological reports Ex. PW-10/A and Ex. PW-10/B, site plan of location Ex. PW-10/C and Ex. PW-10/D have also been relied upon by land owners to prove the utility and potentiality of land under acquisition. Whereas, respondents have relied upon sale deeds Ex. RA, Ex. RC, Ex. RE, Ex. RG, Ex. RH (in land reference petition No. 42 of 1987, Jagannath through LRs. Dev Jai Vs. LAC), Ex. RI, Ex. R-15 (in land reference petition No. 27 of 1987, Mohan Vs. LAC) and award Ex. RA (in land reference petition No. 42 of 1987, Jagannath through LRS. Dev Jani Vs. LAC). Various other documents including copies of mutations and akstatima, attested in pursuance to sale deeds relied upon by the parties, have also been relied upon by land owners as well as beneficiary ACC Limited, which are of no relevance for the purpose of determination of market value of the land under acquisition.

8. As per provisions of Section 25 of the Act, the Reference Court cannot determine the value of acquired land at a rate lesser than the rate awarded by Land Acquisition Collector. In present case, the highest value determined by Land Acquisition Collector is Rs.7,500/- per bigha and in the light of aforesaid provisions of the Act, the value of acquired land cannot be determined below Rs.7,500/- per bigha.

9. It is no longer res-integra that when the land is acquired for a purpose of single use, which has no relevance with the nature and classification of land on the basis of its agricultural potentiality, its value is not to be determined on the basis of its nature and classification, but has to be determined on the basis of purpose for which it has to be put in utilization after acquisition, considering the entire land as a single unit, resulting awarding of uniform rate to all kind of land acquired. (See ***Dadu Ram Vs. Land Acquisition Collector and others (2016) 2 ILR 636 (HP)***; ***H.P. Housing Board Vs. Ram Lal and others, 2003 (3) Shim.L.C. 64; Union of India Vs. Harinder Pal Singh and others 2005 (12) SCC 564; Executive Engineer and another Vs. Dila Ram, Latest HLJ 2008 (HP) 1007).***

10. Award Ex. RA relied upon by ACC Limited pertains to compensation assessed by Land Acquisition Collector with respect to trees, but not to the land and therefore, the same has rightly been discarded by learned Reference Court being irrelevant for determining the value of acquired land.

11. Sale deeds relied upon by ACC Limited pertains to village Panjgain, land of which village is under acquisition. Sale deeds Ex. RE, Ex. RI and Ex. R-15 are dated 4.9.1976, 19.8.1976 and 7.5.1976, which were executed more than two years prior to issuance of notification dated 21.10.1978, therefore, these deeds are not having any proximity of time with the notification under Section 4 of the Act. Even otherwise, if these sale deeds are taken into consideration, then value of land as per these sale deeds becomes eitherRs.2,000/- per bigha or less than Rs.1,000/- per bigha, which is lower than the highest value of land determined by Land Acquisition Collector.

12. Sale deeds Ex. RA, Ex. RC, Ex. RG and Ex. RH are dated 15.6.1978, 3.5.1978, 29.3.1978 and 15.6.1978. These sale deeds are proximate in time with

notification under Section 4 of the Act, however, again value of land as per these sale deeds becomes ranging from Rs.650/- per bigha to Rs.2,000/- per bigha. The said value, being lesser than the highest value determined by the Land Acquisition Collector, cannot be made ground for determining the compensation of land under acquisition. The findings returned by learned District Judge in this regard do not warrant any interference.

13. Sale deeds Ex. PX and Ex. P-1 (in land reference petition No. 4 of 1987, Mari Devi Vs. LAC) are dated 17.2.1993 and 9.12.1986, having no proximity in time with notification under Section 4 of the Act, as these sale deeds have been executed after 15 years and 8 years of issuance of notification under Section 4 of the Act.

14. Sale deeds Ex. PW-6/A (in reference petition No. 42 of 1987, Devjani Vs. LAC), Ex. PW-7/A and Ex. P-5 (in land reference petition No. 42 of 1987, Jagannath through LRs. Dev Jani Vs. LAC), were executed in the year 1978, prior to issuance of notification and to prove these sale deeds and similarity and potentiality of land involved in these sale deeds with acquired land, vendor/vendee have also been examined by land owners. Scrutiny of their deposition reveals that PW-6 Chhoto (examined in Reference Petition No. 53 of 1987, Nagru through Anil Kumar Vs. LAC) and PW-3 Fitho (examined in Reference Petition No. 42 of 1987, Jagannath through LRs. Dev Jani Vs. LAC), vendor and vendee in sale deed Ex. PW-6/A were none else, but mother and daughter, who have admitted that no sale consideration was paid either before Sub Registrar or in presence of witnesses. In sale deed Ex. PW-7/A vendor PW-7 Balak Ram has admitted that vendee in the said sale deed was his real sister and that no sale consideration was paid either in presence of Sub Registrar or before witnesses to the execution of the sale deed. Similarly, in sale deed Ex. P-5, PW-5 Janku has sold land to Gandhi and in this case also no sale consideration was exchanged between vendor and vendee in presence of Sub Registrar or any witnesses. PW-5 Janku in his cross-examination has also admitted that vendee Gandhi is his god brother. Therefore, learned District Judge has rightly concluded that these sale deeds were sham transaction but not genuine to be relied upon to determine the value of land.

15. It is now settled legal position that the award of Reference Court relating to the same village of similar land possessed of same quality of land and potentiality, in absence of any tangible material on record as regards the distinctive features of differentiation between the quality of land, subject matter of award and land under acquisition, offers a comparable base for determination of compensation. (See ***Special Land Acquisition Officer Kheda and another Vs. Vasudev Chandrashankar and another, (1997) 11 SCC 218).***

16. It is also settled law that in absence of exemplar transactions of the same village, exemplar transactions of adjoining villages can be taken into consideration and in case there is evidence on record with regard to similarity of nature, utility and potentiality of land, then same value of land of the said village can be determined and in case there is no evidence with regard to similarity of nature, utility and potentiality of land, the exemplar transactions of adjoining village can be taken into consideration, but the value of the land cannot be determined to be the same and keeping in view the surrounding circumstances, the value of land can be determined after making appropriate deductions. ***(See Jai Prakash and others Vs. Union of India (1997) 9 SCC 510, Kanwar Singh and others Vs. Union of India (1998) 8 SCC 136 & Manoj Kumar Vs. State of Haryana 2017 SCC Online SC 1262).***

17. Award Ex. PZ passed by learned Reference Court, in another instance of acquisition of land for ACC Limited, on 29.4.1995 pertains to the acquisition proceedings initiated on 1.10.1992, i.e. fourteen years after the notification under Section 4 of the Act in the present case and thus the same is not proximate in time to case in hand, which is a

necessary condition for comparing and determining the value of land under acquisition. Award Ex. P-7 dated 20.9.1985 pertains to acquisition proceedings initiated vide notification dated 23.11.1978 issued under Section 4 of the Act and proximate in time to the notification under Section 4 of the Act in present case. The said award pertains to a different village i.e. village Bhater and Nalag. Similarly, in award Ex. PZ/1, land pertaining to village Nalag is involved and further the value of land in the said award was determined keeping in view the agricultural quality of the land, whereas in present case value of land, as also observed by this Court at the time of remanding the matters in earlier appeal(s) to learned District Judge, valuation of land is to be determined on the basis of potentiality and not on the basis of agricultural quality. Similarly, for the same reason, award Ex. P-1 pertaining to village Dhaun Kothi, a different village, wherein also value of land was determined on the basis of agricultural quality, cannot be considered for assessing the value of land in present case. Another award Ex. PA (in Mari Devi) dated 30.5.1992, despite related to the same village Panjgain and Baloh, is also not relevant in present case, as in the said award also value of land was determined on the basis of agricultural quality. Therefore, learned District Judge was justified in ignoring the aforesaid awards for determining the value of land under acquisition in present case.

18. Sale deed Ex. PW-4/A dated 3.4.1978 involving transfer of 1 biswa land for Rs.1500/- between PW-4 Ram Nath (vendor) and PW-5 Tilak Raj (vendee) pertains to the village Panjgain and sale deed Ex. PW-8/A dated 24.4.1978 pertaining to the same village, proved on record by vendor PW-8 Amar Nath, involves 2 biswa of land sold for Rs.4,000/-. These deeds are only exemplar sale deeds which can be taken into consideration for determining the value of land as there is nothing on record to suspect their genuineness and these sale deeds are proximate in time being executed within six months prior to the notification under Section 4 of the Act. Therefore, learned District Judge has rightly concluded that sale deeds Ex. PW-4/A and Ex. PW-8/A are the only exemplar sale deeds, which are proximate in time to the notification under Section 4 of the Act in present case and can be taken into consideration for determining the value of land.

19. In present appeals land pertains to two villages i.e. Panjgain and Baloh is involved. The exemplar sale deeds Ex. PW-4/A and Ex. PW-8/A and also all other sale deeds relied upon either by land owners or ACC Limited, pertains to village Panjgain only. As discussed supra, the value of land determined for acquisition of land in adjoining village can be awarded on establishing the similarity of nature, quality and potentiality of the land with the same.

20. In present case PW-11 Dev Raj Patwari has deposed that village Baloh and village Panjgain are adjoining to each other and potentiality and quality of acquired land in both villages is almost similar. Depositions of Ranu in reference petition No. 53 of 1987, (Nagru through Anil Kumar Vs. LAC), petitioner Jagarnath in reference petition No. 42 of 1987 (Jagannath through LRs. Dev Jani Vs. LAC) and Pohlo Ram Power of Attorney of Madi Devi in reference petition No. 4 of 1987 (Madi Devi Vs. LAC) have also substantiated the claim of land owners. It is admitted fact that land of both villages has been acquired for the same purpose i.e. for the purpose of mining and the lime stone in the acquired land is useful for manufacturing cement. Similarly, nature and potentiality of land viz-a-viz the purpose for which it has been acquired, has also been substantiated from the report Ex. PW-10/A and geological map Ex. PW-10/B proved on record by Geologist PW-10 Rajnish Sharma, wherein lime stone area has been depicted in both villages, which is to be extracted for utilization in cement factory at Barmana. Therefore, there is ample evidence on record to consider that the nature, utility and potentiality of the acquired land in Baloh village is similar to that of land in village Panjgain. The said fact is further established from the fact that Collector has also awarded the identical value to the acquired land in both the villages.

Therefore, similarity of nature, quality and potentiality of land acquired in both villages i.e. Panjgain and Baloh has been established on record and thus value of land in both villages is identical.

21. Sale deeds Ex. PW-4/A and Ex. PW-8/A pertains to the land situated in village Panjgain have been executed on 3.4.1978 and 24.4.1978, respectively and as such they are proximate in time to the date of notification under Section 4 of the Act and there is also proximity of location of land under acquisition and subject matter of the sale deeds, having the same value and potentiality. As per sale deed Ex. PW-4/A, value of land is Rs.30,000/- per bigha, whereas according to sale deed Ex. PW-8/A, value of land is Rs.40,000/- per bigha. These are only two exemplar sale deeds, which can be taken into consideration for determining the value of land, as there is no impediment to rely upon these sale deeds like other exemplar sale deeds and awards relied upon by the parties. On the basis of these sale deeds average value of the land is Rs.35,000/- per bigha.

22. The Apex Court in ***BhikulalKedarmalGoenka Vs. State of Maharashtra and another (2016) 14 SCC 279***, has held that deduction from the determined market value of acquired land, towards development charges, is not warranted when no development required to be made for implementation of public purpose, for which land is acquired. It is also held by the Apex Court in ***Land Acquisition Officer Revenue Divisional Officer, Chittor Vs. L. Kamalamma (Smt.) dead by LRs and others K. Krishnamachari and others (1998) 2 SCC 385***, that when no sales of large chunks of comparable land are available, even land transactions in respect of smaller extent of land can be taken note for determining the price of acquired land by making appropriate deductions, such as, for development of land by providing enough space for development of land to be carried on by the beneficiary like construction of roads, sewers, drains, expenses involved in formation of a layout. In ***Atma Singh (dead) through LRs. and others Vs. State of Haryana and another (2008) 2 SCC 568,*** the Apex Court has held that for assessing the market value of the land, the potentiality of the acquired land should also be taken into consideration and potentiality means capacity or possibility for changing or developing into state of actuality and market value of a property has to be determined having due regards to its existing advantages and its potential possibility when utilized in its most advantageous manner.

23. The Apex Court after putting reliance on its earlier pronouncement in *Trishala Jain Vs. State of Uttranchal (2011) 6 SCC 47***,** in ***Vithal Rao and another Vs. Special Land Acquisition Officer (2017) 8 SCC 558,*** has held that for determining the true market value of the acquired land and especially when the acquired land is a large chunk of undeveloped land, it is the just and reasonable to make appropriate deduction towards expenses for development of acquired land and deductions should be made keeping in mind the nature of land, area under acquisition, whether the land is developed or not and, if so, to what extent, the purpose of acquisition, etc. It has also been held that while determining the market value of large chunk of land, when sale deeds of larger parcel of land are not available, the value of smaller piece of land can be taken into consideration after making proper deduction in the value of lands. It is further held that the Court should also take into consideration the potentiality of acquired land apart from other relevant considerations and the Court can always apply reasonable amount of guesswork to balance the equities in order to fix a just and fair market value in terms of parameters specified under Section 23 of the Act.

24. Relying on judgments of the Apex Court in *The Collector of Lakhimpur Vs. Bhuban Chandra Dutta, AIR 1971 SC 2015*and*Kaushalya Devi Bogra and others etc. Vs. Land Acquisition Officer Aurangabad and another, AIR 1984 SC 892*, this High Court in ***State***

of H.P. and another Vs. Sanjeev Kumar and another 2010(2) S.L.J. (HP) 1225, which has also been relied upon by the Reference Court, has held that deduction of about 30% was permitted for determining the market value of large property on the basis of sale transaction of smaller property.

25. In a recent judgment ***Maya Devi (D) through LRs and others Vs. State of Haryana & Another JT 2018 (1) SC 495***, the Apex Court has approved deduction of 1/3, where exemplar was for a small extent of land and the acquired land has to be developed for construction of warehouse.

26. In sale deeds Ex. PW-4/A and Ex. PW-8/A small chunks of land have been transferred, whereas large chunks of land belonging to land owners have been acquired by the ACC Limited. Therefore, on this count there should be some reasonable deductions from the value of land arrived at on the basis of transactions of small chunk of land. But at the same time in present case, it is also to be considered that value of land is not to be determined on the basis of its potentiality for utilization of land for agricultural purposes or house building, but the potentiality of land is to be assessed keeping in view its utility to the purpose for which it has been acquired. Admittedly, the land under acquisition in present appeals has been acquired for extraction of lime stone for production of cement. No doubt for conversion of lime stone into cement involves a process to be undertaken in Cement Plant, but so far as use of extracted lime stone is concerned, i.e. to be used in the same form in which it is extracted from the land and except extraction, no other special process except crushing is required to be undertaken for using the said extracted lime stone whereas after conversion of this lime stone into cement, its value is converted number of times higher than the value of lime stone used for its production. Therefore, no deduction on account of development charges is to be made in present case, rather value of land is to be determined by adding its potentiality of yielding lime stone for the purpose of production of cement in the value determined on the basis of sale deeds Ex. PW-4/A and Ex. PW-8/A, wherein the transaction of land was not for a commercial purpose like extraction of lime stone.

27. The contention of ACC Limited that the exemplar sale deeds are sham transactions and have been executed only for exaggeration of price of land for getting higher compensation for acquisition of land is also not substantiated from the evidence, especially deposition of RW-1 Subash Sharma, on record. Acquired land is situated in village Panjgain and Baloh, whereas, according to his statement the survey was conducted for determining the lime stone for manufacturing of cement in Gagal Dhar, Bilaspur and after the recommendation in the year 1975, prospecting lisence was issued in favour of ACC by the State, whereafter drilling operations in Gagal Dhar was also undertaken to extract sample of lime stone before applying for industrial lisence to the Government of India. Though RW-1 has stated that inhabitants of locality regarding establishment of ACT Factory in the area were informed by him, but there is no corresponding corroborative documents/evidence including alleged survey conducted by RW-1 or any other paper establishing his visits in villages Panjgain and Baloh, to substantiate his statement. There is nothing on record to doubt the genuineness of sale deeds Ex. PW-4/A and Ex. PW-8/A.

28. Potentiality of acquired land for yielding lime stone for which purpose the land has been acquired, has been proved on record by PW-10 Rajnish Sharma, Geologist of Industrial Department, who has placed on record his report Ex. PW-10/A and geological map Ex. PW-10/B, including that the entire land under acquisition is lime stone area. Therefore, definitely the value on the basis of potentiality of acquired land is to be added in the average value of the land acquired on the basis of sale deeds Ex. PW-4/A and Ex. PW-8/A.

29. In my opinion, on the basis of potentiality of land, particularly keeping in view the purpose of acquisition, it would be appropriate to add 15% in the value of land determined in ordinary course. In case it is added in value of land i.e. Rs.35,000/- per bigha arrived at on the basis of average of Ex. PW-4/A and Ex. PW-8/A, value of land becomes Rs.40,250/- per bigha. However, for the reason that sale deeds Ex. PW-4/A and Ex. PW-8/A are transactions of small chunk of land, the value of acquired land requires to be determined after making deduction in the value arrived at on the basis of these sale transactions. Learned District Judge has allowed deductions of 30% on the basis of pronouncement of this Court in *State of H.P. Vs. Sanjeev Kumar 2010 (2) SLJ HP 1225 (supra)***.** The Apex Court, as discussed supra, has permitted 1/3 deduction for transfer of small extent of land in comparison to large chunk of acquired land and where some development work is required to be undertaken by the beneficiary. Whereas, in present case, no development work is to be undertaken by the beneficiary, therefore, deduction of 30% is on higher side. But at the same time, it is also to be considered that land involved in Ex. PW-4/A and Ex. PW-8/A is one biswa and two biswas respectively which is too small chunk in comparison to chunks under acquisition. It is also true that chunk of acquired land for comparison is to be considered on the basis of land of each land owner and not entire land under acquisition. But even then plots of one biswa and two biswas involved in exemplar deeds are too small. Considering the entire evidence on record, it would be appropriate to have deductions of 25%. Deductions for small chunk land, where the deductions of small chunk is made and addition of value on the basis of potential related to the purpose, for which land has been acquired, is to be made for quality of lime stone available in the land and it would be appropriate to add 15% value of land calculated on the basis of sale deeds Ex. PW-4/A and Ex. PW-8/A. As such, after making deduction of 25% in the value of Rs.35,000/- per bigha, value of land comes to Rs.26,250/- per bigha and with further addition of 15%, keeping in view potential, value of land comes to Rs.30,187/- per bigha, which in round figure will be Rs.30,000/- per bigha.

30. In view of above discussion, land owners are held entitled for compensation at the rate of Rs.30,000/- per bigha along with statutory benefits including interest thereon and accordingly, appeals of land owners bearing RFA Nos. 370, 390 to 400, 407 to 413 of 2010 and RFA Nos. 182 to 190 of 2011 are allowed and appeals preferred by ACC Limited bearing RFA Nos. 443 to 475 of 2011 are dismissed in aforesaid terms. No order to costs. Record be sent back.

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

M/s Arora Pharmaceuticals Pvt. Ltd &Anr. ...Petitioners

Versus

State of Himachal Pradesh ...Respondent

Cr.MMO No. 122 of 2017
Reserved on 26.07.2018
Date of decision:27.08.2018

Drugs and Cosmetics Act, 1940 (Act)- Section 27(d)- **Drugs and Cosmetics Rules, 1945-** Rule 85- Suspension of licence – Effect – Whether complaint for offence under Section 27(d) of Act thereafter would be maintainable?– Held – No - Sample of formaldehyde solution manufactured by petitioner found not of standard quality – Assistant Drugs Controller and

Licensing Authority after hearing manufacturer, suspending licence for one month – Order attaining finality – Drugs Inspector, thereafter also filing complaint against manufacturer for offence under Section 27(d) before Court – Challenge thereto – Held, manufacturer stood punished by authorities by way of suspension of licence and order attaining finality – Complaint before Magistrate not maintainable- Petition allowed complaint quashed (Paras- 2 to 4 and 24).

Drugs and Cosmetics Act, 1940- Section 27(d)- **Code of Criminal Procedure, 1973-** Section 468- Limitation – Computation - Quashing of complaint – Sample of drug taken on 7.7.2007 – Found not of prescribed standard by Government analyst vide report dated 7.3.2009 – Complaint for offence filed before Magistrate on 6.3.2012- Complainant not seeking condonation of delay – Held, complaint barred by limitation – Petition allowed – Complaint quashed. (Paras-14, 28 and 29)

Cases referred:

Krishna Sanghi and others versus The State of Madhya Pradesh, 1977 Cri. L.J. 90 (M.P.)

Prakash Chander Sharma versus Kaushal Kishore, Allahabad High Court in Cri. L.J. 1980 Vol-I 578

State of Karnataka versus Vedavati, Cri. L.J. 1978 Vol. 84(II)1375

For the petitioners: Mr. Anand Sharma and Mr. Karan Sharma, Advocates.
For the respondent: Mr. Ashwani Sharma, Additional Advocate General.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge.

The present petition is maintained by the petitioners under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code") for quashing of the complaint titled as State of Himachal Pradesh, through Drug Inspector, Una versus Murari Lal Arora filed under Sections 18(a) (I) of the Drugs and Cosmetics Act, 1940, read with Section 27(d) of the Act, being illegal, which is pending adjudication before the Court of learned Judicial Magistrate Ist Class, Court No.II, Hamirpur, H.P.

2. Briefly stating the facts, giving rise to the present petition are that on 06.3.2009, the Assistant Drug Controller -cum-Controlling Authority, Sai Road Baddi, District Solan, H.P., informed the office of Assistant Drug Controller and Licensing Authority that sample of formaldehyde solution I.P.B. RL-10, D/M 06/2007, D/E 05/2010, manufactured by the Firm was reported as not of standard quality by Government Analyst G.A. vide report No.HFW-CTL(Drugs) Report/06-1425, dated 07.03.2009. It has been alleged that the sample did not comply in respect of the test for formaldehyde which is 16.2 percent w/w against the I.P. 66, requirement as 34 to 38% w/w and the weight per ml at 20° centigrade is 1.1048 gms., against the I.P. 66 requirement as 1.079 gms., to 1.094 gms.

3. It has been contended that, thereafter, a show cause notice was issued by the petitioners vide office memo dated 21.5.2009, as to why their licence (s) should not be suspended or cancelled under Rule 85 of the Drugs and Cosmetics Rules, 1945 (hereinafter to be referred as the 'Rule'). The petitioner filed reply vide letter dated 04.6.2009, confirming the re-packing of manufactured and sale of subject drug. It has been alleged that Murari Lal Arora, the Managing Director of the Firm, appeared in the Drug Control Department, F17, Karkordooma, Shahdara, Delhi and explained about manufacturing and sale of the above said drug and reiterated averments made in the letter dated 04.06.2009.

4. It has been alleged that after taking into consideration, reply of the firm, the petitioners in response to show cause notice and explanation given by the firm during the personal hearing were considered, which were found un-satisfactory. It has been mentioned that the firm has since manufactured and sold not of standard quality product, i.e. formaldehyde solution I.P.B. No.RL-10,D/M 06/2007, D/E 05/2010 and thereby contravened the provisions of Section 18(a) (I) of the Drugs & Cosmetics Act, 1940 (hereinafter to be referred as the 'Act'). Therefore, one Sh. Ravi Kant, Assistant Drugs Controller and Licensing Authority, appointed under Rule 59 (i) of the Drugs & Cosmetics Rules 1945, suspended the Licence(s) No. 553 and 554 on Form 25 and 28 of the firm referred to above, in part in respect of "formaldehyde solution I.P." for a period of one month from 01.03.2010 to 30.03.2010 (both days inclusive), under Rule 85 of Drugs & Cosmetics Rules 1945, for having manufactured and sold not of standard quality drug.

5. Further, it has been alleged that whatever offence was committed by the petitioners, has been decided by the concerned authorities and no appeal whatsoever against the order dated 14.01.2010, was filed under Rule 85 of the Drugs & Cosmetics Act, by the petitioner-Firm as firm has accepted the sentence of suspension of licence. Hence, orders passed by the learned Authority dated 14.01.2010 (Annexure-PA) had become final, because none of the parties had assailed the same. However, even after the finality of orders, Annexure-PA/1, instead of filing appeal, as provided under Rule 85 of the Drugs and Cosmetics Rule, within a period of three months up till 14.04.2010, the respondents filed the presents compliant with mala fide intention to cause harassment to the petitioners after long time.

6. It has been contended that vide order dated 14.1.2010, the proceedings had been finally concluded as none of the parties either the petitioner or prosecution had challenged, hence, attained finality, but still the petitioners have received a notice,Annexure-PC,through the Station House Officer, Police Station, Hamirpur, H.P., issued by the learned Judicial Magistrate, Ist Class, Court No.II, Hamirpur, H.P., to put in appearance for 3rd of March, 2017.

7. It has been alleged that the petitioner had also sent reply to the memorandum, dated 21.05.2009 on 04.06.2009 and specifically submitted that from the report sent by the Assistant Drug Controller, Hamirpur, H.P., that subject product was not found of standard quality with respect to the Assay and weight per ml., by the Government Analyst, who had tested the sample after a period of twenty months of its receipt in their laboratory and also explained the number of facts vide letter dated 04.6.2009. It has been mentioned that the said product was labeled in accordance with the conditions stipulated in the Pharmacopoeia I.P. 66. Thereafter, it was sold after clearance from the Laboratory, which has been equipped and manned by the approved Analyst in order to show that the purported product had failed in test(s), because of improper storage in the laboratory, being situated in a cold space where temperature at most of times is below 15 degree centigrade, on which re-packer had no control.

8. It has been contended that as per the averments made in the present petition as well as in the complaint, the proceedings initiated by the respondent by filing of complaint, are absolutely illegal, arbitrary and against the provisions of law. Hence, the notice issued by the learned Judicial Magistrate, Ist Class, Court No.II, Hamirpur, for effecting the service and directing it to appear before the learned Court at Hamirpur is illegal after a period of more than seven years of the decision dated 14.01.2010 and amounts to double jeopardy and against the principles of fundamental rights, as enshrined in the Constitution of India, which shows that nobody can be prosecuted/punished two times for the same offence.

9. It has been contended that whole of the proceedings right from the taking up of the sample till date are absolutely illegal and have been initiated just to harass the petitioners on one pretext or the other, more particularly, when the authorities have already taken the decision and penalized the petitioners, as per the Rules, whereas it was none of the business of the prosecution (Drug Inspector-complainant) to continue with the complaint filed by the complainant, because the petitioners had never filed any appeal against the orders passed under Rule 85 of the Drugs and Cosmetics Rules and had accepted the verdict of the authorities. It has been contended that before issuing of notice the learned Court below has not applied its mind while directing the petitioner to appear after a period of almost a decade. Further, it has been alleged that the learned Court below has also not taken into consideration and complied by the provisions of the Constitution of India, more particularly, Articles 20(2), which shows that *"no person shall be prosecuted and punished for the same offence more than once."* Hence, it has been prayed that the complaint filed by the respondent is required to be quashed and set aside.

10. It has also been contended that before issuance of the notices, the learned Court below did not take into consideration the fact gathered from the report sent by the Assistant Drugs Controller, Hamirpur, that the subject product was not found of standard quality in respect of Assay and weight for ml. (milliliter) by government Analyst, who had tested the sample after 20 months of its receipt in their laboratory. Whereas, as per Rule 57 of the Act, on receipt of a package from the Inspector,containing a sample for the test or analysis, the government Analyst shall compare the seals on the packet, with the specimen impressions received separately and shall note the condition of the seal on the packet. It has been alleged that the testing of the sample was done after twenty months of its receipt in their laboratory.

11. Further, it has been alleged that conditions to procedure prescribed as per Rule 57 of the Rules ibid, have also not been complied with in any manner whatsoever, as prescribed under Section 23 of sub-section 4 of the Act, hence, the entire proceedings are vitiated. It has been alleged that as per the storage stipulations, Formaldehyde solution I.P., should not be stored in temperature 15 degree centigrade, while the Government lab is situated in a cold place where temperature at most of the time is below 15 degree centigrade, on which the petitioners had no control, shows that there was improper storage in the government Laboratory, which has resulted in the failure of the produce of the petitioners.

12. It has been contended that the learned Judicial Magistrate Ist Class did not take into consideration the fact that when there was no material in the complaint for initiating the prosecution, it was well within the power of the learned Court below to dismiss the complaint under Section 203 of the Code of Criminal Procedure even without issuance of process.

13. It has been contended that the learned Court below also did not taken into consideration before issuance of process for summoning the petitioners when there was no material against the petitioners and moreover the controversy had already been decided by the competent authority, which was accepted by the petitioners without assailing the same by either parties and which has also attained finality, hence, the present proceedings amounts to abuse of process of law and the proceedings, which have not basis at all and are liable to be quashed. Further, it has been alleged that the complaint has been initiated after a period of ten years and there would not be any allegation, which could be proved by the prosecution even on the basis of facts mentioned in the complaint because it is a fundamental law and nobody can be vexed two times for the same offence. Therefore, it has

been prayed that the proceedings against the petitioners pending before the learned Court below may be quashed and set aside.

14. The respondent-State filed reply. In the reply, it has been submitted that function of Formaldehyde to be described elaborately by the petitioners, as it is used for manufacture of vaccines and hard gel capsules, also used to kill microorganisms and that Assistant Drug Controller-cum-Controlling Authority, Baddi, H.P., informed Drugs Controller, Delhi on 24.3.2009, instead of 06.03.2009. It has been submitted that notice dated 21.5.2009 was given by the respondent and not by the petitioners and that the petitioners have contravened Section 18(a)(i) of the Drugs and Cosmetics Act, 1940 read with Section 27 (d) of the Act. It has also been submitted that Drug Inspector has taken sample on 07.07.2007 and sent sample to CTL, Kandaghat on 10.07.2007 and CTL, Kandaghat also tested the sample before expiry of the drug and sent its report on 07.03.2009, which was received in the office of Drugs Inspector, Hamirpur on 27.03.2009. It has been alleged that letter to M/s Arora Pharmaceuticals Pvt. Ltd was sent on 16.05.2009, but the accused has not challenged the report dated 07.03.2009 for re-testing, though there was sufficient time for re-testing, as the expiry date of the drug was May, 2010. It has been submitted that the sample was sent for testing in a proper manner and the test was carried out in a proper manner also. It has been submitted that the complaint was filed by the complainant on 06.03.2012 for legal action and that the Drug Inspector visited the spot and prepared spot memo on 29.02.2012.

15. Further, it has been submitted that complaint against the accused has been filed in accordance with Drugs and Cosmetics Act, 1940 for contravention of Section 18(a) (I) of the Act, which is punishable under Section 27(d) of the Act. However, it has been submitted that the letter dated 14.01.2010 was issued by the Assistant Drug Controller to the petitioner, which was received by the respondent from the petitioner on 29/02/2012, which was very late and in this letter only administrative action with reference to licensing part was taken.

16. It has further been submitted that testing of the Drug was done before expiry date and the Government Analyst report has been received on 27.03.2009, which is before expiry date of the drug as expiry date was May, 2010, however, the firm has not challenged the report or asked for re-testing as per the Act.

17. It has been submitted that the complaint was filed as per the provisions of law and the learned trial Court has rightly issued the process against the petitioners. It has been denied that the present complaint filed against the petitioners is a gross abuse of the process of law and there is no likelihood of the success of the case. Petitioners are liable for the contravention of the Act and Rules and the prosecution has been rightly initiated against the petitioners and the complainant will succeeded in proving the case against the petitioners and the petitioners are liable to face the prosecution before the learned Trial Court as the petitioners have contravened the provisions of Section 18(a) (I) punishable under Section 27 (d) of the Drugs and Cosmetic Act, 1940 and Rules, 1945 made thereunder and are liable for punishment as provided under the Rules.

18. I have heard the learned counsel for the parties and perused the record.

19. Learned counsel appearing for the petitioners has argued that the proceedings pending before the learned trial Court may be quashed and set aside.

20. On the other hand, learned Additional Advocate General appearing for the respondent-State has argued that as the petition is without merits, so the petition may be dismissed.

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

22. At this stage, taking into consideration the fact that the sample was taken in March,2009 and thereafter, show cause notice was issued to him and on the basis of such notice, his licence was suspended. The order passed pursuant to the show cause notice has attained finality and there is no dispute with regard to that. The complainant's case is that thereafter the present complaint is not maintainable as if at all the respondents were aggrieved by that order, that could have maintained the appeal. Admittedly no appeal against order was maintained by the respondents or by the petitioner and that order has attained finality. The second question which has been taken is that the cognizance was taken beyond the period of limitation and the third question is double jeopardy, as the authorities have already taken decision and finalised the decision.

23. This Court after going through the record finds that the sample was tested after 20 months of its receipt in the Laboratory whereas, as per Rule 57 of the Act, on receipt of a package from the Inspector, containing a sample for the test or analysis, the government Analyst shall compare the seals on the packet with the specimen impression received separately and shall note the condition of the seal on the packet and as the testing was done after 20 months of the receipt in the Laboratory, the chances of its deterioration cannot be ruled out.

24. In these facts and circumstances of the case, when the other conditions are also not specified while conducting the tests by the analysts and there is nothing on record that it was stored above the temperature of 15 degree centigrade. The judicial notice of the fact that in winters at the place of testing, the temperature some times goes to zero degree centigrade also is required to be taken. Further, the delay on the part of taking cognizance though tried to be explained by the respondents that by stating delay was not there as the cognizance was taken within ten months from the prosecution sanction, but the delay is there which has created a right in favour of the petitioners. At the same point of time, once the petitioner was already punished by the authorities and that order has attained finality, the present complaint is not maintainable, as Rule 46 of the Drug and Cosmetic Rules, provides as under:

> **"Rule 46 of the Drug and Cosmetics Rules, 1945, procedure on receipt of sample-on receipt of package from an Inspector containing a sample for test or analysis, the government analyst shall compare the seals on the packet (or on portion of sampler or container) with the specimen impression received separately and shall note the condition of the seals (on the packet or on portion of the sample or container). After the test or analysis has been completed, he shall forthwith supply to the inspector a report in triplicate in Form 13 of the result or the test or analysis, together with full protocols of the test or analysis applied."**

25. In the present case, the later analysis of the sample when the temperature at the place has sometimes gone to zero degree centigrade, the chances of sample deteriorating cannot be ruled out. There is nothing in the prosecution case that it was stored above 15 degree centigrade in the Laboratory, so, definitely the benefit goes to the accused.

26. In a case titled ***Krishna Sanghi and others*** versus***The State of Madhya Pradesh,*** 1977 Cri. L.J. 90 (M.P.), it has been held as under:

> **7. "……..Whenever a complaint or a challan is filed at the instance of any person or any police officer, the Court must first see that Section 468 of the Code of 1973 is attracted or not. If it does, it**

should not register the case but give an opportunity to the person or the police officer filing the complaint or challan to satisfy it on the point of limitation for purposes of condonation of delay. As regards the condonation of delay, it should not be done as a matter of course. The delay has to be condoned with exercise of judicial discretion. Section 473 of the Code empowers the Court to condone such delay if sufficient cause has been shown or if the interest of justice make it necessary to do so. But the application of the section would always depend upon the facts and circumstances of each case of which the Court would be required to exercise its judicial discretion in the matter, like an application under Section 5 of the Limitation Act, 1963. At this stage, I would also like to point out that the provisions of Section 473 of the Code should also be liberally construed like Section 5 of the Limitation Act so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to the prosecutor but cannot be construed too liberally because the government is the prosecutor or prosecution is upon the police report. After the delay is condoned by the Court on its being satisfied by the process referred to above, then alone it would register the case and proceed with the same in accordance with law. Before condoning the delay, although I do not find any provision of giving of notice to the accused person in Chapter XXXVI of the Code, but natural justice demands that the accused person must be heard before passing an order in that regard as such an order is bound to affect a valuable right which accrues to the accused and which cannot be allowed to be taken way lightly. As such, they have to be heard when an application under Section 473 of the Code is moved by the prosecution before cognizance is taken."

27. In a case titled ***Prakash Chander Sharma*** versus ***Kaushal Kishore,*** Allahabad High Court in Cri. L.J. 1980 Vol-I 578, it has been held:

"8. Section 468, Cr. P.C. bars the taking of cognizance by a court with respect to an offence for which the complaint is filed after the expiry of the period of limitation. The bar of limitation is an absolute bar. It goes to the root of the jurisdiction of the court. It provided amnesty to the accused from prosecution, which he would otherwise be faced, with, if the limitation had not been prescribed. He has a right not to be prosecuted for the alleged offence, when the period for such prosecution has elapsed in accordance with law. Therefore, when a complaint is filed against the accused, which prima facie is barred by time, it becomes necessary for the prosecuting agency to simultaneously file an application for condonation of the delay under Section 473, Cr.P.C. Unless the delay is condoned, the court cannot take cognizance of the complaint. In the instant case admittedly the complaint was belated by years. The offence was alleged to have been committed on 20th December, 1975, while the complaint was filed on 6th May, 1977. The officer-in-charge Municipal Board Bulandshahr with its Law Section to assist him must be aware that such a belated complaint could not in law, be filed and its cognizance could not be taken by the court, therefore, as a reasonable and cautious litigant, it was necessary for him to have filed the application for condonation of

delay alongwith the complaint supported by an affidavit explaining the delay. In the absence of such an application, the Magistrate had no other alternative, but to dismiss the complaint as time barred. The Magistrate could not, in law, proceed with the complaint and summon the accused. The question of explaining the delay at a subsequent stage could not therefore, arise for, at the initial stage itself the complaint had to be dismissed by the Magistrate in accordance with Sec.468, Cr.P.C. I am not inclined to agree with the submission made on behalf of the respondent's counsel that cognizance could be taken of a prima facie time barred complaint by a Magistrate, who could proceed with the case, summon the accused and even record the evidence and thereafter consider the question whether cognizance should at all be taken and the delay condoned. The initial question for determination before proceeding with a time barred complaint is the question of limitation. The new provision has been enacted for the purpose of preventing a vexatious and frivolous prosecution of the accused leading to an unnecessary harassment of the citizen. It must be strictly construed, so that the intention of the law is achieved."

28. Applying the above cited law in the facts and circumstances of the present case, it is crystal clear that the complaint is barred by time and so, if allowed to continue, the result will be acquittal in all respects.

29. The learned Additional Advocate General for the respondent has failed to show anything the cognizance was taken within limitation. Though the learned counsel for the petitioners has demonstrated that the cognizance was taken beyond the period of limitation .

30. In a case titled ***State of Karnataka*** versus ***Vedavati,*** Cri. L.J. 1978 Vol. 84(II)1375, it has been held:

"5. The offence committed by the accused, if proved, is one falling under S.468 (2) (b) of the Cr.P.C. That being so, the charge-sheet should have been filed within one year from 25-12-1974. As regards the condonation of delay, it should not be condoned as a matter of course. The delay has to be condoned with exercise of judicial discretion. S. 473 of the Cr. P.C. empowers the court to condone such delay, if sufficient cause is shown or in the interest of justice or if the interest of justice makes it necessary to do so. But the application of the section would always depend upon the facts and circumstances of each case of which the court would be required to exercise its judicial discretion in the matter like an application under section 5 of the Limitation Act. In the case on hand, a valuable right which was accrued to the accused could not have been interfered with by the learned Magistrate there being no sufficient cause."

31. In the present case nothing has been established or there is nothing on record that before issuance of notice, delay has been condoned by the learned Court below. Furthermore, there is nothing on record to conclude that the delay is to be condoned.

32. The net result of the above discussion is that the complaint before the learned Court below even if allowed to proceed, will in all probabilities result into acquittal of the accused and as per the averments, which have come on record that cognizance has been taken, after the limitation and the petitioner has already been punished by the authorities for the same contravention. The sample was not analyzed within the reasonable time, the

same remained below the prescribed temperature for approximately two years in the Laboratory and other conditions with regard to preserving the sample were not complied with by the Analysts. In these circumstances, the present is a fit case where the powers under Section 482 Cr.P.C. are required to be exercised to meet the ends of justice.

33. The net result of the above discussion is that the complaint pending before the learned Court below is required to be quashed and is accordingly quashed. Therefore, the same is quashed and set aside and the further proceedings/orders passed by the learned Court below are quashed and set aside.

34. The petition is accordingly disposed of alongwith pending application(s), if any.

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

Ramesh Chand. .....Petitioner.

Versus

State of Himachal Pradesh &ors. .....Respondents.

CWP No. 1979 of 2018

Date of decision: August 27, 2018.

Himachal Pradesh Co-Operative Societies Rules, 1971 (Rules)- Rules 43, 45 and 48- Complaint against office bearers of Society- Writ against – Maintainability – On complaint of irregularities done by President and other office bearers of Society, Assistant Registrar, directing its Secretary to convene special meeting of Managing Committee to discuss complaint or hold fresh elections – Petitioner, President of Society challenging such direction on ground that he could not be removed before completion of tenure of two years – Held, Rules provide for removal of office bearers of Co-operative Society in constitutional and democratic manner – Special meeting of Executive Committee can be convened in terms of Rule 48- Removal of office bearers is subject to compliance of procedure prescribed in Rules 43 and 45 – Only meeting of Society has been sought to be convened to discuss contents of complaint –Writ petition pre-mature – Assistant Registrar, directed to proceed with complaint in accordance with statutory provisions – Petition disposed of with liberty to Petitioner to approach High Court if he felt dis-satisfied. (Paras-6, 9 and 11).

Cases referred:

Vipulbhai M. Chaudhary versus Gujarat Cooperative Milk Marketing Federation Limited and others, (2015) 8 Supreme Court Cases

Mukund L. Abhyankar v. Chief Executive Officer, 2017 SCC OnLine Del 8616: (2017)241 DLT 358

Rajendra N. Shah v. Union of India: 2013 SCC OnLineGuj, 2242

For the petitioner	Mr. Anshul Bansal, Advocate with Mr. Anshul Attri, Advocate.
For the respondent	Mr. Narinder Guleria, Addl. AG with Mr. Kunal Thakur, Dy. AG, for respondents No. 1 to 4. Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate, forrespondents No. 5 to 13.

The following judgment of the Court was delivered:

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

Heard.

2. This writ petition has been filed with the following prayer:

> "The impugned letter dated 21st August, 2018 (Annexure P-3) issued by respondent No. 4 may very kindly be quashed and set aside in view of the law laid down by the Hon'ble Apex Court in (2015) 8 SCC 1 titled "Vipulbhai M. Chaudhary vs. Gujarat Coop. Milk Mktg. Federation Ltd."
>
> Or
>
> that the respondents No. 2 and 3 may kindly be directed to adjudicate upon reference of dispute under Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968 in a time bound manner, without prejudice to the rights of the petitioner."

3. True it is that Ramesh Chand, the petitioner herein, has been elected as Pradhan (President) of the Truck Operators Co-operative Society Limited, Barmana, Tehsil Sadar, District Bilaspur by its Managing Committee in its meeting held on 31.3.2017 along with other office bearers and also the members of Executive Committee. The petitioner is going to complete the period of one year and five months as President of the Committee by the end of this month. However, among the members of the Executive Committee of the Society, nine have lodged a complaint against the functioning of the committee headed by the petitioner and certain irregularities they allegedly observed with regard to the conduct of the business of the Society highlighted therein. Therefore, vide Annexure P-2 they have requested the 4th respondent i.e. the Assistant Registrar, Co-operative Society, Bilaspur, District Bilaspur to convene special meeting of the Managing Committee for removal of president, vice president or other office bearer of the Executive Committee of the Society so that fresh election of its office bearers is conducted.

4. Consequently, the 4th respondent has conveyed to the Secretary of the Bilaspur District Truck Operators Co-operative Society Limited, Barmana Tehsil Sadar, District Bilaspur to convene the meeting of the Executive Committee of the Society within one week vide letter Annexure P-3 dated 21.8.2018 and also inform all the office bearers of the Managing Committee of the Society so that the matter can be discussed in the presence of official representatives to be deputed by his office. Nothing, however, has been brought on record as to whether consequent upon the communication Annexure P-3 the Secretary of the Society has fixed the meeting of the Society or not. However, the petitioner aggrieved by the proposed action has filed the present writ petition in this Court.

5. Mr. Anshul Bansal, learned Counsel representing the petitioner while agitating the proposed action of the respondents has contended that office bearers of the Society cannot be removed from their office at least till two years from the date of their election. Learned Counsel has based the submissions so made on the judgment of the Apex Court in ***Vipulbhai M. Chaudhary*** versus ***Gujarat Cooperative Milk Marketing Federation Limited and others, (2015) 8 Supreme Court Cases.*** True it is that Hon'ble Apex Court has held so in the guidelines i.e. para 52.2 of this judgment, however, to our mind framed for those states where the statutes required changes in terms of the constitutional mandate i.e. 97th amendment in the Constitution of India have not been carried out.

6. This case, however, is distinguishable on facts, firstly in our State we have Rules framed by the State of Himachal Pradesh known as "The Himachal Pradesh Co-

Operative Societies Rules, 1971" having provisions of removal of the office bearers of Co-operative Society in a constitutional and democratic manner. The special meeting of the Executive Committee of a Society can be convened in terms of Rule 48 and the removal of office bearers will be subject to compliance of the procedure prescribed under Rules 43 and 45 of the rules ibid. Therefore, in the State of Himachal Pradesh the statute take care of a situation of this nature.

7. Above all, the 97th amendment in the Constitution perhaps has been quashed by the High Court of Gujarat which fact has been taken note of by Delhi High Court in ***Mukund L. Abhyankar*** v. ***Chief Executive Officer, 2017 SCC OnLine Del 8616: (2017)241 DLT 358.*** It is noted in para-43 of this judgment that 97th amendment has been struck down by the Gujarat High Court in ***Rajendra N. Shah*** v.***Union of India: 2013 SCC OnLineGuj, 2242***. It has further been observed by Delhi High Court in the judgment supra that due to the 97thamendment ceased to exist the fundamental basis of the decision in *Vipulbhai's* case supra stand eroded.

8. It is further observed that though the appeal preferred against the judgment of Gujarat High Court in *Rajendra N. Shah's* case supra is pending adjudication in the Hon'ble Apex Court, however, the operation of the same has not been stayed. Therefore, the point in issue in this writ petition is not covered by the ratio of the judgment in *Vipulbhai's* case cited supra and rather the statutory rules in-existence in the State of Himachal Pradesh, in a specially convened meeting of the Committee the matter qua removal of the office bearer of the Society can be discussed and to be removed of course by resorting to constitutional and democratic mechanism.

9. Above all, at this stage only meeting of the Society has been sought to be convened to discuss the contents of the complaint Annexure P-2 to the writ petition. The writ petition, as such, is pre-mature. As a mater of fact, the petitioner should have wait for the outcome of such discussion and in case the removal of the office bearers of the Society in violation of the statutory rules and for that matter the democratic mechanism, he should have approach this Court at an appropriate stage.

10. We, therefore, dispose of the writ petition in*limine* with the observation that the respondents shall proceed in the complaint Annexure P-2 strictly in accordance with the statutory provisions applicable in the given situation of course with liberty reserved to the petitioner to approach this court again if he feel aggrieved and dis-satisfied by the procedure so followed or the action contrary to the Rules taken in the matter.

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

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

State of Himachal Pradesh .....Petitioner
Versus
Anil Kumar .....Respondent

Cr. Revision No. 111 of 2018
Reserved on. 21.08.2018
Decided on: 27.08.2018

Code of Criminal Procedure, 1973- Section 319- Additional accused – Summoning of – Circumstances – Trial Court refusing prosecution request of summoning 'S' and 'V' as

additional accused on ground that they were named as assailant(s) only by complainant and his father in their deposition – Petition against – Held, Chargesheet clearly mentioning that involvement of aforesaid 'S' and 'V' did not come out during investigation – Other independent witnesses not naming them as assailant(s) in their deposition before Court – No other material to summon aforesaid persons as co-accused – Order of Trial Court upheld – Petition dismissed. (Paras- 6 to 9)

For the petitioner:	Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals.
For the respondent:	Mr. Vinod Gupta, Advocate, vice Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge.

The present petition, under Sections 397 and 401 of the Code of Criminal Procedure, has been maintained by the petitioner/State of Himachal Pradesh, against the order dated 23.12.2016, passed by learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur), in Cr. MP No. 266/4 of 2016, whereby an application, under Section 319 of the Code of Criminal Procedure (hereinafter to be called as "the Code") for arraying two persons namely Sammy and Vinod Kumar as co-accused in the present case, has been dismissed.

2. As per the prosecution, during the trial, the complainant, Ashok Kumar as well as his father Krishan Singh, while appearing in the witness box as PW-1 and PW-8, had stated that the persons mentioned in para-1 supra, had also caused injuries to the complainant, in addition to the accused. Therefore, it has been prayed that in view of the said piece of evidence, it is sufficient to hold the aforesaid persons guilty of the offence besides accused Anil Kumar and they are liable to be arrayed as co-accused in the present case.

3. In reply to the application, it has been pleaded that the application filed by the prosecution is an afterthought, with a view to delay the proceedings and there is nothing sufficient in the evidence to allow the prayer made in the application, thus the application deserves to be dismissed.

4. Learned Additional Advocate General has argued that the learned Court below without application of mind and on the basis of surmises and conjectures dismissed the application filed by the prosecution, as such, the present petition deserves to be allowed and the order passed by the learned Court below deserves to be set aside. On the other hand, learned vice counsel appearing on behalf of the respondent has argued that there is no material to proceed against the respondent and even after examination of the witnesses, nothing has been found against the persons named in the application. He has further argued that the application has been moved just to delay the proceedings, so the same has rightly been dismissed by the learned Court below and such well reasoned findings need no interference.

5. To appreciate the arguments of learned counsel for the parties, this Court has gone through the record in detail.

6. PW-3, PW-4, PW-5 and PW-6 have specifically denied the suggestion that Sammy and Vinod were also involved in the incident. Therefore, it cannot be said that the aforesaid persons were also guilty of the alleged offence. Furthermore, the application has

been maintained by the prosecution only after all the independent witnesses in the case had turned hostile and had not supported the case of the prosecution. In these circumstances, if the prayer of the prosecution is considered at this stage, it would be extremely prejudicial to not only the persons named in the application, but also to the accused, Anil Kumar.

7. The discretion under Section 319 of the Code of Criminal Procedure is reproduced as under for ready reference:

> **"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 afresh, and witness 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.**

Meaning thereby that the discretion under Section 319 of the Code has to be exercised very sparingly and with caution and only when the Court is satisfied that some offence had been committed by such person.

8. In final report under Section 173 Cr. P.C. filed by the Police, it has been categorically mentioned that during investigation the persons named in the application, had been throughly interrogated, however their involvement had not been found in the alleged offence. Further, despite examination of eight witnesses, nothing material has come against the persons named in the application to array them as accused persons.

9. After taking into consideration the evidence, which have come on record, this Court finds that the order passed by the learned Court below is just and reasoned and after appreciating the law and the evidence correctly, as there is no material on record to prove the involvement of persons named in the application in the alleged incident. Accordingly, the present petition is dismissed and the order passed by the learned Court below is upheld. Let records of the learned Court below be sent back forthwith.

10. The petition, so also pending miscellaneous application(s), if any, stands disposed of.

****

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

Rakesh Kumar and others .....Plaintiffs

Versus

Bhagwati Public AushadalyaChintpurni and others .....Defendants

OMP No. 345 of 2018
In Civil Suit No. 33 of 2018
Date of Order: August 28, 2018.

Code of Civil Procedure, 1908- Order XXXIX Rules 3 & 4- Ex-parte injunction – Compliance of Rule 3(a) & (b) – Consequences of non-compliance – Held, object of Rules 3(a) and (b) is to ensure that matter is disposed of at the earliest within time frame- And opposite party should know purpose for which suit has been filed and what are documents being relied upon – Compliance of Rule 3 is mandatory – For non-compliance, ex-parte injunction vacated. (Paras- 6 and 8)

Code of Civil Procedure, 1908- Section 148-Order XXXIX Rule 3- Time for compliance, whether can be extended by Court? – Held, under Section 148 of Code Court can enlarge time, if any, fixed or granted by it for doing any act prescribed or allowed by Court – However, time for compliance of provisions contained in Order XXXIX Rule 3 of Code is provided in Code itself and court cannot enlarge it. (Para-5)

Case referred:

M/S T.K. International Ltd. V/S Shri Hem Raj Chauhan &ors., Latest HLJ 2005 (HP) 371

For the plaintiffs	Mr. O.C. Sharma, Advocate.
For the defendants	Mr. Sanjeev Kuthiala and Ms. AnaidaKuthiala, Advocates, for defendants No. 1, 8 to 12 and 16. Remaining defendants unserved.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

By way of instant application having been filed on behalf of defendants No. 8 to 12 and 16, under the provisions of Order 39 Rule 4 read with Section 151 CPC, prayer has been made for vacation of *ex parte* ad interim injunction passed by this Court on 1.5.2018. Perusal of order dated 1.5.2018, passed by this Court in OMP No. 119 of 2018 (wrongly recorded as OMP No. 92 of 2018) suggests that the defendants were restrained from selling, alienating, encumbering or transferring the suit property in any manner, but such order was subject to compliance of provisions contained under Order 39 Rule 3 CPC. Averments contained in the application suggest that though applicants/defendants were served by way of summons for putting appearance on 22.5.2018 but alongwith summons neither application for stay nor copy of plaint or documents so relied upon by the plaintiff was/were supplied. Applicants-defendants No. 8 to 12 and 16 have averred that since the plaintiffs failed to comply with the provisions contained under Order 39 Rule 3 CPC, ad-interim injunction granted vide order dated 1.5.2018, deserves to be vacated.

2. Factum with regard to non-compliance of provisions contained in Order 39 Rule 3 CPC stands admitted by the plaintiffs in the reply to the aforesaid application. Plaintiffs have stated that inadvertently, they failed to make compliance in terms of Order 39 Rule 3(a) and (b) CPC and they have moved an application under Sections 148 and 151 CPC for grant of further time to make compliance of Order 39 Rule 3 (a) and (b) CPC, being OMP No. 346 of 2018. Plaintiffs have further submitted that copies of plaint, application and

documents now stand delivered to the applicants alongwith notices and they have also put in appearance in the suit as such, prayer made in the present application deserves to be rejected.

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

4. It would be profitable to extract provisions of Order 39 Rule 3 CPC here under:

> "3. Before granting injunction, Court to direct notice to opposite party.—The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party: 3 [Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant—
>
> (a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with—
>
> (i) a copy of the affidavit filed in support of the application;
>
> (ii) a copy of the plaint; and
>
> (iii) copies of documents on which the applicant, relies, and
>
> (b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.."

5. Perusal of aforesaid provision make it clear that affidavit of compliance was required to be filed by the plaintiffs specifically stating therein that after passing of order dated 1.5.2018, they have supplied requisite documents alongwith application and plaint but, in the case at hand, no such compliance has been made, as has been fairly admitted by the plaintiffs.

6. Purpose behind incorporating proviso alongwith its sub-clauses (a) and (b) is to ensure that matter is disposed of at the earliest within time framed prescribed under CPC. Apart from above, another object while incorporating this proviso appears to be that opposite party should know the purpose for which suit has been filed and what are the documents being relied upon by the plaintiff (s), as such, compliance in terms of Order 39 Rule 3 CPC is mandatory. Another contention raised by Mr. O.C. Sharma, learned counsel representing the plaintiffs that he has moved application under Sections 148 and 151 CPC, for enlargement of time, is also of no relevance because under Section 148 CPC, court can enlarge time, if any, fixed or granted by it for doing any act prescribed or allowed by the court but, as has been observed herein above, compliance of provisions contained in Order 39 Rule 3 (c) CPC is provided in the Code itself and as such, this Court can not enlarge time.

7. Reliance is placed upon judgment of this Court in **M/S T.K. International Ltd.** V/S **Shri Hem Raj Chauhan &ors.**, Latest HLJ 2005 (HP) 371, wherein it has been held as under:

> "6. It is a matter of common knowledge that the proviso of Order XXXIX Rule 3 of the Code of Civil Procedure was added vide Central Act No. 104 of 1976 which came into force on and with effect from 1.2.1997. Purpose behind incorporating the proviso along with its sub-clauses (a) and (b)

appears to be that the mater should be disposed of at the earliest after nearing the parties as also within the time frame prescribed under the Code of Civil Procedure. Another object while incorporating this proviso appears to be, that the opposite party could know for what suit was filed against it and what are the documents being relied by the plaintiff. this seems to avoid unnecessary delay."

8. Consequently, in view of above, present application is allowed. Ad-interim order dated 1.5.2018 passed in OMP No. 119 of 2018 (wrongly recorded as OMP No. 92 of 2018), is vacated. Plaintiffs are at liberty to move a fresh application for the purpose, if so required and desired.

****

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

United India Insurance Company Limited ....Applicant/appellant.

Vs.

H.P. State Electricity Board and others .....Non-applicants/respondents.

CMP(M)_ No.: 2125 of 2012 in
RFA No. 938 of 2012
Date of Decision: 30.08.2018

Limitation Act, 1963- Section 5- Condonation of delay- Conduct of party – Held, condonation of delay is matter of discretion which has to be exercised diligently – When there is no sufficient explanation for delay application for condonation liable to be dismissed – Conduct of party approaching court is one of relevant factors which Court must consider while allowing or disallowing application for condonation of delay – Party which does not approach Court with clean hands, cannot expect it to exercise discretion in his favour – Application for condonation of delay, found to have been filed on incorrect allegations against Presiding Officer and functioning of Court – Held, applicant has not approached Court with clean hands – Application dismissed with costs assessed at Rs.20,000/- (Paras-7 to 9)

Limitation Act, 1963- Section 5- Condonation of delay- False plea – Effect – Applicant seeking condonation of delay in filing appeal – Averring in application that Reader of Court informed him of case listed on 25.6.2011 having been adjourned without any date and next date would be intimated later on – Also alleging that in January 2012, he came to know that case stood disposed of on 25.6.2011 itself and no arguments ever heard – Application accompanied with affidavit of counsel who represented applicant before Claims Tribunal – High Court directing inquiry into allegations by Registrar General – During enquiry allegations found false – Said Advocate also admitting contents of his affidavit as false- When asked to appear in person, Advocate stating that arguments had taken place on that date – But he tendering unqualified and unconditional apology – High Court accepting apology in view of long standing practice of advocate and closing issues qua him. (Paras-4 and 5)

For the applicant/ appellant: Mr. Lalit K. Sharma, Advocate.

For the non-applicants/ respondents: Mr. Abhey Kaushal, Advocate, vice Mr. T.S. Chauhan, Advocate, for non-applicants/respondents No. 1 to 3.

Mr. Raman Prashar, Advocate, for non-applicant/respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

CMP(M)_ No. 2125 of 2012

By way of this application, prayer has been made for condonation of 225 days delay in filing the appeal. Reasons mentioned in the application as to why the appeal could not be filed within the statutory period are mentioned in paras No. 3 to 5 of the application, which are reproduced hereinbelow:

> *"3. The Civil Suit No. 14-S/1 of 2009 titled HPSEB vs. United India Insurance Company Ltd. and another was decided by the learned District Judge, Solan District Solan on 25.06.2011 and the copy whereof was applied on 27.1.2012 which was received on 20.3.2012 by the counsel representing the applicant before the learned trial Court.*
>
> *4. That as a matter of fact as per the affidavit sworn by the counsel of the applicant, who was representing the applicant-Company before the learned trial Court, the Civil suit was listed for arguments on 26.2.2011, 26.3.2011, 23.4.2011, 28.5.2011 and lastly on 25.6.2011, however, on 25.6.2011 also no arguments were addressed/heard and that on 25.6.2011 the counsel of the applicant was informed by the Reader of the said court that the case has been adjourned without any date and the next date shall be intimated as and when the case shall be taken up for arguments. It was further mentioned that the case was not listed for arguments for considerable time whereafter the counsel made inquiries from the Court in the month of January, 2012 regarding the case and on inquiry got the knowledge that the case has already been decided on 25.6.2011.*
>
> *5. That the counsel further stated that he had no knowledge about the disposal of the case on 25.6.2011. The copy of the affidavit of the counsel Sh. B.R. Sharma is marked as Annexure A-1. After obtaining the copy of the impugned judgment and decree, the counsel aforesaid, supplied the same alongwith his legal opinion to the Divisional Office of the applicant-Company at Shimla on 21.3.2012. After receipt of such information, the applicant office at Shimla processed the matter and sent the case file with its recommendation for filing the appeal before the Hon'ble Court to its Regional Office of the Company at Chandigarh on 28.3.2012 for their approval, who is competent authority in the said regard. The Regional Office further processed the matter and sought the legal opinion from Dharam Paul Gupta, Advocate, Punjab & Haryana High Court, who vide his opinion dated 6.4.2012 received in the Regional Office of the Company at Chandigarh on 12.4.2012 has opined to assail the judgment of the trial Court before this Hon'ble Court and the competent authority after getting the legal opinion vide its decision dated 13.4.2012 has taken the decision to assail the trial Court judgment before the Hon'ble High Court and accordingly the Divisional Office of the applicant Company at Shimla was duly informed about such decision and the entire case file was sent back to the Divisional Office of the applicant Company at Shimla on 8.6.2012 which was received at Shimla on 11.6.2012 and thus the Divisional Office of the applicant Company, Shimla appointed the present*

counsel for the purpose of filing the appeal. Thus, the appeal is being filed without any further delay."

2. As per the averments made in the application, there were serious allegations against the Presiding Officer to the effect that actually on the date, on which the suit was shown to have been decided by the learned Trial Court, the case was fixed for arguments, but no arguments took place on that date and the matter was simply adjourned and the counsel for the applicant was informed by the Reader of the Court that the case stood adjourned without any date and the next date shall be intimated as and when the case shall be taken up for arguments.

3. Taking into consideration the seriousness of the allegation so made in the application, this Court on 16.05.2018 passed the following order:

"**CMP(M) No. 2125 of 2012**

This is an application filed by the appellant for condonation of delay in filing the appeal. Reasons given in para 3 to 5 of the same as to why delay occurred in filing the appeal are reproduced in verbatim herein under:-

"3. The Civil Suit No. 14-S/1 of 2009 titled HPSEB vs. United India Insurance Company Ltd. and another was decided by the learned District Judge, Solan District Solan on 25.06.2011 and the copy whereof was applied on 27.1.2012 which was received on 20.3.2012 by the counsel representing the applicant before the learned trial Court.

4. That as a matter of fact as per the affidavit sworn by the counsel of the applicant, who was representing the applicant-Company before the learned trial Court, the Civil suit was listed for arguments on 26.2.2011, 26.3.2011, 23.4.2011, 28.5.2011 and lastly on 25.6.2011, however, on 25.6.2011 also no arguments were addressed/heard and that on 25.6.2011 the counsel of the applicant was informed by the Reader of the said court that the case has been adjourned without any date and the next date shall be intimated as and when the case shall be taken up for arguments. It was further mentioned that the case was not listed for arguments for considerable time whereafter the counsel made inquiries from the Court in the month of January, 2012 regarding the case and on inquiry got the knowledge that the case has already been decided on 25.6.2011.

5. That the counsel further stated that he had no knowledge about the disposal of the case on 25.6.2011. The copy of the affidavit of the counsel Sh. B.R. Sharma is marked as Annexure A-1. After obtaining the copy of the impugned judgment and decree, the counsel aforesaid, supplied the same alongwith his legal opinion to the Divisional Office of the applicant-Company at Shimla on 21.3.2012. After receipt of such information, the applicant office at Shimla processed the matter and sent the case file with its recommendation for filing the appeal before the Hon'ble Court to its Regional Office of the Company at Chandigarh on 28.3.2012 for their approval, who is competent authority in the said regard. The Regional Office further processed the matter and sought the legal opinion from

Dharam Paul Gupta, Advocate, Punjab & Haryana High Court, who vide his opinion dated 6.4.2012 received in the Regional Office of the Company at Chandigarh on 12.4.2012 has opined to assail the judgment of the trial Court before this Hon'ble Court and the competent authority after getting the legal opinion vide its decision dated 13.4.2012 has taken the decision to assail the trial Court judgment before the Hon'ble High Court and accordingly the Divisional Office of the applicant Company at Shimla was duly informed about such decision and the entire case file was sent back to the Divisional Office of the applicant Company at Shimla on 8.6.2012 which was received at Shimla on 11.6.2012 and thus the Divisional Office of the applicant Company, Shimla appointed the present counsel for the purpose of filing the appeal. Thus, the appeal is being filed without any further delay."

In support of the averments so made in the application, alongwithit Annexure A-1 stands appended, which is an affidavit sworn in by one Shri Braham Raj Shama, who as per the affidavit, was the learned Counsel representing the present applicant before the learned Civil Court. A perusal of the averments made in the application as also the affidavit referred to above, demonstrates that there are serious allegations levelled therein with regard to mode and manner in which the Court had conducted itself.

At this stage, this Court is not commenting as to whether allegations levelled in the application are correct or not but if the same are correct, remedial measures have to be taken in this regard by the Institution. However, if the averments so made in the application and the contents of the affidavit are incorrect, then appropriate action has to be initiated against the officer who has sworn the affidavit, on the basis of which, application has been filed, as also learned Counsel who has filed the affidavit. Accordingly, before any further order is passed, Registrar General is directed to hold inquiry in the matter and submit his report to this effect within a period of two weeks, as to whether averments contained in para 3 and 4 are correct or not.

List on 13.6.2018."

4. Pursuant to the receipt of the inquiry report so submitted by the Registrar General of this Court, dated 08.06.2018, the case was listed on 20.06.2018, on which date, the following order was passed:

"Pursuant to order dated 16.5.2018, Inquiry Report stands filed by the Registrar General, dated 8.6.2018. Before this Court passes any further order, in the interest of justice, it is directed that a copy of Inquiry Report be handed over to Dr. Lalit K. Sharma, learned Counsel for the appellant, with a further direction that Counsel Shri B.R. Sharma, shall file his personal affidavit within a period of one week in response to the Inquiry Report.

List on 27.6.2018, on which date, Sh. B.R. Sharma, Advocate shall personally remain present in the Court. Attested copy of Inquiry report be supplied to Dr. Lalit K. Sharma, learned Counsel for the appellant during the course of the day.".

5. Thereafter, when the matter was listed on 27th June, 2018, Mr. B.R. Sharma, learned counsel, who was representing the present applicant before the learned Trial Court

filed an affidavit, wherein he mentioned that the averments which were so made in the application for condonation of delay in filing the appeal in reference to him were in fact incorrect. He also tendered his unconditional and unqualified apology in the Court, which was accepted, as is borne out from the order, dated 27.06.2018, which is reproduced hereinbelow:

> *"Pursuant to order dated 20.06.2018, Mr. B.R. Sharma, Advocate, who was representing the appellant before the learned Tribunal is present in person. On his instructions, Mr. Sudhir Thakur, learned Counsel has assisted the Court. Sh. B.R. Sharma, Advocate has filed an affidavit which is ordered to be taken on record. Besides this, he has tendered his unconditional and unqualified apology in the Court. He further submits that he withdraws the averments which he had so made in the affidavit appended with the application wherein it stood mentioned that on 25.6.2011, the case was simply deferred for another date and no arguments took place. He further submits that in fact arguments took place on that date.*
>
> *Taking into consideration the fact that an unconditional and unqualified apology stands tendered by Mr. B.R. Sharma, Advocate in the Court and further Shri Sudhir Thakur, has persuaded the Court that in view of long standing practice of Shri B.R. Sharma, Advocate, it will be in the interest of justice, in case the issue is put to rest at this stage. The Court while concurring with the submissions of Mr. Thakur, closes the issue, as far as Shri. B.R. Sharma, Advocate is concerned.*
>
> *On the request of Dr. Lalit K. Sharma, learned Counsel for the appellant, the case is adjourned to enable him to have instructions in the matter.*
>
> *List on 01.08.2018."*

6. Section 5 of the Limitation Act reads as under:

> *"5.* ***Extension of prescribed period in certain cases.****- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.*
>
> *Explanation.- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Section."*

7. A Court of law, while dealing with an application for condonation of delay in filing the appeal, has to construe the expression "*sufficient cause*" with pragmatism in justice oriented approach. Where delay is sufficiently explained, the same ought to be condoned. However, it is equally well settled that "*sufficient cause*" contemplated by Section 5 of the Limitation Act means a cause which is beyond the control of the party, which has filed an application for condonation of delay. Undoubtedly, condonation of delay is a matter of discretion, however, the discretion has to be exercised by the Court diligently and when there is no sufficient explanation given by the applicant, then, the application for condonation of delay is liable to be dismissed. In this regard, the conduct of the party, which is approaching the Court for condonation of delay, is one of the relevant factors, which a Court considers while allowing or disallowing the application for condonation of delay. A party, which does not approach the Court with clean hands, cannot expect the Court to exercise discretion in its favour. The power conferred upon the Court for condonation of

delay has to be exercised by the Court diligently and only if it is satisfied that the first party could not approach the Court within the period of limitation for reasons which are *bonafide* and cogent. The Court will not come to the rescue of a party which approaches the Court for condonation of delay with unclean hands and by levelling false allegations.

8. Coming to the facts of this case, the applicant has not approached this Court for condonation of delay with clean hands. The explanation put forth as to why the appeal could not be filed within the period of limitation, cannot be termed to be *"sufficient cause"*. As I have already mentioned above, incorrect allegations stood levelled against the learned Presiding Officer, as also the functioning of the Court as to why the appeal could not be filed within the period of limitation. On enquiry, the averments made in the application have been found to be incorrect. This Court does not expect United India Insurance Company Limited, which is one of the leading Insurance Company of the country, i.e., applicant in the present case, to file application for condonation of delay on scandalous allegations.

9. In these circumstances, in the facts of this case, as the applicant/appellant has not approached this Court with clean hands for condonation of delay in filing the appeal and incorrect averments and assertions stood made in the application, the same is dismissed with costs assessed at Rs.20,000/- to be paid to the Kerela Chief Minister's Disaster Relief Fund against receipt, within a period of four weeks from today.

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

Shri Jhompi Ram Sharma (since deceased) through his legal heirs
..Petitioners/Tenants.

Versus

Shri Gopal Krishan (since deceased) through his legal heirs
..Respondents/Landlord.

Civil Revision No. 74 of 2013.
Reserved on : 23rd August, 2018.
Decided on : 31st August, 2018.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(3)(d) (as amended vide Amendment Act, 2009)- Eviction suit – Ground – Bona fide requirement for commercial purposes –Landlord filing eviction suit on ground that premises required for commercial purposes for his unemployed sons –No such ground existed in Act when eviction suit filed before Rent Controller – Act enabling eviction of tenant on said ground amended only during pendency of proceedings – Rent Controller allowing eviction and Appellate Authority dismissing appeal of tenant- Revision - Tenant arguing that in absence of express retrospectivity of amended provisions, Rent Controller had no jurisdiction to entertain eviction petition on said ground on the day it was filed – And order of eviction as upheld by Appellate Authority was without jurisdiction – Held, Provisions as amended nowhere provide with rigidity that these would not be applicable to pending eviction suits – Plea of tenant not tenable. Revision dismissed. (Para 14)

Cases referred:

Nand Kishore Marwah and others vs. Samundri Devi, (1987) 4 SCC 382

Gauri Shankar versus Tilak Raj Sharma, 1988(2) Sim. L. C. 303,

Jasvinder Singh vs. Sh. Kedar Nath, along with other connected matters, Latest HLJ (2012) (HP) 1452
Uday Shankar Upadhyay vs. Naveen Maheshwari, (2010)1 SCC 503

For the Petitioner :	Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.
For the Respondents:	Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The landlord (respondent herein), instituted, A rent petition bearing Case No. 25-2 of 2009, cast under the provisions ,of, Section 14(3)(i) (iv) (d) (i)(ii), of, the H.P. Urban Rent Control Act (hereinafter referred to as the Act), before the Rent Controller, Rampur Bushehar, District Shimla, H.P., seeking eviction, of the tenant, from, the demised premises, on the ground (a) of his requiring the demised premises for his own use; (b) his bonafidely requiring the suit premises, for, commercial purpose; (c) the respondent/tenant falling, in, arrears of rent, in, respect of the demised premises, (d) whereon, the learned Rent Controller rendered affirmative findings, vis-a-vis the landlord, and, adversarial to the tenant, and concomitantly directed the eviction of the tenant from the demised premises. Uncontrovertedly, the tenant/ petitioner herein, has, within the prescribed statutory period, hence liquidated the entire apt arrears of rent, hence, the affirmative findings rendered, upon, the ground of his falling into arrears, of, rent, in, respect of the demised premises, is, hence extantly rather worthless. The tenant being aggrieved therefrom, preferred a statutory appeal, before, the learned Appellate Authority, and, the latter thereon, rendered a pronouncement hence bearing concurrence, with, the verdict recorded by the learned Rent Controller, upon, the apposite rent petition. The tenant is aggrieved therefrom, hence, has motioned this Court, through, the instant civil revision petition.

2. Briefly stated the facts of the case, are, that the respondent herein, is, the landlord of House No.10/05, situated in Ward No.5, Rampur Bushahr, built on land denote by Khatoni No.159, Khasra No. 328 and 329, Mauza Kasba Bazar-II, Rampur Bushahr, to the exclusion of all other co-sharers. The said house, a shop measuring 30x10 feet was rented out to the tenant Jhompi Ram, for non residential purpose. In the said shop, the tenant started running the shop of Manyari, sports goods etc. Besides the tenant, there has been another tenant in the building/house, aforesaid, of the landlord. It is pleaded that the monthly rent of the shop, let out to the tenant Jhompi Ram, is Rs.880/- per month including house tax. It has further been mentioned that as per the Municipal Committee records, the rateable value has been entered to be Rs.800/-. Similar, building/shop having similar amenities is being rented out at Rs.15,000/- per month in the locality. A shop smaller to the demised premises, was rented out for Rs.10,000/- per month. The eviction of the tenant was sought from the demised shop on the ground that the petitioner requires it for his own use because his two sons are unemployed, who require the sop, in question, for running business or office therein. In fact, the family of the landlord has quadrupled with two sons, their wives and children. For the sons being unemployed they require some commercial place in order to run their own business of any type or to start office. It was further maintained that his sons are not occupying any other building, for use as office, residence or consulting room in the urban area. Apart from this, they did not vacate any such building in the urban area of Rampur Bushahr before or after the commencement of the Act. It was further maintained that even the landlord is not occupying any other

residential or commercial building in Rampur urban area. As far as tenant Jhompi Ram is concerned, he has acquired a three storeyed house bearing No.135 about five years ago which he rented out to different person, in order to run shops, on commercial rates. On the contrarily, the petitioner has no shop with him despite being the owner of the tenanted shop. ON the other hand, the respondent has the luxury to rent out his shops. If he so desires, the tenant can start business in his own commercial premises which is situated on National Highway-22 and is also a commercial industrial hub of the town for the last 15 years.

3. The petitioner herein/tenant, in his reply, filed to the eviction petition, has taken preliminary objections qua maintainability. On merits, It has been asserted that out of the demised premises/shop, the landlord has occupied area measuring 10 feet x 5 feet for his own use, as entrance to his residential house. The accommodation which has been in occupation of the landlord is very spacious and more than sufficient to accommodate his entire family. In fact, he has been in possession of complete two floors of the building/house, to live in, including a spacious hall, being used as his office and for other multifarious purposes. At Bherakhad, on National highway 22, the sons of the landlord are running business of hardware in two storeyed building which is owned by the landlord. The tenant is not owner of any building, as alleged. As a matter of fact, the alleged building is in the rural area of village Chuhabagh which falls within the jurisdiction of Gram Panchayat, Racholi and the same is owned by his sons and daughters. As far as that building is concerned, he has nothing to do with that. In order to earn his livelihood, he runs the business of Manyari, sports goods and stationery, in the main market at Rampur. There is no scope of such business in rural area like Chuhabagh. Thus, it was denied that he has acquired any building within the urban area of Rampur Town. Further denied that village Chuhabagh, on National highway, is a commercial and industrial hub of the town. Other allegations are also denied.

4. The landlord/respondent herein filed rejoinder to the reply of the tenant/petitioner herein, wherein, he denied the contents of the reply, and, re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the suit premises are required by the petitioner his own use?OPP.
2. Whether the petitioner bonafidely required the suit premises for commercial purpose?OPP.
3. Whether the respondent is defaulter in paying the rent regularly?OPP
4. Whether the petitioner is not occupyinganyresidentialaccommodation in Rampur urban area?OPP.
5. Whether the petition is not maintainable in the present form? OPR
6. Whether the petitioner has no cause of action to file the presentpetition? OPR
7. Relief.

6. On an appraisal of evidence, adduced before the learned Rent Controller, the learned Rent Controller, hence, allowed, the petition of the landlord/respondent herein. In an appeal, preferred therefrom, by, the tenant/petitioner herein, before, the learned

Appellate Authority, the Appellate Authority dismissed the appeal and affirmed the order(s) recorded by the learned Rent Controller.

7. Now the tenant/petitioner herein has instituted the instant Civil Revision Petition, before this Court, for hence assailing the findings recorded, in its impugned order, by the learned Appellate Authority.

8. At the outset, the learned counsel appearing for the petitioner/tenant has contended (i) that both the learned Courts below, rather, visibly falling into gross error, in, rendering disaffirmative findings, upon, the issue, appertaining, to the rent petition being not maintainable. However, before proceeding to fathom, the, tenacity of the afore espousal, the connected therewith factual, and, legal matrix requires meteings, of, allusion thereto. The apt factual scenario, is, comprised, (ii) in, the factum of the landlord, rearing, a ground in the apt eviction petition, serialized as sub para (3), of, Para 18 (a), of, the rent petition, sub para whereof stands extracted hereinafter:-

> "3. Two sons of the petitioner are unemployed and the petitioner require the shop for their use, for their own living, business or office. My sons are not occupying any other building for use as office, residence or consulting room in urban area. Nor have they vacated such a building in the urban area Rampur Bsr. Before or after commencement of the Act."

9. A perusal of the afore ground, unfolds, qua the landlord setting forth, therein, a ground bearing consonance, with, the mandate of Section 14(3) (d), of, the Act, the relevant provisions whereof stand extracted hereinafter:-

> "(d). In case of any [residential and non residential building], if he requires it for use as an office, or consulting room by [his son or daughter] who intends to start practice as a lawyer, an architect, a dentist, an engineer, a veterinary surgeon or a medical practitioner, including a practitioner of Ayurvedic Unani or Homeopathic System of Medicine or for the residence of [his son or daughter] who is married, if
>
> (I) his [son or daughter] as aforesaid is not occupying in the urban area concerned any other building for use as office consulting room or residence, as the case may be; and
>
> (ii) his [son or daughter] as aforesaid has not vacated such a building without sufficient cause, after the commencement of this Act, in the urban area concerned:"

However, at the stage contemporaneous, to, the landlord rather projecting, the, aforesaid apt statutory ground, of eviction, rather conspicuously thereat, (i) the apt statutory ground stood not borne, on, the statute book, rather it uncontestedly acquired force, upon, the amending Act of 2009, vis-a-vis, the H.P. Urban Rent Control Act, receiving on 28th February, 2012, the Presidential assent. Consequently, the learned counsel appearing for the tenant/petitioner herein, has, with great vehemence urged before this Court (ii) that when evidently at the apt stage, the afore statutory ground, was not existing on the statute book, nor when any express retrospectivity is foisted upon it, (iii) thereupon at the out set, the rearing of the afore ground, was, grossly impermissible, (iv) besides, hence, the apt cause of action, appertaining therewith, was neither enforceable nor any concurrent pronouncement(s), in affirmation thereto, can acquire any hue of validity, (v) rather he contends that the affirmative findings concurrently pronounced thereon, being stained with, a, vice of jurisdictional disempowerment.

10. In making the aforesaid espousal, the learned counsel appearing for the petitioner/tenant, has placed reliance, upon, a verdict rendered by the Hon'ble Apex Court

in a case titled as ***Nand Kishore Marwah and others vs. Samundri Devi,*** reported in ***(1987) 4 SCC 382***, the relevant paragraphs No. 11 and 12 whereof stand extracted hereinafter:-

> "11. It is pertinent to note that this Section applies to those suits which were pending on the date of the commencement of this Act. Admittedly this Act came into force on 15th July, 1972 and therefore if the suit was pending on that date it is only then that the provisions of Section 39 will come to the assistance of the tenant- appellant. Admittedly this suit was not pending on the date on which this Act came into force. An attempt was made to contend that so far as the present property is concerned the Act will be deemed to have come into force on the expiry of 10 years i.e. 1.10.86 but this contention could not be accepted as it is very clear from the language of this Act that it applied I only to a suit pending on the date of the commencement of this Act and this is the view taken in the Om Prakash Gupta's case [(1982) 2 SCC 61] wherein it was observed:
>
> > "Further, in order to attract section 39 the suit must be pending on the date of commencement of the Act which is 15th of July, 1972 but the suit giving rise to the present appeal was filed on 23rd of March, 1974 long after the commencement of the Act. There is yet another reason why section 39 will have no application to the present case.
>
> 12. It is therefore clear that so far as the present appeal is concerned, the provisions of Section 39 will be of no avail. Section 40 of the Act reads as under:
>
> > "40. Pending appeals or revisions in suits for eviction relating to buildings brought under regulation for the first time-Where an appeal or revision arising out of a suit for eviction of a tenant from any building to which the old Act did not apply is pending on the date of commencement of this Act, it shall be disposed of in accordance with the provisions of Section 39, which shall mutatis mutandis apply."
>
> This Section talks of the pendency of a revision or an appeal arising out of a suit pending on the day on which this Act came into force. It is clear that provisions of Section 40 will come to the rescue of the appellant-tenant only if the suit from which revision or appeal arose was pending on the date of commencement of this Act i.e. 15.7.1972 and therefore it could not be contended that the present revision petition or the appeal either to the High Court or the appellate authority arose out of suit which was pending on the date on which this Act came into force. Admittedly the suit itself was filed much after the coming into force of this Act. In this view of the matter therefore, in our opinion, even this contention of learned counsel for the appellant could not be accepted."

However, the factual scenario prevailing therein, and, also an incisive reading, of, the apt statutory provisions aforesaid, borne therein, and, as stand adjudicated therein, are, for reasons assigned hereinafter, in, stark disjunction, vis-a-vis, the extantly prevailing factual matrix/scenario. Consequently, also, the reliance, as placed by the learned counsel appearing, for the tenant/petitioner herein, upon, the aforesaid case, is misfounded besides, is, inapt. The reason for forming, the, aforesaid conclusion, stands aroused, by the factum qua therein, (i) the Hon'ble Apex Court dealing with apt exemption(s) or exclusion(s), of, apt statutory provisions, vis-a-vis, (a) Civil suits, for eviction, upon, theirs being imminently and evidently pending, before Civil Courts concerned, on coming into force, of, the apt provisions, and, appertaining to eviction, of, the tenant(s), from, the demised premises concerned, (b) rather begetting attraction, of, exclusion(s) of hence application(s), thereon, vis-a-vis, the apt special statutory mechanism, (c) besides the tenants,being entitled, to, save their apt evictions, reared on ground(s) of his/theirs, rather defaulting, in liquidating,

the contractual rent, vis-a-vis, his/ their landlords, (d) upon, evident liquidation(s), of, the contractual rent and damages, along with interest, before the court concerned, rather evidently occurring, from, the date of acquisition of knowledge qua the pendency of the suit. Further more Section 40 of the Act , provisions whereof, stand, alluded, to, in the *Nand Kishore's case (supra)* also bring to the fore, the, factum, of, the provisions borne, in Section 39, being applicable, to, the pending appeals, or revisions as arise, from the verdict rendered, upon, the apt suit for eviction, and, as relate to buildings, as brought under regulation, for the first time. A perusal of the afore referred provisions, borne in *Nand Kishore's case (supra)*, make apt underlinings (ii) qua clear delineated, and, marked statutory prescriptions, standing embodied therein, vis-a-vis, the necessity, of, pendency of suits inter se the landlord, and, the tenant, and, anvilled upon, grounds analogus to the ones, as borne, in the apt legislative enactment, (iii) and, the apt statutory exclusion(s), of, the mandate of the relevant statutory provisions, and, also apt benefits against, eviction(s) as, statutorily embodied therein, rather being accruable or bestowable, upon, the tenant, upon, his evidently satiating, the, imperative condition(s) precedent, as, elucidated therein. The sequel thereof, is, qua unless, the aforesaid condition precedents, were, evidently satiated, and, reiteratedly when the apt civil suits, were, pending in contemporaneity, vis-a-vis, the coming into force, of, the statutory provisions, as, alluded therein, thereupon, alone the apt benefits, being visitable, upon, the tenant, AND, not thereafter. Further also the apt benefits, being visitable, vis-a-vis, appeal(s) or revision(s), arising from, verdicts pronounced, upon, the apt civil suits. The trite nuance thereof, is , hence (i) with coming into force, of, apt statutory provisions, thereupon, the institution, of, civil suits by the landlord, against, the tenant, anvilled, upon, purported statutory purpose(s), and, theirs bearing alalogity, vis-a-vis, the grounds borne, in the apt statutory provisions, rather being barred, (ii) and, in case any civil suit, thereafter, rather coming to be instituted, by the landlord against the tenant, thereupon, the apt civil suit, when hence not carrying any legally enforceable cause of action, rather hence its facing dismissal or the court concerned, whereat, the plaint stood instituted, hence upon, an apt motion made therebefore, by tenant/defendant rather proceeding to reject the plaint. Contrarily, hereat, there is no analogus therewith factual scenario nor obviously, the landlord, had, instituted a civil suit before the Civil Court concerned, for hence seeking, the, eviction of the tenant, from, the demised premises, (iii) rather has cast, an, apt eviction petition, before the learned Rent Controller concerned, and, the purported legal fallacy, as, espoused to be committed, is, comprised in his rearing, the, afore ground, though, ground whereof, hence, in contemporaneity thereof, rather was not borne in the statute book, (iv) and, whereas obviously, the afore made discernings, as made, from a keen, and, incisive perusal, of, the afore reproduced paras, of, the *Nand Kishore's case (supra),* may not, hence to the fullest support, the, espousal of the learned counsel appearing, for the tenant, (v) imminently when the afore extracted paras, omit, to make any pronouncement, bearing trite consonance therewith, (vi) and when the apt afore espousal, was, neither dealt with nor stood answered, in, the *Nand Kishore's case (supra),* thereupon, the reliance placed, upon, the aforesaid judgment, is, inapt. Markedly, also the apt therein statutory provisions, visibly make trite prescriptions, both with exactitude and precision, vis-a-vis, the, parametrs, for hence applying the apt exclusionary provisions, and, also for applying the apt barring provisions, (vii), whereas, contrarily hereat, no, rigid statutory prescriptions, for treating hence oustable or not oustable, the, apt grounds, stand constituted in the apt amending provisions, (viii) rather when, for hereinafter, assigned reasoning, the afore espousal, is, rendered hence nugatory.

11. However, the learned counsel appearing for the tenant/petitioner herein, has, thereafter proceeded to place reliance, upon, a judgment of this Court rendered, in, case titled, as, ***Gauri Shankar versus Tilak Raj Sharma***, reported in ***1988(2) Sim. L. C.***

303, and, rests his submission, upon, paragraph No.19 thereof, paragraph whereof, stand extracted hereinafter:-

> "19. The principles which have been recognised in the decision cited by Shri Gupta are unexceptionable. The question, however, is whether they are attracted in a case like the present where the Legislature mandates in imperative terms that the proceedings shall not be instituted for a period of five years from the date of acquisition of the property by transfer by the landlord. The prohibition is absolute and impinges upon the competence of the Rent Controller to entertain the proceedings. It touches his jurisdiction. It cannot be equated with a case where the cause of action may be said to have arisen later during the pendency of the proceedings. Nor can the expiry of a period of 5 years from the date of acquisition of the property by transfer be said to be an even taking place subsequent to the date of the institution o the proceedings which can be taken into account while recording a decision on the merits of the claim of the landlord. The applicability of the two principles canvassed by the learned Counsel for the landlord is ruled out by the language which the Legislature was used in sub-section (6) of Section 14 of the Act. This sub-section robs the Rent Controller of Jurisdiction entertain any application for a period of five years from the date of acquisition by the landlord of the property by transfer for being put in possession of that property on the ground of his personal need. Any application made before the expiry of the period prescribed by sub-section (6) of Section 14 is bound to be dismissed on this ground alone as has clearly been observed by the Supreme Curt in AnadilalBhanwarlal and another v. Smt. Kasturi Devi Generiwala and another, AIR 1985 SC 376."

He further submits qua, with, the apt amendment, to section 14(6) of the Act No. 25 of 1987, making a contemplation (i) qua the imperative enabling necessity, of, five years elapsing, from, the date of acquisition of property, by the landlord, thereupon, rendered imperative, adduction of proof, qua, the apt elapsing, of, a period of five years, hence, occurring, since, the amending apt provisions, legally commencing, and, upto the casting, of, any petition, under, the apt amended provisions, AND, the occurrences, if any, of, the aforesaid statutory elapses, during, pendency, of, apt proceeding(s), (i) rather, also infracting the statutory prohibition, and, also the Rent Controller concerned, being jurisdictionally disabled, to pronounce, any affirmative verdict, upon, the apt rent petition, (ii) reiteratedly<u>nor any</u> efflux, of, a period of five years, during, the pendency, of, the apt proceedings, rather reiteratedly, not rendering, the, apt amending provisions to be enforceable, given lack, of, legislative validation/vindication thereto. The learned counsel appearing for the petitioner herein/tenant contends, that, in purported concurrence therewith, the, rigidity and absoluteness, of, the legal principle qua, (iii) unless, express retrospectivity, is, granted, to, the apt statutory provisions, it operating only prospectively, (iv) and, hence, he, contends, that, with no express retrospectivity, being assigned, vis-a-vis, the apt statutory grounds, nor when the apt grounds initially acquired validity, rather theirs even remaining continued to be incorporated, as apt grounds, in the apt petition, also not implanting, any sustenance thereto, (a) given the petition at its inception, being inchoate, and, (b) it not rearing any legally enforceable cause of action, thereupon, any affirmative concurrent pronouncement, of, verdicts by both the learned Courts below, being jurisdictionally disabled verdicts, rendering them, hence, stained with vice, of, voidness.

12. Nonetheless, even the aforesaid reliance placed by the learned counsel appearing, for the tenant/petitioner herein, upon, *Gauri Shankar's case (supra), (i) only* appertains, to, an apt amendment, rather prescribing with specificity, the imperative necessity, of, completion, of, a particular tenure, or period time, (ii) and, also its

prescribing, the statutory condition(s), and, also enjoining, the, apt mandatory strict compliance therewith, also being efficaciously proven, (iii) AND upon evident, proof, of, all absolute, and, dire statutory necessities, thereupon, alone the, landlord being equipped to hence make a valid reliance thereon. Thereat also there, was, an apt fixity of tenure, or, an apt time or period, and, also the apt implied non defeasance(s) clause, rather stood, judicially pronounced, to, hence rather render the apt petition, to be not maintainable, and, any exercise of jurisdiction, by the Rent Controller, despite, evident statutory breaches, also stood, pronounced to be both nonest and void. However, in the factual matrix, prevailing hereat, the aforesaid pronouncement, is, unattracted, (iv) given the afore apt dissimilarity, as, underlined therein, squarely appertaining, to, a ground contradistinct, vis-a-vis, the ground reared, in the instant petition, (v) and, with also, the, apt strictest disabling statutory legal interdiction(s), standing borne therein, and, also, with theirs rather with stark pointedness, hence, only appertaining to the apt factual scenario, as stands, elucidated therein, (vi) besides, with the apt implied non defeasance clause, as arising, from evident breaches thereof, being judicially pronounced therein, to render the apt petition, to be not maintainable, before the Rent Controller concerned, (vii) thereupon, the apt implied non defeasance clause, as, judicially pronounced therein, obviously cannot be extended, to the factual scenario hereat, (viii) given hereat the apt statutory ground, not, initially creating any strict legal embargo, against, the rearing, of, pleadings in the apt petition, at the stage, when they were not available on the statute book, nor thereupon, per se, when, the apt amendment occurred, during, the pendency of the rent petition, rather not rendering , the apt ground, the striking of issues, and, the adduction of evidence, for, all being, per se, construable, to be, rendered nugatory.

13. Furthermore, the effects thereof, are, (a) that with the tenant hence, at the out set, being empowered, to, recourse the appropriate provisions, borne, in the Code of Civil Procedure, for, his hence seeking rejection, of, the petition. (b) However, he omitted to do so, and, when the afore inferred, lack of any ill consequence, being spelt, in the apt amended provisions, vis-a-vis, the disablings, of, the landlord, to, initially rear them, whereupon, the apt willful abandonments or waivers, of, the aforesaid espousal(s), (b) now estops, the tenant to contend that even, when, the amendment came into force, and, the apt therewith ground subsisted, thereupon, the petition being initially jurisdictionally construable, to be, misconstituted, (c) nor he can contend, after his permitting the apt adduction(s), of, evidence, upon, the relevant ground, qua it being unreadable, especially when he without demur, permitted its adduction. Conspicuously also when, accepting the espousal of the counsel for the tenant, it would beget hardship and unjustness to the landlord. Rather, with the appellant without demur, ensuring the subsisting, of, apt ground, in the apt petition, is to stand concluded, qua hence the learned Rent Controller, rather also tacitly according apt leave, for, its retention, in the, Rent Petition.

14. The learned counsel appearing for the tenant/petitioner herein, has also placed reliance, upon, a judgment of this Court rendered in a case titled as ***Jasvinder Singh vs. Sh. Kedar Nath, along with other connected matters***, reported in ***Latest HLJ (2012) (HP) 1452***, the relevant paragraph No. 9 whereof, stand extracted hereinafter:-

> "9. The rule with respect to the retrospectivity is by now ell settled. In a catena of decision, the Supreme Court holds that it is a cardinal principle of construction that every statute is prima facie prospective unless it is specially or by necessary implementation made retrospective."

(I) wherein deference is meted to the trite, echoing qua unless, an apt explicit retrospectivity, is, assigned by the Legislature, vis-a-vis, any provision, (ii) thereupon, it being construable, to be holding only prospective force, (iii) and, hence, when, in tandem therewith, the, apt amending provisions, are not, explicitly foisted retrospectivity, (iv) thereupon at the stage

contemporaneous, to, the institution of the apt rent petition, the apt statutory grounds, as, reared therein, were unrearable, given theirs being not borne, in, the statute book, hence, rendering disabled the courts below, to pronounce, any affirmative verdict thereon. However, the entire force of the aforesaid submission made before, this Court by the learned counsel, appearing for the tenant/petitioner herein, is weakened by the factum, of, the verdict aforesaid also carrying paragraph No.22 therein, paragraph whereof stand extracted hereinafter:-

> "22. It would come into operation from the date of its publication in the Rajpatra, which is 16th March, 2012, and, would apply from that date. The landlord is not deprived of his right for seeking an order of eviction, but in execution of such an order under Section 14, ordering eviction of the tenant, he will be entitled to premises equivalent in area to the original premises on the conditions as provided in the proviso to clause (c) of sub-section 3 of Section 14. This would not be pre condition for passing an order of eviction, but a ground which can be taken up at the time of execution. I am fortified in taking this view from Section 14 which provides that no tenant can be evicted from the premises in execution of a decree passed before or after the commencement of this Act or otherwise whether before or after the termination of the tenancy, except in accordance with provisions of this Act. The protection of tenancy by inheritance, as provided in Section 2(j), would be available to all those tenants within the ambit of amended provisions where cases are pending and same would be the position for determination of the standard rent as provided for under Sections 4 and 5. In other provisions, namely, Section 7, the substitution is only of the word "standard rent" in place of 'fair rent'. In this view of the matter, the point of law for interpretation urged is disposed of. Each individual petition shall be disposed of on what I hold on the interpretation of the provisions. The cases of tenants/landlords which have already been decided cannot invoke the provisions of the Act of 2012."
>
> (p.1477)

(v) and with the underlined apt portions thereof, clearly making, apt underscorings qua the benefit, of, the apt amending provisions, being bestowable, even, vis-a-vis, the tenant concerned, who further rears proceedings, in appeals or revision, before the statutorily enshrined forums. Corollary thereto being, when, the benefits of apt beneficial provisions, stand, therein expostulated, to be, bestowed even, vis-a-vis, the afore tenants, who rear appeals or revisions, vis-a-vis, the apt verdict, hence, upon, making an analogical consonance therewith connectivity, (vi) rather hence engenders, an inference, qua when the apt grounds, whereon, the concurrent verdicts, were rendered by both the learned Courts below, though were initially unrearable, by the landlord, at the initial stage, yet, when they without demur, continued to be retained in the apt petition, and, their retention has continued, upto the stage,of, this Court being seized, with, the extant petition, it would be unjust to nowat construe it, to be unrearable, (c) and, also it would be grossly unjust, qua, the tenant, permissibly making, given, for, theirs, merely at the outset, being rather unrearable, an espousal, qua hence this Court proceeding to render a concomitant decision, qua its apt disabling effect, upon, the concurrently pronounced verdicts, by the learned Courts below. Predominantly, with the apt protection being visited, upon, appeal, and, revisions, it being antithetical to logical, to render, them unworthwhile.

15. Having rested the aforesaid conundrum, the apt evidence which has been adduced in respect, of, the apt ground, is comprised in the testification, of, the landlord, and, the corroborative therewith testifications, rendered by other Pws. Testifications, in, repudiation thereto, rendered by the tenant, are rested, upon, the factum of the landlord,

rather extantly holding commodious accommodation, at a place contradistinct, vis-a-vis, the building, in part whereof, the demised premises is located, rather a huge commercial premises, and, thereupon the ground of his bonafidely requiring, the, demised premises, being ingrained, with, a vice of malafides. However, the afore made repudiatory testification, by the tenant, is, also enjoined to beget satiation, vis-a-vis, the landlord, not, within, the urban area concerned holding any premises, residential or commercial. However, upon, the premises other than, the building, in part whereof, the, demised premises rather being evidently located outside, the, urban area concerned, hence, the apt premises, would be construed to be neither suitable for the relevant purpose, for meteing the necessity(ies), of, landlord nor it would be construed of hence his rearing, a ground ingrained with evident malafides. Moreso, when it stands propounded in a judgment rendered, by the Hon'ble Apex Court in a case titled as ***Uday Shankar Upadhyay vs. Naveen Maheshwari,*** reported in ***(2010)1 SCC 503*** qua th landlord being the best adjudicatory person, vis-a-vis, his bonafides, and, it being not amenable, for the tenant to dictate him, vis-a-vis, the necessity, of, his requiring the demised premises, nor his being enabled to dictate qua the other purported alternative accommodations, being more suitable for the relevant purpose, thereupon also renders worthless, the, apt repudiation of the tenant.

16. Furthermore, the learned counsel appearing for the petitioner/tenant has contended, that, the findings appertaining to issue of the tenant/petitioner, herein owning a premises, within, the urban area, being erroneous as the apt building of the petitioner herein/tenant, evidently not occurring within the urban area, rather it occurring outside it. However, the aforesaid espousal is rendered rudderless in the face of Ex.PW1/A, making, a, vivid disclosure qua the building owned by the petitioner/tenant, rather being located within the apt urban area.

17. The above discussion unfolds qua the conclusions arrived by both the learned Courts below are based upon a proper and mature appreciation of evidence on record. While rendering the apposite findings, both the learned Courts below have not excluded germane and apposite material from consideration.

18. In view of above discussion, the present petition is dismissed and the verdicts impugned hereat are affirmed and maintained. All pending applications also stand disposed of. No order as to costs.

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

Kanhakru Ram .....Appellant.

Versus

State of H.P. .....Respondent

Cr. A. No. 163 of 2017
Reserved on: 21.08.2018
Decided on: 31.08.2018

Indian Evidence Act, 1872- Section 3- **Indian Penal Code, 1860-** Section 302- Murder – Proof –Circumstantial evidence – Appreciation – Accused convicted and sentenced by Sessions Court – Trial Court relying upon his extra judicial confession made to complainant, taking of axe (weapon of offence) by accused from complainant's wife and incriminatory

recoveries effected pursuant to his disclosure statement – Appeal against – On facts, no evidence as to when axe taken by accused from complainant's wife and deceased killed - Extra judicial confession since not made by him before close relative, trusted person or well wisher, found unreliable - Statement of complainant given during trial found contradictory vis-à-vis statements recorded under Sections 154 and 164 of Cr.P.C. qua extra-judicial confession, making of disclosure statement, and recovery of weapon of offence and other incriminatory articles – Held, conviction based on wrong appreciation of evidence available on record – Appeal allowed – Conviction set aside – Accused acquitted. (Paras-18 to 35)

Cases referred:

Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869

Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550.

State of Himachal Pradesh vs. RayiaUrav @ Ajay, ILR 2016 (5) (HP) 213

For the appellant:	Mr. Satyen Vaidya, Senior Advocate with Mr. Y.P. Sood and Mr. Vivek Sharma, Advocates.
For the respondent:	Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. A.Gs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

Appellant Kanhakru Ram is convict. He has been tried and convicted for the commission of offence punishable under Section 302 of the Indian Penal Code vide judgment dated 25.04.2017 passed by learned Additional Sessions Judge-II, Mandi, H.P. circuit Court at Sarkaghat and sentenced to undergo rigorous imprisonment for life and to pay Rs.1,00,000/- as fine. Aggrieved thereby, the present appeal has been filed on the grounds *inter-alia* that learned trial Court has not appreciated the evidence available on record in its right perspective and rather based the findings on conjectures and surmises. No legal and acceptable evidence has come on record which suggests the involvement of the accused with the commission of the offence. He has been convicted merely on the basis of so called extra judicial confession he made before Suresh Kumar (PW-1) and the disclosure statement Ext.PW-10/B under Section 27 of the Indian Evidence Act leading to the recovery of weapon of offence the axe, Ext. P-2, blood stained jean pant Ext. P-11 as well as shirt Ext. P-13 of the accused. There is, however, no reliable evidence to show that the extra judicial confession was made by the accused and that on the basis of thereof axe Ext. P-2, pant and shirt Ext. P-12 and Ext. P-13 were recovered in the presence of witnesses. The witnesses to such recovery PW-6 Brij Lal, PW-13 Champa Devi and PW-14 Hem Raj, however, have not supported the prosecution case and turned hostile. The axe Ext. P-2 as per prosecution evidence itself was lying on the spot as has come in the statement made by PW-1 Suresh Kumar the star prosecution witnesses. Learned trial Judge allegedly erred legally and factually while concluding that the facts established on record are consisttent only with the hypothesis to the guilt of the accused and exclude every possible hypothesis except it. The contradictions, improvements and inconsistencies in the statements of prosecution witnesses have also been ignored. The impugned judgment, as such, has been sought to be quashed.

2. Now if coming to the factual matrix, accused Kanhakru Ram and PW-1 Suresh Kumar both belong to village Sakoh, Post Office Sidhpur, Tehsil Dharampur, District Mandi, hence neighbour. While accused is working as Beldar (Pump Operator) in the pump house of I &P.H. Section, Sidhpur, the complainant Suresh Kumar was working as Junior Technician in the Public Works Department, Sidhpur. There is a temple of '*Shri Hanuman*

JT in the village at a distance of 400-500 meters from their house. On 8.5.2015, accused came to the house of PW-1 during day time and asked for axe from his wife, Smt. Champa Devi, PW-13, which allegedly was required by him to fence the temple. She revealed such facts to her husband PW-1 Suresh Kumar in the evening at 7.30 p.m when he returned to his house from duty. At that very time, accused allegedly came to PW-21 and told that he was called by Baba (Priest) in the temple. He accompanied by accused left towards temple side. On the way, accused disclosed that he has killed the Baba with axe and kept his body outside the 'Kutia' (hut) and fled away. The complainant informed the police over telephone that accused had killed the baba in 'Hanuman Ji' temple at village Sakoh. The information so given to the police was entered in daily diary vide rapat Ext. PW-11/A, the complainant when reached in the temple noticed that the dead body of baba was lying in southern corner outside the kutia and an '***axe stained with blood'*** was also lying there.

3. The police also reached on the spot and recorded the statement of complainant Suresh Kumar, Ext. PW-1/A under Section 154 Cr.P.C. On the basis of the statement so made by the complainant FIR Ext. PW-10/A came to be registered in the police station. The investigation was conducted by PW-15 Inspector/SHO Amar Singh, Police Station, Dharampur, District Mandi, H.P. He inspected the body, taken its photograph, completed inquest papers. The spot map Ext. PW-15/B was also prepared. The blood stained soil and controlled soil were taken in possession vide seizure memo. The photographs of the hut were also taken. The mobile phone, Adhaar card, ration card of baba were also taken in possession in the presence of witnesses. On the next day i.e. 9.5.2015, the accused was arrested. The post-mortem of the dead body was conducted by Dr. Dharam Pal, Medical Officer, Civil Hospital, Sarkaghat on that very day. The post-mortem report Ext. PW-9/C was issued. The viscera, part of liver, kidney, stomach, intestine and blood etc, were taken in possession and sealed in a parcel with seal 'RH' Sarkaghat. The impression of seal Ext. PW-9/B was also obtained separately. As per his opinion, Ext. PW-9/D, formed on the basis of report, no poison and alcohol could be detected in the viscera, therefore, as per his opinion, the cause of death of the decesed was head injury.

4. On 10.05.2015, the accused while in custody allegedly made the disclosure statement Ext. PW-10/B in the presence of PW-6 Brij Lal and PW-10 Sandeep Kumar and PW-14 Hem Raj. Consequent upon the disclosure statement so made by him, axe Ext. P-2 and clothes were recovered in the presence of the witnesses. The axe allegedly was got identified from PW-13 Champa Devi. The case property i.e. axe and other stomach contents preserved by PW-9 at the time of post-mortem were sent to Forensic Science Laboratory and the report Ext.PW-15/E and Ext. PW-15/F were received.

5. On completion of investigation, the investigating agency has filed the report in the Court below. On completion of committal proceedings, the case was committed to learned Sessions Court for trial.

6. Learned trial Judge has framed the charge under Section 302 of the Indian Penal code against the accused to which he pleaded not guilty and claimed trial. This has led in producing evidence to sustain the charge against the accused by the prosecution.

7. The material prosecution witness is the complainant, who has stepped into the witness box as PW-1. According to him, the statement Ext. PW-1/A was made by him before the police. According to him, his statement under Section 164 Cr.P.C was also recorded by learned Magistrate. Portion 'A' to 'A' thereof was admitted by him to be true and correct. He has identified the axe along with its handle Ext. P-2 and stated that the same was his axe, taken away by the accused from his wife. PW-2 Ganga Ram was the Pradhan of Gram Panchayat, Sidhpur at the relevant time. In his presence the inquest papers Ext.

PW-2/A and Ext. PW-2/B were completed by the I.O. The blood stained soil and clean soil were also taken from the courtyard of the hut in his presence vide memo Ext. PW-2/D, which was duly sealed with seal 'H'. He has also supported the prosecution case qua search of the hut of deceased Baba and recovery of his ration card, Adhar card and cellphone of 'intex company' therefrom. The accused was also arrested on 9.5.2015 at 1.00 a.m. vide memo Ext. PW-2/E. PW-6 Brij Lal was examined to prove the recovery of pant Ext. P-12 and shirt Ext. P-13, which were taken in possession vide memo Ext. PW-6/A allegedly in his presence and in presence of PW-14 Hem Raj. The same were lying on the bed in the house of accused and not produced by him before the police. According to him, no axe was recovered at the instance of accused on that day in his presence. PW-10 MHC Sandeep Kumar, Police Station, Dharampur is a witness to the disclosure statement Ext. PW-10/B allegedly made by the accused qua recovery of axe and blood stained clothes allegedly concealed by him. The clothes the accused allegedly got recovered by taking out behind the tin box kept inside the room and were taken in possession vide recovery memo Ext. PW-6/A, which were sealed with impression of seal 'D'. On that very day, the accused allegedly led the police party to a field adjoining to path in village Sakoh-Balli. He had taken out one axe concealed beneath leaves in a heap of cow dung. The handle of the axe was blood stained. The same was got identified from Champa Devi PW-13, who was called on the spot and its photographs Ext. PW-7/A-10 and A-11 with regard to recovery of pant and shirt, whereas, Ext. PW-7/A-12 to A-14 axe were also taken. The axe was sealed and taken in possession vide recovery memo Ext. PW-6/D. He has identified the axe Ext. P-2, jean pant Ext. P-12, whereas, shirt Ext. P-13, which were taken in possession in his presence. PW-13 Champa Devi has admitted that axe was taken away from her by the accused for fencing 'Shri Hanuman Ji' temple, however, according to her the axe was got identified from her by the police in Police Station. She turned hostile and allowed to be cross-examined. PW-14 Hem Raj allegedly a witness to the recovery of pant, shirt and axe has not supported the prosecution case and also turned hostile. The remaining prosecution witnesses are formal as PW-3 Pawan Kumar is the Junior Engineer and at the instance of police prepared the spot map Ext. PW-3/A. PW-4 HHC Rakesh Kumar taken the copy of FIR to S.D.P.O. Sarkaghat and its copy was taken to the Court of JMIC Sarkaghat and also to the S.P. office, Mandi. PW-5 HCSarwan Kumar was working as additional MHC on the day of occurrence and retained the case property in the Malkhana when deposited with him by the I.O. He has made the entry also in the Malkhana register. The case property was forwarded by him to RFSL, Mandi. PW-7 Hem Raj is the Photographer and he has taken the photographs Ext. PW-7/A-1 to A-14. PW-8 Hazari Lal was working as Patwari in patwar circle Taroon. On the application, Ext. PW-8/A moved to S.D.M. Dharampur, he had issued the jamabandi Ext. PW-8/B, spot tatima Ext. PW-8/C to the police. He had also submitted the compliance report Ext. PW-8/D in this regard to the Naib-Tehsildar, Dharampur. PW-9 Dr. Dharampal has conducted the post-mortem of the dead body and in his opinion the cause of death is the head injury. As per his further version, the injuries could have been caused with axe Ext. P-2 and were sufficient to cause death in ordinary course. PW-11 Constable Karam Singh has proved the rapatrojnamcha Ext. PW-11/A, Ext. PW-11/B and Ext. PW-11/C. PW-12 HHC Rasal Singh had taken the rukka Ext. PW-1/A handed over to him by the IO ASI Bidhi Chand to police station, which he had handed over to MHC Sandeep Kumar who registered the FIR Ext. PW-10A. He had also taken the case property to the laboratory at Mandi. PW-15 is the I.O. of this case. He has deposed what the police has said in the challan filed against the accused.

8. The accused has also been exmained under Section 313 Cr.P.C. He has denied the entire prosecution case either being wrong or for want of knowledge and pleaded that he has been falsely implicated in this case. He has also exmained DW-1 Vijay Singh, Assistant Engineer, H.P.P.W.D. Sub-Division, Dharampur, who has produced the record and

stated that complainant PW-1 Suresh Kumar was not on duty on 9.5.2015 being holiday on account of Second Saturday. DW-2 Yashpal Sharma, S.D.O I&PH Dharampur has stated that on 8.5.2015, the accused was present on duty as he marked his attendance at 2.00 p.m. However, as has come in his cross-examination, in the evening the accused only switched on and switched off the motor and fled away thereafter and he was not physically present on duty in the evening time.

9. Learned trial Judge on appreciation of the evidence available on record and hearing learned Public Prosecutor and also learned defence counsel has noticed the following circumstances having appeared in the evidence against the accused:-

> "Firstly, he has submitted that the accused has taken the axe from the wife of the complainant from his house on the day of occurrence.
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> Secondly, the accused disclosed to the complainant that he has committed the murder of Baba in his kutia.
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> Thirdly, the accused made the statement, while, in custody and got recovered the blood stained clothes and the weapon of offence in presence of the witnesses. The presence of the blood on the clothes of the accused was not explained on the record file and the accused has taken the plea of alibi which falsify from his evidence."

10. While considering the circumstances so appeared against the accused with the help of the evidnece available on record, the prosecution was found to have proved its case against the accused beyond all reasonable doubt. The accused, as such, has been convicted for the commission of offence punishable under Section 302 IPC and sentenced in the manner as pointed out at the very out set.

11. Mr. Satyen Vaidya, learned Senior Advocate assited by S/Sh. Y.P. Sood and Vivek Sharma, Advocates has argued very ably that the present is a case of no evidnece nor the prosecution has proved its case against the accused beyond all reasonable doubt, however, irrespective of it, learned trial Judge has convicted and sentenced him. Learned defence counsel has pointed out that there is no evidnece to show that the accused has made extra judicial confession. Again there is no cogent and reliable evidnece to show that axe Ext. P-2 and clothes i.e. jean pant and shirt Ext. P-12 and Ext. P-13 have been recovered at the instance of accused, consequent upon the disclosure statement Ext. PW-10/B he made, in the manner, as claimed by the prosecution. The prosecution witnesses i.e. PW-6 and PW-14 have turned hostile. Even PW-13 Champa Devi has also not supported the prosecution case qua the recovery of axe in the manner as claimed by the prosecution. Therefore, according to learned counsel, there was no iota of evidence to connect the accused with the commisison of offence. He, in all fairness and in the ends of justice, was entitled to the benefit of doubt and resultantly acquittal.

12. On the other hand, Mr. Narinder Guleria, learned Additional Advocate General while supporting the judgment passed by learned trial Court has stated that the same is supported by the evidence available on record. Also that, the accused has rightly been convicted and sentenced.

13. The present being not a case of direct evidence and rather hinges upon circumstantial evidence casts an onerous duty on this Court to find out the truth by separating grain from the chaff. In other words, it has to be determined that the facts of the case and the evidence available on record constitute the commission of an offence punishable under Section 302 IPC against the accused or not. However, before coming to answer this poser, it is desirable to take note of legal provisions constituting an offence punishable under Section 302 IPC. A reference in this regard can be made to the provisions

contained under Section 300 IPC. As per the Section ibid, culpable homicide is murder firstly if the offender is found to have acted with an intention to cause death or secondly with an intention of causing such bodily injury knowing fully well that the same is likely to cause death of someone or thirdly intention of causing bodily injury to any person and such injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or if it is known to such person that the act done is imminently so dangerous that the same in all probability shall cause death or such bodily injury as is likely to cause death.

14. Culpable homicide has been defined under Section 299 IPC. Whoever causes death by way of an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death can be said to have committed the offence of culpable homicide. Culpable homicide is murder if the act by which death is caused is done with the intention of causing death. Expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degree. We are drawing support in this regard from the judgment of Apex Court in ***Jagriti Devi*** vs. ***State of Himachal Pradesh, AIR 2009 SC 2869***.

15. The ingredients of culpable homicide amounting to murder, therefore are: (i) causing death intentionally and (ii) causing bodily injury which is likely to cause death. Rather the present is a case where the evidence available on record is suggestive of that it is the accused who had caused the death of deceased baba with axe by inflicting injury on his head with axe Ext. P-2 and such an act on his part amounts to culpable homicide amounting to murder or not, needs re appraisal of the evidence available on record. However, before that it is deemed appropriate to point out that if the accused had motive to cause death of deceased, the eye witness count of the occurrence may not be required, however, where the motive is missing, the prosecution is required to prove its case with the help of testimony of eye witnesses.

16. The present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence in the manner as legally required. We can draw support in this regard from a judgment of Division Bench of this Court in ***Sulender vs. State of H.P., Latest HLJ 2014 (HP) 550***. The relevant extract of this judgment is re-produced here as under:-

> "**21**. It is well settled that in a case, which hinges on circumstantial evidence, circumstances on record must establish the guilt of the accused alone and rule out the probabilities leading to presumption of his innocence. The law is no more res integra, because the Hon'ble Apex Court in Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343, has laid down the following principles:
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> > "It is well remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

22. The five golden principles, discussed and laid down, again by Hon'ble Apex Court in Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116, are as follows:

(i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(iii) the circumstances should be of a conclusive nature and tendency,

(iv) They should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

17. Similar is the ratio of judgment rendered again by this Bench in ***State of Himachal Pradesh vs. RayiaUrav @ Ajay, ILR 2016 (5) (HP) 213***. This judgment also reads as follows:-

"10. As noticed supra, there is no eye- witness of the occurrence and as such, the present case hinges upon the circumstantial evidence. In such like cases, as per the settled proposition of law, the chain of circumstances appearing on record should be complete in all respects so as to lead to the only conclusion that it is accused alone who has committed the offence. The conditions necessary in order to enable the court to record the findings of conviction against an offender on the basis of circumstantial evidence have been detailed in a judgment of this Court in Devinder Singh v. State of H.P. 1990 (1) Shim. L.C. 82 which reads as under:-

"1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilt.

3. The circumstances should be of a conclusive nature and tendency.

4. They should exclude every possible hypothesis except the one to be proved.

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

11. It has also been held by the Hon'ble Apex Court in Akhilesh Halam v. State of Bihar 1995 Suppl.(3) S.C.C. 357 that the prosecution is not only required to prove each and every circumstance as relied upon against the accused, but also that the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The relevant portion of this judgment is reproduced here as under:-

> ".....It may be stated that the standard of proof required to convict a person on circumstantial evidence is now settled by a serious of pronouncements of this Court. According to the standard enunciated by this Court the circumstances relied upon by the prosecution in support of the case must not only by fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for as conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt of an accused is to be inferred, should be conclusive nature and consistent only with the hypothesis of the guilt of the accused and the same should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together lead to the only irresistible conclusion that the accused is the perpetrator of the crime."...

18. The guilt or innocence of the accused has to be determined in the light of above legal parameters as well as the evidence available on record. We have already detailed the circumstances as relied upon by the prosecution and considered by learned trial Court to bring guilt home to the accused. It is now to be seen in the light of the evidence available on record as to whether the chain of evidence furnished is so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and in all probability show that it is accused alone who has murdered the deceased baba with axe Ext. P-2.

19. It is in this backdrop, we now proceed to discuss the evidence available on record.

20. The first and foremost circumstance relied upon against the accused is that he having went to the house of the complainant PW-1 and asked for axe from Champa Devi, PW-13 his wife and the purpose to have axe by him was disclosed that the same was required for providing fencing to the temple and kutia of the decesed. Nothing, however, has come in the prosecution evidnece as to at what time, he went to the house of PW-1 to have axe. On the other hand, he reported for duty at the pump house at 2.00 p.m. It is stated so by DW-2, the Sub-Divisional Officer, I&PH, Sub-Division, Dharampur. According to DW-2, the accused was present on duty and signed the attendance register at 2.00 p.m. Even if the testimony of PW-13 Champa Devi that the accused had taken away axe from her is believed to be true, it alone is not sufficient to conclude that the accused had done away with the life of deceased by inflicting injuries on his head with axe. As noticed hereinabove, the time when the axe was taken by the accused does not find mention in the statement of PW-1. On the other hand, the accused had reported for duty at 2.00 p.m. The probable time when the deceased was murdered is not establish from the prosecution evidnece. In the village no-one could know about the death of baba in the temple till 8.00 p.m when the accused has allegeldy revealed this fact to PW-1. The accused was on night duty, perhaps from 2.00 p.m to 10.00 p.m as can be noticed from the statement of DW-2 Yashpal Sharma, the Sub-Divisional Officer, I&PH, Dharampur.

21. As a matter of fact, the accused has not taken the plea of *alibi*, however, it emerges from the trend of cross-examination of prosecution witnesses conducted on his behalf that he was on night duty and has never commited the alleged offence nor met PW-1 and disclosed him that baba was murdered by him. The defence so emerges on record seems to be probable because as per the evidence discussed supra, the deceased was on night duty at pump house. No doubt PW-2 has admitted the suggestion given to him by learned Public Prosecutor that in the evening on 8.5.2015, the accused was not physically present at the pump house, hence on duty. Even if it is believed to be true, hardly of any

help to the prosecution case because the pump house was situated in village Sakoh itself to which the accused belongs. Therefore, even if he was not there throughout and his absence therefrom cannot be taken to believe that he had killed the baba with the axe, particularly, when there is no iota of evidence to suggest as to at what time the axe was taken by the accused from the house of PW-1 and the probable time when the baba was killed. On the other hand, the possibility of accused having come to his house from pump house to have food etc, or coming to his house and going to the pump house intermittently in view of the pump house is situated in village Sakoh itself, cannot be ruled-out. Therefore, mere taking away the axe Ext. P-2 from the house of PW-1 is not at all sufficient to connect the accsued with the murder of the baba.

22. Interestingly enough, the motive to cause death of baba by the accsued is totally missing in this case. What was the motive to kill the baba is even not remotely established on record. Therefore, the present a case hinges upon the circumstantial evidence, which also not inspire any confidence, the accused could have not been convicted.

23. Now if coming to the another circumstance that accused in the evening (8.00 p.m.) came to PW-1 and told him that baba is calling him to come to temple and that PW-1 accompanied the accused, the later on the way disclosed that he had killed the baba with the axe and kept the dead-body in the courtyard outside the kutia again hardly inspire any confidence for the reason that in view of the judgment of this Court in ***Sulender's***casecited supra,an extra judicial confession by the accused is always made before a close relative, a trusted person and his well wisher and not before any person like PW-1, the complainant in this case, who as per plea raised by the accused in his defence was inimical to him. Therefore, the story that accused had made extra judicial confession before PW-1, cannot be believed to be correct by any strech of imagination.

24. Interestingly enough, as per the very first version of the complainant qua this incident find mention in his statement (Ext. PW-1/A) under Section 154 Cr.P.C., the accused disclosed so and fled away. However, as per his statement under Section 164 Cr.P.C Ext. PW-1/B recorded by Judicial Magistrate, Court No.2, Sarkaghat, the accused accompanied him uptokutia and there shown the dead-body which was covered under a tin shed and thereafter they both returned to home. Although, similar is his version while in the witness box as PW-1, yet in view of variation in his statements recorded under Section 154 Cr.P.C and 164 Cr.P.C and he having contradicted his earlier version that the accused fled away after disclosing that he had killed the baba on the way to kutia, such contradiction in the prosecution evidence goes to the very root of the prosecution case.

25. It is doubtful that accused came to PW-1 in the evening (8.00 p.m.) because as per the version of PW-1 in cross-examination, he was on field duty in village Seyoh on that day, where the tarring work was in progress upto 5.00 p.m. He was at place namely Beri till 5.00 p.m. The bus facility, as per his own version, was not available from Beri at that time. How he had covered the distance from Beri to Sakoh, which is 16 kilometers, remained unexplained. On the other hand, as per his version, he had taken lift from Seyoh to Sidhpur. Again, at what time, there is no explanation. When he came to Sidhpur from Seyoh and when he reached at Sidhpur and at what time in his house at Sakoh, there is agian no explanation in this regard. Being so, there is no legal and acceptable evidence to believe that he reached in the house at 8.00 p.m. Similarly, it cannot also be believed that the accused came to him at 8.00 p.m. The link evidence as to by what mode he reached at village Seyoh from Beri and what time he started from Seyoh to Sidhpur and by which bus he reached at Sidhpur, again there is no explanation. There is again no explanation as to at what time he left Sidhpur for his native place at village Sakoh and when he reached there. The story, as such, has been concocted and engineered to implicate the accsued falsely to

the reasons best known to PW-1 and the Investigating Officer. Therefore, there is no iota of evidence to believe that the accused came to the house of PW-1 and on the way disclosed that he had killed the deceased with axe.

26. The third circumstance is the disclosure statement Ext. PW-10/B allegedly made by the accused while in the police custody. The material prosecution witness to prove this part of its case examined by the prosecution is PW-10 Sandeep Kumar, the then MHC Police Station, Dharampur. He has simply stated that on 10.05.2015, the I.O. associated him in the investigation of the case and that in his presence the accused made the disclosure statement qua he having concealed the axe and his blood stained clothes, which he could only got recovered. The statement Ext. PW-10/B so made was recorded in his presence, however, where the said statment made, nothing has come in the statement of PW-10. He is the only witness examined by the prosecution in this regard. However, as noticed supra, nothing in his statement that the disclosure statement was made and recorded in the police station at such a time when the accused was in custody has come on record. Therefore, the necessary constituents of the disclosure statement that the same should be made by the accused while in custody and in the presence of independent witnesses is not proved at all. Therefore, the possibility of statement Ext. PW-10/B is engineered and fabricated to implicate the accused in this case falsely, cannot be ruled-out.

27. Now if coming to the recovery of axe Ext. P-2, jean pant, Ext. P-12 as well as shirt Ext. P-13 of deceased pursuant to the disclosure statement Ext. PW-10/B, the same is again not proved because irrespective of PW-10, who is a police official having stated that pant and shirt were taken out by the accused from behind iron box kept in the room and thereafter handed over to the police. The witnesses to recovery memo, PW-6 Brij Lal and PW-14 Hem Raj have not supported the prosecution case in this regard at all because as per verison of PW-6, the jean pant and shirt were lying in the house of accused on a bed. There is nothing that the same were blood stained. This witness was subjected to lengthy cross-exmaination, however, his testimony remained unshattered as he has denied the suggestions to the contrary that the pant and shirt were not lying on the bed and rather concealed by the accused behind a tin box, lying in the room. PW-14 Hem Raj though has admitted his signatures over the parcel, however, according to him, the same was empty at that time. Nothing according to him did happen in his presence nor anything recovered by the police. In his cross-examination conducted by learned Public Prosecutor while admitting that memos Ext. PW-6/A and Ext. PW-6/D bear his signature, it is denied that he had signed the same at village Sakoh-Balli.

28. Although, he has admitted the suggestion that the police had brought the accused to village Sakoh on that day, however, it is denied that he led the police party to a field adjoining to Sakoh-Balli path and taken out an axe concealed beneath leaves in a heap of cow dung. It is also denied that in his house, the accused had taken out his clothes from the tin box and handed over the same to the police. It is also denied that the clothes were blood stained. He has also denied that PW-13 Champa Devi identified the axe in his presence at village Sakoh.

29. Now if coming to the statement of PW-13 Champa Devi, although, as per her version the axe Ext. P-2 belongs to them and the accused had taken away the same from their house for the purpose of fencing 'Hanuman Ji' temple. It is, however, denied that the axe was identified by her at village Sakoh. The same, however, was got identified from her in the police station. She had admitted her signature on the memo Ext. PW-6/D, however, denied that the same was signed by her at village Sakoh. It is also denied that she was called to the field adjoining to Sakoh-Balli path in village Sakoh and got identified the axe Ext. P-2 from her there in the presence of PW-6 Brij Lal and PW-14 Hem Raj. She has also

denied that axe was sealed by the police at Sakoh. It is also denied that Ext. PW-6/D was signed by the accused at Sakoh in her presence and that she has deposed falsely to save the accused. The statement portion 'A' to 'A' and 'B' to 'B' in her statement Ext. PW-15/G was not made by her before the police. Therefore, while PW-10 Sandeep Kumar being a police official is an interested witness, independent witnesses PW-6 and PW-14 have not supported the prosecution case qua the manner in which pant, shirt and axe were recovered by the police. PW-13 Champa Devi, the wife of the complainant has not supported the prosecution case in this regard.

30. Interestingly enough, as per own statement of the complainant PW-1, when he noticed dead body lying in one corner outside the kutia, the blood stained axe was also lying there. There is no evidence as to when the accused had removed the axe from that place and concealed the same in the heap of cow dung in the field at village Sakoh. It is also not known as to who was the owner of that field and to whom the heap of cow dung belongs. As a matter of fact, the investigating agency has made an effort to plant the recovery of axe and also the clothes of the accused falsely merely to implicate the accused with the commission of murder of baba without there being any proof thereto. The conduct of the Investigating Officer is not above board. Learned trial Judge has not appreciated the evidence available on record in its right perspective and recorded the findings of conviction against the accused mechanically and without application of mind.

31. True it is that as per medical evidence as has come on record by way of testimony of PW-9 Dr. Dharampal and the post mortem report Ext. PW-9/B, the cause of death of baba is the head injury. As per further version of the doctor in the cross-examination, the head injury leading to the death of baba could have been caused with axe Ext. P-2. There is, however, no iota of evidence to show that head injury was inflicted by the accused alone and none-else.

32. The Seriologist report Ext. PW-5/E received in this case only speaks about the availability of human blood on the handle of axe Ext. P-2. Blood was also found on the pants as well as shirt of the accused. However, nothing is there in this report that the blood on the clothes of the accused was human bllod and that of deceased. There is also nothing suggesting that the blood on the handle of axe Ext. P-2 was that of the deceased. The scentific investigation conducted in this case, as such, is also not suggestive of that baba was murdered by the accused in the manner as claimed by the prosecution.

33. Learned trial Judge has emphasized much on the plea of so called alibi taken by the accused. As a matter of fact, plea of the accused that he was on duty could have not been taken as the plea of alibi by any stretch of imagination for the reason that pump house where he allegedly was on duty is situated in village itself and it is not the prosecution case that after commission of offence he absconded or was not available in the village. On the other hand, as per the statement of PW-2, Ganga Ram, the then Pradhan of Gram Panchayat, Sidhpur, he contacted the accused on 8.5.2015 at 10.00 p.m over telephone. At that time, he was available in his house. Being so, there is no question of the accused having raised the plea of alibi. The factum of he being on night duty is established from the testimony of DW-2, the Sub-Divisional Officer, I&PH, Sub-Division, Dharampur.

34. The remaining prosecution witnesses are formal and their evidence at the most could have been used as link evidence had the prosecution otherwise been able to prove its case against the accused with the help of cogent and reliable evidence that it is he alone who had murdered the baba with the axe. Therefore, the elaboration of the link evidence as has come on record by way of testimony of formal witnesses would be nothing but to overload this judgment without there being any necessity to do so.

35. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, accused is acquitted of the charge under Section 302 IPC framed against him. The accused is serving out the sentence. He be set free forthwith, if not required in any other case. Registry to prepare the release warrants accordingly. The amount of fine, if already deposited, be refunded to the accused against proper receipt.

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

Khem Chand .....Appellant.
Versus
State of H.P. .....Respondent

Cr. A. No. 554 of 2016
Reserved on: 21.08.2018
Decided on: 31.08.2018

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of 'charas' – Non-joining of independent witnesses in investigation - Effect – Trial Court convicting accused for his being found in conscious and exclusive possession of 2.100 kg. charas– Appeal against - Case based on chance recovery – Defence discrediting prosecution story on account of non-joining of independent witnesses despite availability, non-production of seal, contradictions in prosecution evidence and enmity of investigating officer with accused, defective recording of statement under Section 313 of Cr.P.C etc. – Held, Independent persons not available at all places and at every time for being associated as witnesses by Investigating Officer to witness search and seizure – Crime scene totally uninhabited – Houses of persons located nearby spot as suggested by defence not examined as defence witnesses – Case based on chance recovery – Non-joining of independent person in search proceedings inconsequential. (Paras-18 to 20)

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of 'charas' –Police witnesses – Value of – Held, evidence of police witnesses if inspires confidence and found trustworthy, it can form basis for conviction against accused – Statements of Investigating Officer 'T' and another police official, Constable 'D' consistent – Contradictions minor in nature and not fatal to prosecution case – Accused not giving any explanation about his presence at that place – Planting of huge contraband improbable – No reason to disbelieve statements of police witnesses – Evidence showing conscious exclusive possession of accused over contraband – Accused rightly convicted for said offence – Appeal dismissed. (Paras- 37 and 38)

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Recovery of charas – Link evidence – Non-production of seal – Effect – Held, in absence of proof of prejudice to accused non-production of seal used for sealing incriminatory article, not fatal to prosecution case (Paras- 36).

Cases referred:

Makhan Singh V. State of Haryana (2015) 12 SCC 247

Noor Aga V. State of Punjab and another, 2008 and State of Punjab V. Baldev Singh (1999) 3 SCC 977

Girija Prasad V. State of M.P. (2007) 7 SCC 625

Govindaraju alias Govinda V. State by Sriramapuram Police Station and another, (2012) 4 SCC 722

For the appellant:	Mr. Vivek Sharma, Advocate.
For the respondent:	Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. A.Gs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Appellant herein is a convict. He has been convicted by learned Special Judge, Kullu, District Kullu, H.P. for the commission of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act' in short) and sentenced to undergo rigorous imprisonment for a term of 10 years and to pay Rs.1,00,000/- as fine vide judgment dated 14.06.2016 passed in sessions trial No. 15(15-A) of 2015.

2. The allegations against the appellant (hereinafter referred to as the 'accused') in a nut-shell, are that on 20.11.2014 around 5.55 p.m. when apprehended by the police of Police Station, Bhunter, District Kullu near Kamand-dhar was found in conscious and exclusive possession of charas weighing 2kg 100grams.

3. Now, if coming to the factual matrix, the prosecution case as per report filed under Section 173 Cr.P.C is that on 20.11.2014 PW-7 Inspector Tenzin accompanied by HHC Joginder Singh, HHC Nanak Chand and Constable Davinder Prasad (PW-5) left SIU, Kullu for patrolling towards Bhunter side at 2.30 p.m. Rapat No. 5 (Ext. PW-9/A) was entered in this regard in the rojnamcha. The police party had gone up to a place known as 'Shondhadhar'. On its way back, when reached at Kamand-dhar about 5.30 p.m., the accused was spotted coming on foot from Diyar side at about 5.55 p.m. He was carrying a bag with him. The police party stopped the vehicle there and apprehended the accused. On inquiry, the accused disclosed his name and other antecedents to the police. He got frightened. PW-7 Tenzin, the I.O. of this case had asked the accused about the contents of the bag which was having inscription '*Prem*' on it. He revealed that there were potatoes in the bag. The I.O. further asked him as to why he got frightened on seeing the police, the accused failed to give satisfactory answer. This has raised suspicion that the accused may be carrying some incriminating substance in the bag. The I.O. associated PW-5 Constable Davinder Prasad and HHC Nanak Chand as witnesses and it is in their presence the bag the accused was carrying with him checked. On its checking, ball shaped black coloured substance wrapped in poly wrappers was found kept therein. On the basis of his experience and on smelling it, PW-7 found the recovered substance to be charas. The identification memo Ext. PW-7/A was accordingly prepared in the presence of the witnesses. The recovered charas was weighed with the help of electronic weighing scale available with the I.O. and found to be 2kg 100grams.

4. The recovered charas was kept back in the same bag and sealed in a parcel of cloth with nine seals of impression 'H'. The sample of seal Ext. PW-5/B was drawn separately and the seal after its use retained by the I.O. in his own custody. He filled NCB-I forms Ext. PW-4/E in triplicate. The recovered charas was taken into possession vide seizure memo Ext. PW-5/A.

5. It is thereafter rukka Ext. PW-4/A was prepared and handed over to PW-5 to deliver the same in Police Station, Bhunter. On the basis of rukka, FIR Ext. PW-4/B was

registered by PW-4 SI Bhag Singh. He made the endorsement on the rukka Ext. PW-4/C and handed over the case file to PW-5 for being taken to the I.O on the spot. The parcel containing the case property was also produced before PW-4. He re-sealed the same with three seals of impression 'M', drawn the sample seal 'M' on a piece of cloth Ext. PW-4/D and also filled relevant columns of NCB-I forms. The case property was deposited with officiating MHC Ms. Pinki Devi (PW-1) along-with NCB forms, samples seals 'H and 'M' and also the copy of seizure memo. PW-7 also prepared the spot map Ext. PW-7/B and recorded the statements of prosecution witnesses as per their version.

6. The accused was apprised about the offence he committed and grounds of arrest and thereafter arrested vide memo Ext. PW-7/B. The Police party returned to the police station and entries in this regard were made in the rojnamcha vide rapat Ext. PW-8/A. The '*jamatalashi*' of the accused was also conducted by PW-7. The officiating MHC (PW-1) had entered the case property in register No.19 of malkhana at Serial No. 23, the abstract whereof is Ext. PW-1/A. On 21.11.2014, after filling the columns of NCB forms, regular MHC Gian Chand (PW-6) had sent the parcel of case property (Ext. P-1) along with NCB forms, sample of seals 'H' and 'M' as well as other relevant documents to FSL, Junga vide RC Ext. PW-6/A. Constable Jai Singh (PW-2) has deposited the case property in the laboratory and obtained the receipt of RC. On his return to police station, he handed over the receipt to PW-6 Gian Chand.

7. The Investigating Officer has prepared the special report Ext. PW-3/A and submitted the same to the then Additional S.P. Kullu, Shri Nihal Chand. He after having made endorsement thereon handed over the same to the Reader HC Nirat Singh (PW-3). HC Nirat Singh had entered the special report in the relevant register, the abstract whereof is Ext. PW-3/B. On 21.11.2015, LHC Manoj Negi (PW-10) brought the case property from the laboratory with result Ext. PW-7/D from FSL, Junga and handed over the same to MHC police station, Bhunter. As per report Ext. PW-7/D, the contents of exhibit were found to be an extract of cannabis and sample of charas. On the completion of investigation, the investigating agency has filed the challan in the Court.

8. Learned trial Judge has framed the charge under Section 20 of the NDPS Act against the accused who pleaded not guilty to the same and claimed trial. The prosecution in support of its case has examined 10 witnesses in all.

9. The material prosecution witnesses are PW-5 Constable Davinder Prasad and PW-7 Inspector Tenzin because while the search and seizure has been conducted by PW-7 the I.O, it is PW-5 who has witnessed the same.

10. The remaining prosecution witnesses i.e. LHC Pinki Devi (PW-1), Constable Jai Singh (PW-2), HC Nirat Singh (PW-3), SI Bhag Singh (PW-4), HC Gian Chand (PW-6), LC Urmila (PW-8), Constable Vijay Kumar (PW-9) and LHC Manoj Negi (PW-10) are formal because before Pinki (PW-1), PW-4 Bhag Singh had produced the parcel containing recovered charas along with sample of seals 'H' and 'M', copy of seizure memo and NCB forms in triplicate, which she had entered at Serial No. 237 of register No. 19. She has proved the abstract thereof, which is Ext. PW-1/A. Similarly, Jai Singh has taken the case property to FSL, Junga and deposited the same there in safe custody. PW-3 Nirat Singh, the Reader of Additional S.P. Kullu has proved the special report Ext. PW-3/A and the entries in the register Ext. PW-3/B. Sub Inspector Bhag Singh, the then SHO/PS, Bhunter registered the FIR Ext. PW-4/B on the receipt of rukka Ext. PW-4/A. He has also made the endorsement Ext. PW-4/C on the rukka and after re-sealing the parcel containing the case property with three seals of 'M' drawn the sample thereof on a piece of cloth Ext. PW-4/D. He also filled the relevant columns of NCB forms Ext. PW-4/E. HC Gian Chand had forwarded the case property vide RC No. 265/14 Ext. PW-6/A to FSL, Junga through

Constable Jai Singh. He also completed column No. 12 of NCB forms Ext. PW-4/E before the case property sent to the laboratory. Lady Constable Urmila has proved the rapatrojnamcha Ext. PW-8/A, whereas, Constable Vijay Kumar Ext. PW-9/A. PW-10 LHC Manoj Negi had brought the case property and the report from FSL, Junga and handed over the same to MHC Police Station, Bhunter.

11. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C has denied the incriminating circumstances appearing against him in the prosecution evidence put during such examination either being incorrect or for want of knowledge. As per his plea raised in defence, the prosecution witnesses have deposed falsely against him and that a false case has been registered against him.

12. DW-1 Inder Singh he examined in his defence has stated that his house is near Kamand-dhar 'Nallah' above the road where he is residing for the last 10 years with his family. House of one Bhim Singh is also situated there at a distance of 100-150 meters. He has been examined by the accused in his defence to discredit the prosecution story on account of non-joining of independent witnesses.

13. Learned trial Judge on appreciation of the oral as well as documentary evidence and taking into consideration and arguments addressed on behalf of the prosecution as well as in defence has concluded that charas weighing 2kg 100grams has been recovered from the conscious and exclusive possession of the accused. He, therefore, has been convicted and sentenced as pointed out at the out set.

14. The legality and validity of the impugned judgment has been questioned on the grounds inter-alia that learned trial Court has based its findings on surmises and conjectures, as the evidence available on record has not been appreciated in its right perspective. Learned trial Court has failed to appreciate that cogent, reliable and trustworthy evidence inspiring confidence has not been brought on record by the prosecution. The prosecution story that the police party on way back to Bhunter apprehended the accused at Kamand-dhar has erroneously been relied upon being not proved at all on record. The factum of PW-5 and PW-7 being official witnesses interested in the prosecution case, their testimony is also erroneously relied upon. The police party was traveling in a private vehicle is also not established on record. The police has failed to give any explanation as to why the prosecution witnesses could not be associated by learned trial Court. The non-production of seal has rendered the prosecution story doubtful, however, learned trial Court has not appreciated this aspect. The contradictions pointed by the defence were ignored without assigning any reasons. The prosecution case that rukka was sent and FIR registered on the basis thereof has also not been proved. The trial Court has also failed to appreciate that the I.O. PW-7 Tenzin was inimical with the accused and it is for this reason a false case has been planted against him. The evidence produced by the accused in his defence has been ignored without assigning any reason. The statement of the accused under Section 313 Cr.P.C was not recorded as per settled legal principles. The link evidence was also not complete besides there being no compliance of provisions contained under Section 52, 55 and 57 of the NDPS Act, hence no findings of conviction could have been recorded against the accused. Being so, the impugned judgment has been sought to be quashed and the accused acquitted of the charge framed against him.

15. Mr. Vivek Sharma, learned counsel representing the appellant-convict has argued that non-joining of independent witnesses irrespective of were available nearby to the spot has rendered the prosecution story highly doubtful. The testimony of official witnesses PW-5 Constable Davinder Prasad allegedly a member of police patrol and PW-7 Tenzin the I.O is not consistent and rather full of contradictions such as qua the location of the spot and its distance from Kullu and Bhunter etc. etc. They, according to learned counsel, have

improved their version while in the witness box. Therefore, the contradictions and improvements in the statements of PW-5 and PW-7 according to Mr. Sharma goes to the very root of the prosecution case. No reason has been assigned for non compliance of the provisions contained under Section 50 of the NDPS Act, this has also rendered the prosecution case highly doubtful. The evidence available on record allegedly has not been appreciated in its right perspective. Cogent and reliable link evidence has also not come on record suggesting the involvement of the accused in the commission of alleged offence.

16. On the other hand, 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-5 and PW-7 that their version is consistent and worthy of credence. Merely that they are official witnesses, their testimony, cannot be ignored. The prosecution has also connected the accused with the commission of offence with the help of cogent and reliable link evidence. Therefore, the impugned judgment, which according to learned Additional Advocate General, is well reasoned calls for no interference in this appeal.

17. Considering the rival submissions made on both sides, following points arise for determination in the present appeal:-

i) Is the present a case where witnesses could have been easily associated to witness the search and seizure but PW-7, the Investigating Officer has failed to do so intentionally and deliberately and as a result thereof the proceedings qua search and seizure of the contraband from the conscious and exclusive possession of the accused has vitiated and as such the impugned judgment is not legally sustainable ?

ii) Is the evidence as has come on record by way of testimony of official witnesses i.e. PW-5 Constable Davinder Prasad and PW-7 Inspector Tenzin is not consistentand rather contradictory in nature, hence not worthy of credence?

Iii) Whether the inconsistencies, contradictions and other procedural irregularities, if any, in the prosecution evidence renders the prosecution case qua recovery of contraband allegedly charas from the conscious and exclusive possession of the accused doubtful?

Points No. 1 to 3.

18. All the points have been taken up for consideration together. It is well settled at this stage that joining the independent persons to witness the search and seizure in a case of this nature 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 at every time for being associated as witnesses by the Investigating Officer to witness the search and seizure. The support in this regard can be drawn from the judgment of the Apex Court in ***Makhan Singh V. State of Haryana (2015) 12 SCC 247***, which 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 accsued 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...."

It is held so by this Court also in ***Criminal Appeal No. 165 of 2011 titled State of H.P. V. Balkrishan, decided on 27th February, 2017***.

19. In a normal course, in a case of this nature where there is provision of severe punishment against an offender, greater care and caution is required to be taken while appreciating the evidence on record and holding an accused guilty. The legal principles in this regard have also been settled by the Apex Court in ***Noor Aga V. State of Punjab and another, 2008*** and ***State of Punjab V. Baldev Singh (1999) 3 SCC 977***, taken note of by learned trial Court also in the impugned judgment. Therefore, such being the settled legal position, of course, as per the requirement of provisions contained under Section 100 and 108 of the Code of Criminal Procedure, it is the duty of the I.O. to conduct search and seizure in the presence of independent witnesses, however, whether someone was available for being associated as independent witness on the spot or not, need reappraisal of the given facts and circumstances and the evidence available on record.

20. It is not the prosecution case that PW-7 has made effort to join the independent person to witness the search and seizure. Both PW-5 and PW-7 have stated that no effort was made nor any police official deputed in search of independent person for being associated as witness at the time of search and seizure had taken place on the spot. The explanation in this regard as forthcoming is that since there was no prior information qua the illicit trafficking of the contraband, therefore, being a case of chance recovery independent witnesses could not be associated. The explanation so forthcoming is not only reasonable but plausible also for the reason that the police team headed by Inspector Tenzin PW-7 was on routine checking and detection of crimes. The accused spotted at the place of recovery all of sudden and asked to stop. On suspicion, the search of the bag he was carrying with him conducted in the presence of PW-5 and HHC Nanak Chand, another member of the police patrol and ball shaped black coloured contraband allegedly charas was recovered. The I.O. on the basis of his experience has found the same to be charas. Both PW-5 and PW-7 have stated in one voice that no vehicle came there when the search and seizure was being conducted. They both have denied the suggestion that at a little distance from the spot, there were residential houses. Although, they admitted the existence of 'Nallah' at some distance (1.5 kilometer away from the spot as per PW-5), however, denied that two houses, one of Nimat Ram and another of Bhim Singh were situated nearby the 'Nallah'. It is also denied that Nimat Ram and Bhimsingh were residing in those houses. However, the accused in his defence has neither examined said Nimat Ram nor Bhim Singh and rather examined one Inder Singh, whose name was never suggested to PW-5 and PW-7 in their cross-examination. Therefore, learned trial Judge has rightly refused to place reliance on the testimony of DW-1 Inder Singh. The facts thus remain that no habitation was there nearby Kamand-dhar where the accused was apprehended nor it is proved that houses of Nimat Ram and Bhim Singh were situated near the 'Nallah', which otherwise was also at a distance of 1.5 kilometers away from the spot. The place rather was isolated. It is proved so even from the perusal of the spot map prepared by the I.O. The present, as such, is a case where independent witnesses were not available. The ratio of the judgment of the Apex Court in ***Makhan Singh's*** case cited supra, is attracted in the case in hand.

21. Now if coming to the second limb of the argument that the evidence as has come on record by way of the testimony of PW-5 and PW-7, the official witnesses is not consistent and rather contradictory, hence inspire no confidence, it is worthwhile to mention here that even if it is so, the prosecution cannot succeed in this case, because it is well settled at this stage that the evidence of official witnesses, if consistent and inspire confidence cannot be ignored and rather relied upon to record the findings of conviction against the accused. The reliance in this behalf can be placed on the judgment of the Apex Court in ***Girija Prasad V. State of M.P. (2007) 7 SCC 625***, in which it has been held that

the testimony of official witnesses is as much good as that of independent person, however, close scrutiny of their statements is required and the same can be relied upon after having all circumspection and caution. Learned trial Judge has also placed reliance on the judgment of the Apex Court in ***Govindaraju alias Govinda V. State by Sriramapuram Police Station and another, (2012) 4 SCC 722***, in which it has been held that whenever the evidence of the official witnesses after careful scrutiny inspire confidence and is found to be trustworthy it can form basis for recording findings of conviction against the accused and non-association of some independent person to witness the search and seizure is not fatal to the prosecution case. The relevant extract of this judgment reads as follows:-

> "We are certainly not indicating that despite all this, the statement of the police officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not inspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the investigating officer recorded the statement of the accused and the article was recovered pursuant thereto, is not sufficient ground to discard the evidence of the police officer relating to recovery at the instance of the accused. [See (Govt. of NCT of Delhi) v. Sunil.] Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the police officer itself is unreliable then it may be difficult for the court to accept the recovery as lawful and legally admissible. The official acts of the police should be presumed to be regularly performed and there is no occasion for the courts to begin with initial distrust to discard such evidence."

22. Now if coming to the case in hand, PW-5 and PW-7 both are police officials, hence official witnesses. Whether their testimony inspire confidence and could have been relied upon to record the findings of conviction against the accused need reappraisal of the statement made by them while in the witness box. They both are categoric and have stated in one voice that police party left the office of SIU, Kullu on 20.11.2014 at 2.30 p.m. Rapat in daily diary entered in this behalf is Ext. PW-9/A. PW-7 who was posted as Incharge, SIU Kullu at that time accompanied by HHC Joginder Singh, HHC Nanak Chand and Constable Davinder Prasad (Pw-5) proceeded to Bhunter side and had gone up to Shondhadhar in private car of PW-7. They returned from Shondhadhar and while on the way from Shondhadhar to Diar, they reached at Kamand-dhar around 5.55 p.m. The police party noticed one person going towards Diyar side. PW-7 stopped the vehicle and inquired the name and other antecedents of the accused. He disclosed his name as Khem Chand. Both of them have identified the accused to be the same person who was apprehended by them on that day in the Court. The accused was having mud coloured bag having inscription 'Prem' on it in his hand. PW-7 asked about the contents of the bag. The accused told that he was carrying potatoes in the bag. When all this was being inquired into from him, he got perplexed and frightened also. PW-7 asked the reason therefor. The accused, however, could not give any satisfactory reply. Both PW-5 and PW-7 while in the witness box are categoric while stating so in the witness box.

23. The further case of the prosecution is that the accused got perplexed and this has resulted in suspicion in the mind of the I.O. PW-7 and search of the bag became necessary. Therefore, PW-7 has associated PW-5, Constable Davinder Prasad and HHC Nanak Chand, who were the members of the police patrol and checked the bag in their presence. In the bag, ball shaped black coloured substance wrapped in poly wrappers was found kept. The same on checking was found to be cannabis. The I.O. prepared the identification memo Ext. PW-7/A. It is thereafter, the recovered charas was weighed with

electronic weighing scale and found 2kg 100grams. The same was put back in the bag in the same manner in which it was taken out and the bag thereafter parcelled in a cloth parcel and sealed with nine seals of impression 'H'. The parcel was taken in possession vide recovery memo Ext. PW-5/A. The impression of seal 'H' Ext. PW-5/B was drawn separately on a piece of cloth. NCB forms Ext. PW-4/E was prepared in triplicate and seal 'H' embossed thereon also. PW-7 retained the seal in his own custody. Both witnesses have supported the prosecution case in this regard also in one voice.

24. As per the further case of prosecution after the search and seizure in the manner as aforesaid has taken place on the spot, the I.O prepared the rukka Ext. PW-4/A. Same along with parcel containing case property, sample seal, copy of seizure memo and NCB forms in triplicate were sent to police station through Constable Davinder Prasad. Both of them have proved this part of the prosecution case also.

25. The close scrutiny of the statements of PW-5 and PW-7 lead to the only conclusion that the same is consistent without any contradiction and improvement. There is thus no reason to disbelieve the same nor non-joining of some independent persons as a witness is fatal to the prosecution case.

26. Now if their statement in cross-examination is seen, they both have categorically stated that the police party left SIU, Kullu at 2.30 p.m. According to PW-5, they reached at Diar around 4.30 p.m, whereas, as per that of the I.O. PW-7 they reached at Bhunter around 3.00 p.m and it took about 45 minutes to them to reach at Bhunter. Meaning thereby that as per testimony of PW-7, they reached at Diar around 3.45 p.m. There is not much difference and the contradiction, if any, in time to reach Diar is minor because as per the version of PW-5, they reached there around 4.30 p.m., whereas, as per that of PW-7 around 3.45 p.m. Such contradiction, as such, is not fatal to the prosecution case.

27. As per the version of PW-5, the distance of Diar from Kullu is 45-46 kilometers, whereas, that of PW-7, the distance of Diar from Bhunter is 15-16 kilometers. No suggestion has been given to PW-7 qua the distance between Kullu and Bhunter. Therefore, even if any contradiction qua the distance between Kullu and Bhunter and Bhunter to Diar the same is again not fatal to the prosecution case.

28. As per further version of PW-5, the distance of Sondhadhar from Diar is 6-7 kilometer, whereas, as per that of PW-7, 3-4 kilometer. The contradiction in this regard is also not of such a nature so as to go to the very root of the prosecution case. No doubt, Diyar is a big village having residential houses also, however, as per version of PW-5 its distance from spot i.e. Kamand-dhar was about 4 kilometer. PW-7 has given the distance between Kamand-dhar and Diyar as 3 kilometer. Therefore, village Diyar cannot be said to be in the locality of Kamand-dhar nor was it possible for the I.O. to have sought the presence of some-one to witness the search and seizure from Diyar, that too, when the police had no prior information qua illicit trafficking of the contraband and rather it was a case of chance recovery. Both PW-5 and PW-7 have denied in one voice that houses, tea stall and bus stop were in existence at Kamand-dhar.

29. Both of them have denied the suggestion that nearby Kamand-dhar, two houses are situated viz., one in hill side and another in valley side of the road. They both are again categoric that no effort was made to associate independent witnesses. As per further version of PW-7, the police party reached at police station, Bhunter at 9.40 p.m., whereas, though no such suggestion was given to PW-5, however, his testimony that the file was handed over by him to the I.O. in police station at 9.50 p.m corroborates the testimony of PW-7, the I.O. qua the timing of arrival of the police party in the police station.

30. The further investigation i.e. preparation of spot map Ext. PW-7/B by the I.O. and recording the statements of the prosecution witnesses under Section 161 Cr.P.C on the spot finds corroboration from his statement while in the witness box as PW-7. The memo Ext. PW-7/C reveals that the accused was arrested after his interrogation.

31. The link evidence is also complete in this case because special report Ext. PW-3/A prepared by PW-7 was produced by him before Additional S.P. Kullu, Shri Nihal Chand. His Reader HC Nirat Singh PW-3 has corroborated this part of the prosecution case while in the witness box. SI Bhag Singh PW-4 was the SHO, Police Station, Bhunter at the relevant time. The parcel containing the case property was produced before him by PW-5 along with NCB forms, copy of seizure memo, sample of seal and rukka Ext. PW-4/A. He has not only registered the FIR Ext. PW-4/B but also prepared the case file and made endorsement Ext. PW-4/C on the rukka. He has also re-sealed the parcel with three seals of impression 'M' and drawn the sample of seal Ext. PW-4/D separately. He filled in relevant columns of NCB forms Ext. PW-4/E and thereafter the case file was handed over to Constable Davinder Prasad to take the same to the spot, whereas, case property was deposited with PW-1 LHC Pinki. Pinki has corroborated the statement of SI Bhag Singh qua the deposit of sealed parcel with seals 'H' and 'M' handed over to her by the said witness along with copy of seizure memo, NCB forms in triplicate. She entered the same in the malkhana register against Serial No. 237. The abstract of register Ext. PW-1/A is also proved by her with the help of original record brought to the Court. Nothing has come either in the cross-examination of SI Bhag Singh or that of LHC Pinki Devi, which belies the prosecution case.

32. Now if we peruse the statement of PW-6 Head Constable Gian Chand, regularly posted MHC in Police Station, Bhunter at that time, on completion of relevant columns No. 12 of NCB forms Ext. PW-4/E, he handed over the case property along with documents vide RC Ext. PW-6/A to Constable Jai Singh (PW-2) with a direction to deposit the same in FSL, Junga. As per his further version, PW-2 had produced the receipt before him when came back after depositing the case property in the laboratory. Jai Singh while in the witness box as PW-2 has corroborated the testimony of PW-6 qua the deposit of case property by him in FSL, Junga in safe condition along with the copy of FIR, copy of Fard (seizure memo), sample of seals 'H' and 'M', NCB forms in triplicate and docket vide RC No. 265 Ext. PW-6/A. Nothing is in their cross-examination also to discredit the case of the prosecution. LC Urmila Devi PW-8 has proved the rapatrojnamcha Ext. PW-8/A, which supports the prosecution case that police party returned to the Police Station, Bhunter at 9.40 p.m. Similarly, PW-9 Constable Vijay Kumar has proved the rapatrojnamcha Ext. PW-9/A, which reveals that police party had left SIU office, Kullu at 2.30 p.m for patrolling and collecting information towards Bhunter side.

33. Therefore, the testimony of the formal prosecution witnesses to establish the link lead to the only conclusion that the accused was apprehended by the police party headed by PW-7 at Kamand-dhar and charas weighing 2kg 100grams recovered from the bag which he was carrying. The parcel in which the recovered charas sealed was identified by both of them. They have also identified the bag Ext. P-2, the accused was carrying with him. They have also identified the transparent police wrapper Ext. P-3, in which charas Ext. P-4 was wrapped. It is also established from the testimony of PW-5 that parcel when produced by HHC Gopal Chand, Incharge District malkhana in the presence of learned Public Prosecutor and learned defence counsel, the seals except one were found intact. One of seal was slightly broken. Any how, it is no-body's case that the case property when produced in the Court was found to be tempered with.

34. Now if coming to the statement of accused under Section 313 Cr.P.C, there is denial simplictor to the incriminating circumstances appeared against him in the prosecution evidence without there being any explanation as to what he was doing at Kamand-dhar, if was not carrying the charas. Otherwise also, huge quantity i.e. 2kg 100grams charas could not have been planted by the police.

35. Now if coming to the statement of DW-1 Inder Singh, the accused examined in his defence, as already said hereinabove, no suggestion was given to PW-5 and PW-7 that his house situated nearby Kamand-dhar. Therefore, it is difficult to believe that Inder Singh is having his house nearby the spot and was residing there with his family.

36. The non-production of seal used by the I.O and PW-4 SI Bhag Singh is not fatal to the prosecution case because nothing suggesting that any prejudice has been caused thereby to the defence has come on record. As a matter of fact, it has not been suggested to the I.O. PW-7 that due to non-production of seal, prejudice has been caused to the accused. It has been held so by this Court in ***Criminal Appeal No. 305/2014 titled Sohan Lal V. State of H.P., decided on 02.11.2016***.

37. In view of the above, the prosecution has satisfactorily proved that charas weighing 2kg 100grams has been recovered from the conscious and exclusive 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 2kg 100grams has been recovered from his conscious and exclusive possession.

38. 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 SURESHWAR THAKUR, J.

Smt. Krishna Devi & Others .....Appellants.

Versus

Harjit Singh and another ....Respondents.

FAO No. 212 of 2018.
Reserved on :24.08.2018.
Decided on : 31st August, 2018.

Employees Compensation Act, 1923- Section 3- Monthly income – Determination - Widow of deceased driver stating on oath that her husband was drawing salary of Rs.10,000/- per month – Commissioner however assessing monthly income at Rs.6,000/- and granting compensation accordingly – Appeal by claimants – On facts found (i) widow had stated on oath about monthly income of deceased at Rs.10,000/-, (ii) she was not cross-examined by Insurer on this point (iii) Owner-employer not confronted with any record, he was statutorily required to maintain qua salary of deceased, (iv) Employer -Owner of vehicle, admitting that wages of deceased were Rs.10,000/- per month – Held, Commissioner went wrong in determining income of deceased at Rs.6,000/- per month- Monthly income assessed at Rs.10,000/- Appeal allowed – Compensation enhanced – Award modified. (Paras-3 to 5).

Case referred:

Jaya Biswal vs. IFFCO Toko General Insurance Co. Ltd, (2016)11 SCC 201

For the Appellant:	Mr. Ajay Sharma, Advocate.
For Respondent No.1:	Mr. C.D. Negi, Advocate.
For Respondent No.2:	Mr. Parneet Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The successors-in-interest/dependents, of, deceased Udham Singh, who uncontrovertedly, met his end, during, the course of his performing his employment as a driver, upon, the ill-fated truck bearing No.HP-25-1511, in sequel to the afore truck rolling down, from, the highway into a gorge, hence, assail through the instant appeal, the apt impugned verdict. His employer is impleaded in the apt petition, cast under the Employees Compensation Act, as respondent No.1, and, he does not controvert, the, factum of his engaging, the, deceased as a driver, upon, the afore truck. The apt insurer also does not contest the factum of his issuing, vis-a-vis, respondent No.1, an apt insurance policy bearing Policy No. 36090131110200003412, not it contests, the, fastening of apposite indemnificatory liability, upon, it.

2. However, the contest reared before this Court, is, at the instance of the claimants/dependents, of, deceased Udham Singh, and, their contest is confined to the learned Commissioner, (a) not bearing in mind the efficacy of the testification rendered by one Krishna Devi, the widow of the deceased, wherein, she has rendered clear articulations qua her deceased husband, drawing, a sum of Rs.10,000/- per mensem as salary, from, his apt employment. (b) The learned counsel appearing for the appellants contends that the afore rendered testification, constituted the best evidence in respect, of, the, per mensem salary, drawn, by deceased Udham Singh, from, his apt employment, (c) unless, the owner, who stepped into the witness box as RW-1, had, during course thereof, hence, proceeded to negate the efficacy thereof, comprised, in, his thereat producing the apt register of wages, as, enjoined to be statutorily maintained by him, under, the apt mandate, of, Section 13-A of the Payment of Wages Act, 1936, provisions whereof, stand extracted hereinafter:-

> "13A. Maintenance of registers and records.—(1) Every employer shall maintain such registers and records giving such particulars of persons employed by him, the work performed by them, the wages paid to them, the deductions made from their wages, the receipts given by them and such other particulars and in such form as may be prescribed.
>
> (2) Every register and record required to be maintained under this section shall, for the purposes of this Act, be preserved for a period of three years after the date of the last entry made therein."

He further submits that, unless, the counsel for the insurer, while holding the widow of the deceased, to, cross-examination, hence, had either confronted her with the apt records maintained, by respondent No.1, and, records whereof, were, in contemporaneity thereof, rather enjoined to be elicited by the counsel, for, the insurer, from the apt employer, hence, for his apt nugatory efforts, rather carrying force, (d) whereas, there being stark omission qua therewith, (e) besides when even subsequent thereto, upon, the owner stepping into the witness box, his also failing to produce the apt records, as, enjoined to be statutory maintained by him, (f) thereupon, the mere oral testification of the employer, for, hence repelling the efficacy of the testification rendered by the widow of the deceased, and, as appertain to the per mensem salary, drawn by the deceased, from, his apt employment, was,

hence amenable to face rejection, whereas, meteing(s) of credence thereto, by, the learned Commissioner, is, contended to be grossly inapt.

3. This court has considered the aforesaid submission, and, finds immense force therein, given the widow of the deceased while stepping into the witness box as PW-1, hers in her affidavit, as stood, tendered, during course thereof, and, stood marked as Ex. PW1/A, rather making echoings therein, qua, her deceased husband drawing, a, per mensem salary borne in a sum of Rs.10,000/-. Thereafter, the counsel for the insurer in contemporaneity, to his holding her to cross-examination, rather failed to ensure elicitations, from, respondent No.1, of apt records appertaining tot he aforesaid factum, nor when PW-1 was confronted therewith, for hence negating the efficacy of the afore echoings, qua the relevant factum probandum, as, made by her in her relevant examination-in-chief, (a) rather when even thereafter the counsel for the insurer omitted to elicit from RW-1, the apposite record, (b) nor when the former adduced the relevant records, though enjoined to be statutorily maintained by him, (c) besides his in his cross-examination by the counsel for the petitioner, rather acquiescing, vis-a-vis, suggestion(s) qua, the, per mensem wages reared by the deceased, from, the apt employment being constituted in a sum of Rs.10,000/-, (d) thereupon, the learned Commissioner has falling into error in concluding qua the per mensem salary, of, the deceased, being confined in a sum of Rs.6000/-.

4. In coming to the aforesaid conclusion qua the statutory necessity of the employer to maintain, and, produce the records, with respect to the apt wages, defrayed by him to his employees, and, in case of omission, of, production thereof, before the Courts concerned, an, adverse inference being drawable against the owner, and, to a further conclusion qua thereupon, the, testifcation rendered by the dependents of the deceased, vis-a-vis, the per mensem salary of the latter, rather, warranting meteing of credence thereon, this Court is supported, by a judgment rendered by the Hon'ble Apex Court, in, a case titled as ***Jaya Biswal vs. IFFCO Toko General Insurance Co. Ltd***, reported in ***(2016)11 SCC 201***, the relevant paragraph No. 29 whereof, stand extracted hereinafter:-

> "29. Further, under the Payment of Wages Act, 1936, the onus is on the employer to maintain the register and records of wages, Section 13A of which reads as under:
>
> "13-A. Maintenance of registers and records- (1) Every employer shall maintain such registers and records giving such particulars of persons employed by him, the work performed by them, the wages paid to them, the deductions made from their wages, the receipts given by them and such other particulars and in such form as may be prescribed.
>
> (2) Every register and record required to be maintained under this section shall, for the purposes of this Act, be preserved for a period of three years after the date of the last entry made therein."
>
> From a perusal of the aforementioned section it becomes clear that the onus to maintain the wage roll was on the employer, i.e. Respondent No.2. Since in the instant case, the employer has failed in his duty to maintain the proper records of wages of the deceased, the appellants cannot be made to suffer for it.

Consequently, the per mensem salary of the deceased, is, computed as Rs.10,000/-, hence, the comepnsation amount is determined as under:-

Age of the deceased at the time of accident	60 years
Factors to be applied	117.41

Income of the deceased at the time of accident	Rs.10,000/- per month
Compensation amount calculated	Rs.5000x117.41= Rs.5,87,050/-
Expenditure of Funeral	Rs.5000/-
Total Compensation	Rs. 5,87,050+5000= Rs.5,92,050/- (Rs. Five Lacs ninety two thousand and fifty only)

5. For the reasons recorded hereinabove, the instant appeal is allowed and the impugned award modified. Accordingly, the claimants/dependents of the deceased are held entitled for a sum of Rs.5,92,050/-, as, compensation along with interest at the rate of 12% per annum, from, the date of filing of the petition till its realization. Since, the ill-fated truck is insured with respondent No.2, hence, the later shall indemnify the insured qua the aforesaid amount of compensation. The amount of compensation shall be proportionally apportioned inter se the claimants as per rules. All pending applications also stand disposed of. No order as to costs.

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

New India Assurance Company Ltd. .....Appellant.

Versus

Dharam Singh and others ....Respondents.

FAO No. 292 of 2017.
Reserved on : 21.08.2018.
Decided on : 31st August, 2018.

Motor Vehicles Act, 1988- Sections 149 & 166 - Motor Accident- Claim application – Driving licence – Validity and effect – Claims Tribunal holding accident to have occurred on account of rash and negligent driving of scooter by its driver – Tribunal granting compensation to claimant and fastening liability on insurer in toto – Appeal against – Driver of scooter however authorized to drive 'Light Motor Vehicle' only – Not authorized to drive two wheeler – Held, driver of offending vehicle had no valid and effective driving licence to drive it at time of accident – Vehicle being plied in breach of terms of policy – Appeal partly allowed with direction to Insurance Company to first satisfy award and then recover same from insured. (Paras-2 to 4)

Cases referred:

New India Insurance Company vs. Tika Ram, 2011(3) Shim. LC 95

Oriental Insurance Company Limited vs. Zaharulnisha and others, (2008)12 SCC 385

For the Appellant: Mr. Parneet Gupta, Advocate.
For Respondents No. 1: Mr. H.S. Rangra, Advocate.
For Respondents No.2 & 3: Mr. ArushMatlotia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts a challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Mandi, H.P., upon, Claim Petition No. 35/2011, whereunder, compensation amount comprised, in, a sum of Rs.9,83,400/- along with interest accrued thereon, at the rate of 7.5% per annum, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the disabled claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. The learned counsel appearing, for the insurance company, does not contest the validity of the affirmative findings recorded by the learned tribunal, upon, the issue appertaining to the factum of the claimant receiving, upon his person, the apt disabling injuries, in sequel to his being struck by the offending scooter, given, its being provenly driven in a rash and negligent manner by respondent No.1. However, he rears, a, vigorous contention before this Court, (i) that with the apt driving licence, borne in Ex.RW1/B, making, a, clear pronouncement, vis-a-vis, its holder, being authorized to drive "LMV Transport", whereas, with the apt vehicle rather falling, in, a contradistinct therewith category, inasmuch, as it being, a, two wheeler, (ii) thereupon, respondent No.2, one Dinesh Kumar, stood barred, to drive the offending scooter, (iii) given a person, who, successfully qualifies a driving test, for hence enabling him to drive, a motor cycle with gear, though, is deemed fit to qualify a test, for, hence also being enabled, to, drive motor cycle without gear, (iv) thereupon, with the apt qualifying test(s) for hence testing the efficiency, of, the apt driver for rather driving a two wheeler, and for hence, his efficiently driving, a, four wheeler, rather being contradistinct, (v) whereupon, with obviously, respondent No.2 herein, one Dinesh Kumar, though successfully qualified the test, for, driving a four wheeler, per se, thereupon, his not being deemed fit, to, also qualify the apt efficiency test, for, his being enabled, to, also drive a two wheeler, in category whereof, the, offending scooter rather falls. In making the aforesaid submission, the learned counsel appearing for the insurer, has, placed reliance, upon, a judgment of this Court, rendered in a case titled as ***New India Insurance Company vs. Tika Ram***, reported in ***2011(3) Shim. LC 95***, and, has also placed reliance, upon, a judgment of the Hon'ble Apex Court, rendered in a case titled as ***Oriental Insurance Company Limited vs. Zaharulnisha and others***, reported in ***(2008)12 SCC 385***. A reading of the apt paragraph No.5, occurring in Tika Ram's case (supra), paragraph whereof stand extracted hereinafter:-

> "5. The Apex Court in Oriental Insurance Company Limited v. Zaharulnisha and others, (2008)12 SCC, 385 also held that a person having driving licence of Heavy Motor Vehicle cannot be said to hold a valid driving licence to drive a Scooter."

(a) does support the aforesaid submission, and, signification thereof, is, qua the insurer rather proving the trite factum, of, hence the terms and conditions, of, the insurance policy being evidently breached, besides its also proving qua, the, fastening of the apt indemnificatory liability, upon it, being visited hence with an inherent fallacy. Consequently, the apt indemnificatory liability is enjoined to be fastened, upon, the owner of the offending vehicle, who, stands impleaded herein as respondent No.3.

3. The claimant, in sequel, to the injuries suffered by him, in a motor vehicle accident, caused by the rash and negligent manner of driving, of, the offending scooter by respondent No.2 herein, stand entailed with, the apt disability, as, pronounced in Ex.PW4/A. The per centum of disability, is, reflected therein to be, a, 41 per centum, hence,

permanent disability, vis-a-vis, the right lower limb. The aforesaid disability certificate stands proven, by PW-4. Even though, PW-4 was subjected, to, a rigorous cross-examination, by the learned counsel for the insurer, yet no suggestion stood meted to him, by the apt counsel for the insurer, for falsifying the pronouncements, borne therein, vis-a-vis, the disability quantified therein at 41%, and, it appertaining to the right lower limb, besides it being permanent in nature. The claimant had in his testification borne in Ex.PW2/A, rendered firm echoings qua his hitherto being engaged, in, masonry job. The aforesaid echoings borne in his testification, were not efficaciously disproven. Consequently, given an apt proven 41% permanent disability, of, the right lower limb, standing entailed, upon, the claimant, and, upon its standing construed, in, entwinement with the hitherto earnings reared by him, from, his avocation as a mason, importantly also when, the, facile free movements, of, the right lower limb, is imperative for enabling the claimant, to, efficiently perform, his hitherto avocation of a mason, and, also concomitantly, for, rather enabling him to rear an income therefrom. Contrarily, with the facile efficient movement, of, his right lower limb, rather being impeded, by the disability entailed, upon him, (i) and, no evidence standing adduced by the insurer qua, dehors, the disability, in, the aforesaid quantum entailed, upon, the claimant, and, it being visited, upon, a important member of his limb, rather not impacting, his efficiently performing his apposite avocation, as a mason, (ii) nor evidence being adduced qua the disability entailed upon the claimant, not, rendering him incapacitated to perform the apt masonry work(s), (iii) thereupon, the per centum of the disability entailed, upon, the claimant, is concluded to be disempowering him, to rear any income from his hitherto avocation as a mason. Consequently, the computation by the learned tribunal, of, his drawing an income of Rs.10,000/- per month from his apt avocation, and, also in the learned tribunal after bearing in mind the afore per centum of disability, its hence computing compensation, in a sum of Rs. 9 lacs, under, the head “loss of future income”, cannot, be construed to have hence erred.

4. Even though, this Court has concluded for reason aforesaid, qua the fastening of the apt indemnificatory liability, upon, the insurer hence suffering from, a, gross error. Nonetheless, in consonance with the verdicts of the Hon'ble Apex Court rendered in case titled as National Insurance Co. Ltd. v. Baljit Kaur, reported in (2004)2 SCC1 as also in a case titled as Deedappa v. National Insurance Co. Ltd., reported in (2008)1 SCC (Cri) 517, the insurer company shall satisfy the award, and, shall have the right to, in accordance with law, recover, the, amount deposited by it, along with interest, from, the owner of the vehicle i.e. respondent No.3 herein.

5. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Records be sent back forthwith.

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

Nirmal Singh …Appellant/plaintiff.

Versus

Bhajan Singh ....Respondent/defendant.

RSA No. 539 of 2005.
Reserved on : 24th August, 2008.
Decided on : 31st August, 2018.

Specific Relief Act, 1963- Section 38 - Permanent prohibitory injunction – Private partition (khangitakseem) – Held, Factum of separate exclusive possession over specific Khasra numbers by co-sharers, merely evidence of family arrangement, and not of private partition. (Para-8)

For the Appellant: Mr. K.D. Sood, Sr. Advocate with Mr. Rajneesh K. Lal, Advocate.

For the Respondent: Mr. Rajiv Jiwan, Advocate.

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 mandatory injunction, stood partly decreed, by the learned trial Court, and, till dismemberment of the joint estate inter se the parties at contest, the plaintiff, was, held entitled to the relief of permanent prohibitory injunction. In an appeal carried therefrom, by the aggrieved defendant, before the learned First Appellate Court, the latter partly allowed, the appeal, and, modified the decree of permanent prohibitory injunction, as, pronounced by the learned trial Court, only to the extent of the defendant, being restrained from causing any interference, in, the settled possession of the plaintiff, as, reflected in the apt revenue records, till, the apt joint estate stands partitioned. However, the findings of the learned trial Court, upon, issue No.2 to 6, were affirmed. The plaintiff, is aggrieved therefrom, and, by casting the instant Regular Second Appeal, before this Court hence strives to beget its reversal.

2. Briefly stated the facts of the case are that the subject matter of the dispute between the parties is that the land measuring 46-14 bighas, comprising of Khasra Nos. 717, 817, 1115, 1118, 675, 1114, 818, 1108, 1111, 1117, 1120, 1555/1166, 674, 1113, 821, 1109, 1112 and 1119, Kita 18, entered in Khewat No.409, Khatauni Nos. 517 to 522, in mauza DabatMajari, Pargana KotKehloor, Tehsil Shri Naina Devi Ji, District Bilaspur, H.P. It is alleged that the plaintiff is joint owner in possession of the suit land along with other o-sharers. Since, the other co-sharers are not raising any construction, as such, they have not been impleaded as party. It is averred that the defendant is threatening to raise forcible construction near the house of the plaintiff, and the defendant has no right whatsoever to raise any construction in the joint land till the land is finally partitioned in accordance with law and the defendant is also threatening to dispossess the plaintiff from his share in the suit land and has further prayed that the construction which as been raised by the defendant be also demolished. It is further alleged that the defendant was requested several times to not interfere with the joint possession of the plaintiff and to admit his claim in the suit land and the failure and refusal of the defendant to do so, the suit was filed.

3. The defendant contested the suit and filed written statement, wherein, he has denied that the suit land is joint qua the parties. It is pleaded by the defendant that the suit land has already been partitioned in the family settlement and at present, the parties are in their separate possession of the suit land. It is further averred that the plaintiff is owner of the land to the extent of his share which is already occupied by him in Khewat No.409, Khatoni No. 522 where he has constructed a house and is in exclusive possession of Khasra No.821, 1109, 1112, 1119, land measuring 11-15 bighas. It is further pleaded that the defendant is in exclusive possession of the land of Khasra No.818, 1108, 1111, 1117 and 1120, land measuring 11-12 bighas. It is also pleaded that the plaintiff started disturbing the boundary marks of the land which is recorded in the exclusive possession of

the defendant. The defendant has also denied of causing any type of interference with the possession of the plaintiff of his share in the suit land, as such, the plaintiff is not entitled to any relief.

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 for permanent prohibitory injunction, as prayed for?OPP.
2. Whether the plaintiff is entitled for mandatory injunction, as prayed for? OPP.
3. Whether the suit is not maintainable, as alleged?OPP
4. Whether the plaintiff has o legally enforceable cause of action, as alleged?OPD.
5. Whether the plaintiff is estopped to file this suit, as alleged?OPD.
6. Whether the defendant is in exclusive possession of the suit land in a family partition, as alleged?OPD.
7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom, by the defendant/respondent herein, before, the learned First Appellate Court, the latter Court partly allowed the appeal, and, modified the decree 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 10.05.2006 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 first Appellate Court could not have lawfully modified the decree of permanent prohibitory injunction restricting it only to that part, the suit property, which is recorded in possession of the defendant, in the revenue papers, while at the same time affirming the finding of the trial Court that a portion of Khasra No. 1111, which is recorded in possession of the defendant, is also in possession of the plaintiff-appellant?

Substantial question of Law No.1:

8. Even though, a reading of the averments, borne in the plaint, make, a, palpable disclosure, (a) of, the defendants rather attempting to raise construction(s) near the house of the plaintiff, whereon, rather the plaintiff espouses qua his planting fruit bearing trees, and, also his thereon installing, a, “gobar gas” plant, (b) yet the defendant, had, in his written statement, rather reared a contention qua contentious Khasra No. 1111, hence, standing recorded in the apt revenue record(s) respectively, borne in Ex. P-1, Ex. DA and Ex. DB, to be exclusively possessed by him, (c) and, had also contended that the afore reflections, as, borne in the afore exhibits, being, a, sequel of a valid family partition, hence, occurring inter se, the, recorded joint owners. Though, the factum of recording, of, exclusivity of possession, of, contentious Khasra No.1111, and, of other khasra numbers, by

defendant Bhajan Singh, rather may ultimately enable him, to, tenably espouse before the Revenue Officer concerned, to in consonance therewith, hence, draw an apt mode of partition, vis-a-vis, the jointly recorded suit khasra numbers, (d) yet with Ex.PW5/A, rather comprising an application, for, effecting, the, partition of the undivided suit property, being preferred before the revenue officer concerned, hence gears an inference, qua the afore reflections, clearly unraveling qua holding, of, exclusivity of possession, by, each of the co-owners, in the undivided suit property, being construable, to be, mere personal arrangements, and, not tantamounting to theirs, under a valid taksimkhangi, as, recorded inter se them, rather proceeding to dismember the apt joint estate, and, thereafter, the, apt reflections finding occurrence therein.

9. Be that as it may, the decree as pronounced by the learned trial Court, for, permanent prohibitory injunction, till, the dismemberment of the joint estate occurs, and, decree whereof was partly modified, by the learned First Appellate Court, only, vis-a-vis, the settled possession of the plaintiff, as recorded in the revenue papers, (i) does also prima facie obviously facilitate, foisting of, validities, vis-a-vis, apt recorded exclusivity of possession, of, co-owners, of, the apt khasra numbers, as, borne in the afore exhibits, borne in Ex. P-1, Ex. DA and Ex. DB, (ii) with, a, concomitant sequel qua the installation, of, “gobar gas plant” by the plaintiff purportedly in the year 1992, purportedly, upon, khasra No. 1111, being also prima facie rather standing gripped with an aura of invalidity. However, before proceeding to determine, the, validity, of, the afore pronouncement, as, recorded by the learned First Appellate Court, whereunder, it appears to have scored off, the effect, of, installation of a “gobar gas plant” by the plaintiff purportedly, upon, khasra No. 1111, (iii) it is deemed imperative, to, dehors Ex.PW5/A, though, comprising, an, application preferred before the Revenue Officer concerned, whereunder, the plaintiff, is, seeking dismemberment, of, the apt joint estate, (iv) and, with its pendency rather prima facie, negativing, the validity, qua exclusivity of possession, of, each of the co-owners, in, the undivided land, (v) rather hence allude to the deposition, rendered by the plaintiff, and, as, borne in his cross-examination, wherein, he acquiesced to a suggestion qua, except, the contentious suit khasra No. 1111, there being no dispute qua the afore khasra number, vis-a-vis, the other recorded co-owners, (vi) and, also his further acquiescing qua apt khasragirdawaries being prepared, (vii) wherefrom an inference, is sparked qua the plaintiff, accepting, the, reflections borne in Ex.PW5/A, wherein each of the respective co-owner, is, depicted to be holding exclusive possession, of, those khasra numbers, as, embodied therein, and, importantly with khasra No.1111, being, in, the apt afore exhibits, rather reflected to be in, the, exclusive possession, of defendant Bhajan Singh, thereupon, the plaintiff also acquiescing qua the veracity, of, the apt reflections, borne, in the aforesaid exhibits, (viii) besides when the aforesaid factum of settled exclusive possession, of, certain khasra numbers, borne in the undivided suit land, is, the apt parameter, for, rather drawing, the, apt relevant mode of partition, besides also warrants meteing, of, apt deference, in, the drawing up, of, the instrument, of, partition, (ix) thereupon, it appears that the plaintiff, has, taken to unnecessarily wrangle, with, defendant Bhajan Singh, only, for his purportedly rather usurping, the, defendant Bhajan Singh's possession, vis-a-vis, a part, of, Khasra No. 1111, (x) usurpation whereof, is, concerted by his making strivings, for, hence establishing qua his installing the apt “gobar gas plant”, upon, khasra No. 1111/1, as reflected in tatima Ex.PW6/A. The defendant, has, contrarily contended qua his installing the apt “gobar gas plant”, upon, the afore referred portion, of, khasra No. 1111/1. PW-6, who prepared Ex.PW6/A stepped into the witness box, and, has rendered, a, testification, qua his previously holding demarcation, of, the afore khasra No. 1111, and, thereat his noticing qua the plaintiff Nirmal Singh, rather installing his “gobar gas plant”, upon, a, portion thereof, and, as, disclosed in the rather subsequent therewith prepared tatima, exhibited as Ex.PW6/A. However, the afore referred testification, of, PW6, is, vulnerable to the gravest doubt, given his ex facie making disclosure, in, his

examination-in-chief, qua his in contemporaneity, of, his holding demarcation of khasra No. 1111, on 20.11.2000, his thereat noticing qua upon, a, part thereof, importantly, upon, khasra No. 1111/1, the, apt installation of a "gobar gas plant" being made by the plaintiff, (xi) given readings, of, Ex. DD, Ex,DE and EX. DF, rather not, underscoring the aforesaid factum. Furthermore, when, in, contemporaneity thereto, he omitted to prepare a tatima, with, a clear pronouncement therein qua, upon, a, portion of khasra No. 1111, the plaintiff rather installing a "gobar gas plan". In sequel, any reverence as meted thereto, was, untenable, and, any drawing of any purported conclusion by the learned First Appellate Court, vis-a-vis, the plaintiff holding settled possession thereof, was also, inapt. Even otherwise, with this Court for afore reasons, anvilled, upon, the afore acquiescences, made by the plaintiff, during, the course of his being held, to, cross-examination by the learned counsel, for the defendant, hence rests, a, firm conclusion, qua, the respective co-owners, rather accepting the validities, of, the apt entries, as, borne in the relevant revenue record, with echoings therein, vis-a-vis, each holding exclusivity of possession, of, those khasra numbers, as, find apt reflection against their names, (xii) thereupon, the aforesaid factum, when is legally expostulated to warrant meteing, of, deference thereto by the revenue officers concerned, in the latter proceeding to dismember, the joint estate, thereupon, the decree rendered, by the learned first appellate Court, is, just and equitable, vis-a-vis, it validating the apt reflections, as, borne in the revenue records, and, also the decree of injunction, as, pronounced by the learned First Appellate Court, qua till culmination, of, the partition proceedings, its, holding force, is also both just and tenable.

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. Accordingly substantial questions of law is answered in favour of the the respondents and against the appellants.

11. In view of above discussion, there is no merit the instant appeal, and, it is dismissed. In sequel, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 95of 2003, 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.

Shri Prem Chand ..Appellant/Plaintiff.

Versus

Jai Singh (since deceased) through his legal heirs and others...Respondents/Defendants.

RSA No. 176 of 2009.
Reserved on : 29th August, 2018.
Decided on : 31st August, 2018.

Specific Relief Act, 1963- Section 10 - Contract - Specific Performance – Whether specific performance of contract stipulating payment of damages in lieu of specific performance can be denied? – Held - No - Plaintiff seeking specific performance of agreement to sell – Defendant denying valid execution of agreement – Trial Court holding agreement to be valid and decreeing suit – District Judge though affirming finding of due execution of agreement but modifying decree to one for refund of earnest money and compensation, on ground that agreement provided for payment of refund of earnest money and compensation in lieu of specific performance – RSA by plaintiff- On facts, High Court found (i) agreement to sell not

signed by vendor 'J', (ii) No evidence that money was deposited in sub-Treasury for purchase of non-judicial papers for scribing sale deed, as recited in agreement – Held, though mere mentioning of amount payable as damages, on breach of agreement will not prevent Court from granting its specific performance but plaintiff not found ready and willing to perform his part of agreement – Thus, not entitled for specific performance of agreement – Decree of First Appellate Court upheld – RSA dismissed. (Paras-9 to 12).

Cases referred:

Dadarao and another versus Rarao and others, reported in 2001(1) Cur. L. J. (C.C.R) SC, 18
M.L. Devender Singh and others vs. Syed Khaja, reported in 1973(2) SCC 515
Kamal Kant Jain v. Surinder Singh (dead) through his Lrs, reported in AIR 2017 SC 5592
Asia Begum (died per L.Rs vs. Mahmuda Begum, reported in 2010(2) Civil Court Cases 391 (A.P.)

For the Appellant: Mr. K.D. Sood, Sr. Advocate with Mr. Rajneesh K. Lall, Advocate.
For Respondents: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition, of, a decree for specific performance of agreement to sell, stood decreed, by the learned trial Court. The aggrieved defendants, preferred, the apt first appeal before the learned First Appellate Court, and, upon Civil Appeal No. 91 of 1999/RBT 302 of 2004, the learned First Appellate Court, hence while modified the primary decree rendered by the learned trial Court, and, rather proceeded to render a decree, vis-a-vis, the plaintiff, qua his being entitled for a recovery of sum of Rs.25,680/-, i.e. Rs.10680/- + Rs.15,000/- as damages, along with, interest at the rate of 6% per annum, commencing from the date of the suit, till its realization. The plaintiff/appellant herein hence being aggrieved therefrom, has, instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that the defendants' predecessor-in-interest, one Johanda Ram, was owner in possession of the suit land as described in para No.1 of the plaint, and had entered into an agreement to sell, on 13.05.1992 in respect of the part of the land measuring 6K-2M, for total sale consideration of Rs.39,000/-. The sale could not be executed on 13.5.1992 as Treasury Officer was not available. Therefore, the agreement was executed and sale deed was to be executed after 14.5.1992. The plaintiff had deposited amount of Rs.10,680/- with Sub Treasury, Bhoranj for procuring stamp for writing the sale deed. This amount was to be considered as a part payment towards the sale out of total consideration of Rs.39,000/-. Inspite of notice and numerous requests, the defendants' predecessor-in-interest did not execute the sale deed. In the event of refusal to execute the sale deed, the plaintiff was entitled to refund the amount of Rs.10,680/- along with Rs.15,000/- and costs of litigation. Hence, on these averments decree for specific performance of the contract and in alternative, if plaintiff is not found entitled to specific performance due to any legal or formal defect, then a decree for recovery of Rs.10,680/- along with damages of Rs.15,000/- as per agreement and interest has been prayed for.

3. The defendants contested the suit and filed written statement, wherein, thedefence of the predecessor-in-interest, of the defendants was that as a matter of fact land was agreed to be sold 5 kanals at the rate of Rs.20,000/- per kanal. The predecessor-in-interest of the defendant being uneducated and rustic villager and due to his old age, put thumb impression on certain papers, which had later on been forged. It was denied that the

amount deposited for purchase of stamp was the earnest money or the part payment. The defendants' predecessor-in-interest had agreed to sell 5 Kanals at the rate of Rs.20,000/- per Kanal, which even now he is ready to execute the sale deed.

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

1. Whether the plaintiff is entitled for the relief of possession by way of specific performance? OPP.
2. If issue No.1 is not proved, whether the plaintiff is entitled for recovery of Rs.10,680/- along with damages for Rs.15,000/- ?OPP.
3. Whether the plaintiff is ready and willing to perform his part of the agreement?OPP
4. Relief.

5. 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, modified the judgment and decree recorded by the learned trial Court.

6. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 22.04.2009, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether in view of the concurrent findings of the court below that the agreement of sale Ext. P-3 was genuine, legal and valid, the plaintiff could be denied the specific performance of the agreement and only granted damages in lieu of the agreement of sale as alternative relief?

b) Whether on the proper construction of the agreement of sale EX.P-3 and the provisions of the Specific Relief Act and the Judgment of the Aprx Court, the compensation was not an adequate relief and specific performance was the only relief which could be granted and the findings of the court below to the contrary are perverse, based on misreading of oral and documentary evidence?

Substantial questions of Law No.1 and 2:

7. The litigating parties before this Court, do not contest, vis-a-vis, the concurrent findings rendered, by both the learned courts below, qua Ex.P-3 being efficaciously proven to be validly and duly executed by one Johanda Ram, the predecessor-in-interest of the defendants. However, the learned counsel appearing for the appellant/plaintiff, has contended, with much vehemence that (a) the learned first Appellate Court, in not granting the primary relief of specific performance of the apt contract, rather it proceeding to grant the alternative relief qua the plaintiff, being entitled, to refund of sums of money, as borne therein, has hence visibly committed a gross legal fallacy, (b) fallacy whereof, ingraining the judgment and decree, is, espoused to stand, comprised in the learned first Appellate Court while rendering the aforesaid decree, its, inaptly placing reliance, upon, paragraph No.7, encapsulated in a verdict rendered by the Hon'ble Apex

Court, in a case titled as ***Dadarao and another versus Rarao and others***, reported in ***2001(1) Cur. L. J. (C.C.R) SC, 18***, relevant portion whereof stand extracted hereinafter:-

> "Specific Relief Act, 1963, Sections 14 and 16- Specific Performance- If the agreement had not stipulated as to what is to happen in the event of the sale not going through, the plaintiff could have asked the court for a decree of specific performance- Here the parties to the engagement had agreed to even if the seller did not want to execute the sale deed, he would only be required to refund the amount to complete the sale transaction."

(c) whereas, the hereinbefore extracted paragraph only appertains, vis-a-vis, the recitals borne in the contract, of sale wherewith the Hon'ble Apex Court thereat, hence, stood seized, (d) and, wherein stood embodied a specific clause qua, upon, in the event of apt breaches, (e) thereupon, only damages being defrayable by the errant contracting party to the opposite party, (f) and, also a specific recital being borne therein qua hence no primary relief for specific performance, of, contract being claimable nor validly renderable; (g) also he contends, that, the aforesaid apt pointed distinguishing fact, as, borne, in, Dadarao's case (supra), hence visibly, is, *per incuriam,* vis-a-vis, the decision rendered by the Hon'ble Apex Court in a case titled as ***M.L. Devender Singh and others vs. Syed Khaja***, reported in ***1973(2) SCC 515***. The aforesaid submission addressed by the learned counsel appearing for the appellant/plaintiff before this Court, has, vigour and is vindicated, (a) given it being founded, upon, a judgment rendered by the Hon'ble Apex Curt in a case titled as ***Kamal Kant Jain v. Surinder Singh (dead) through his Lrs***, reported in ***AIR 2017 SC 5592***, the relevant paragraph whereof, occurring at serial No.8, stands extracted hereinafter:-

> "8. We may now examine whether the courts below were correct in their reading of paragaph 6 of the agreement to sell and Section 23 of the Specific Relief Act, which reads as under:
>
> "23. Liquidation of damages not a bar to specific performance.-
>
> (1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.
>
> (2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract".

8. Be that as it may, hereinafter it is, the, predominant duty of this Court, to, analyse the verdict rendered by the Hon'ble Apex Court, in, M.L. Devender Singh's case (supra), (a) wherein, the Hon'ble Apex Court had after analysing, the, provisions of Section 10 of the Specific Relief Act, and, the provisions of Section 23 of the Specific Relief Act, hence squared, the, trite conclusion (b) qua with the errant defendant therein being placed, in, a position, to, rather exploit the need of the plaintiff, whereas, the plaintiff acting fairly and bonafidely, with, the errant defendant, (c) thereupon, hence recorded a conclusion, qua, the plaintiff being entitled, to, the primary decree of specific performance of contract, and, the according of the alternative relief of damages or refunds, by the learned trial Court, in consonance with the apt recitals borne therein, in the contract of sale, (d) rather emanating from the learned trial Court, not, exercising its discretion, in accordance with law. Even if, the Hon'ble Appex Court in M.L. Devender's Case (supra), has in paragraph No.19 thereof, para whereof stands extracted hereinafter:-

> "19. A reference to Section 22 of the old Act, (the corresponding provision is Section 20 of the Act of 1963) would show that the jurisdiction of the Court to decreespecific relief is discretionary and must be exercised on sound and reasonable grounds "guided by judicial principles and capable of correction by the Court of appeal". This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. This is made perfectly clear by the provisions of Section 20 of the old Act (corresponding to Section 23 of the Act of 1963) so that the Court has to determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted."

(I) mandated qua the jurisdiction, of, Civil Courts, to render a primary decree, of, specific performance of contract, though, being discretionary, (ii) yet its exercise being founded, upon, sound and reasonable principles, (iii) and, also expostulations, stand borne therein, qua the afore apt jurisdiction of the Civil Courts, being not amenable for curtailment, merely by fixing pecuniary, sums, as, liquidated damages, yet obviously reading thereof does not foist any rigid principle of law qua (iv) it being always incumbent, upon, the civil courts to render, a, primary decree, of specific performance of contract of sale, (v) and, the alternative thereto contemplated relief, of, refund of money, hence, by the errant contracting party, to, the opposite party, being throughout rather grossly impermissible; (vi) thereupon, for want of fixity of, a, rigid principle, and, further when the plaintiff herein, in, consonance with the apt recitals borne, in Ex.P-3, and, with a clear contemplation borne therein, vis-a-vis, upon the defendant hence breaching the obligations cast therein, upon him, his, being enjoined to refund the moneys contemplated therein, (vii) hence espousing, in, substitution of the primary relief of rendition, of, a decree of specific performance of contract of sale, rather qua the apt contemplated refunds, is rather a valid espousable, and, decreeable relief, being made to him, (ix) paramountly, when a reading, of, verdict of the Hon'ble Apex Court, in M.L. Devender's case (supra), does not reflect (x) that the plaintiff in the afore case making an alike espousal, (xi) thereupon, when hereat the apt alternative relief, is, espoused by the plaintiff, thereupon, prima facie, he is estopped, given his hence waiving and abandoning, the primary relief to hence claim qua a compliant decree, in consonance therewith, being rendered.

9. Be that as it may, even though the afore conclusion, for the reasons ascribed hereinafter, make upsurgings, vis-a-vis, the plaintiff's willful abandonments, and, waivers, whereupon, his espousal for claiming qua the primary decree of specific performance, of contract of sale, being pronounced qua him, is, per se oustable, (a) also reiteratedly given the plaintiff, in, M.L. Devender Singh's case (supra), contra-distinctively, vis-a-vis the plaintiff hereat, not rearing espousals in alternative, to the according, of, the apt primary decree, (b) yet the vigour of the aforesaid inference does get prima facie scuttled, by the Andhra Pradesh High Court, in a verdict, rendered in a case titled as ***Asia Begum (died per L.Rs vs. Mahmuda Begum***, reported in ***2010(2) Civil Court Cases 391 (A.P.)*** (c) rendering a clear mandate, qua, even with, the plaintiff pleading a relief alternative, to his, espousing for rendition, of, a primary decree for specific performance of contract of sale, (d) thereupon, unless evidence makes emergence, vis-a-vis, the plaintiff being not ready or willing to perform his part of obligation, (e) thereupon, it being incumbent, upon, the civil courts to rather proceed to render the primary decree, of specific performance of contract, of, sale. However, for the reasons to be assigned hereinafter, even the aforesaid verdict, is, grossly inapplicable hereat. Nonetheless, before proceeding to assign apt reasons, it is worthwhile, to extract hereinafter, the, provisions of Sections 10, 16, 14 and 23 of the Specific Relief Act, provisions whereof read as under:-

"***10. Cases in which specific performance of contract enforceable***.—Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced—

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Explanation.—Unless and until the contrary is proved, the court shall presume—

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

14. Contracts not specifically enforceable.—

(1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lendor is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in persuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

23. Liquidation of damages not a bar to specific performance.—

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

The opening underlined apt portion of Section 10, of, the Specific Relief Act, make clear statutory expostulations, qua excepting, the, provisions to the contrary, standing, borne in the Act, thereupon, the civil court concerned, being enjoined to render a decree for specific performance of contract of sale, (a) upon, want of standard evidence for ascertaining, the, actual apt damages as may ensue, upon, the plaintiff, and, as arises, from, the apt contractual breaches, by the errant vendor; (b) or upon evidence making upsurging, qua the mandated compensation, for, apt breaches, rather not adequately and satisfactorily, hence

recompensing, the, non derelicting contracting party. Furthermore, the provisions of Section 14 of the Specific Relief Act, make trite underlinings (i) qua, upon, the plaintiff demonstrably acting in fraud of the contract, and, with the coinage "except as otherwise" occurring in Section 10 of the Act, rather excluding, the, thereunderneath borne, the afore referred statutory expostulation(s), comprised, in the coinage, "when the act agreed to be done in such that compensation in money for its non-performance would not afford adequate relief", (ii) upon , contra therewith provisions, hence, standing borne in a chapter similar, vis-a-vis, wherein Section 23 stands borne, (iii) thereupon with Section 23, of, the Act, being borne in a chapter similar, wherewithin, Section 10 is borne, (iv) and, with hence the provisions, of, Section 23 of the Act, rather acquiring, the, excepting therewith, rather apt overwhelming clout, and, operation, vis-a-vis, the provisions borne in Section 10 of the Act, (v) and, with theirs making a candid statutory expostulation, against, any decree, vis-a-vis, liquidation of damages or deceeable recitals in consonance therewith, as, borne in the apt agreement, per se, not operating as a bar, upon, the civil court concerned, to render the primary relief, of, specific performance, of, contract of sale, (vi) unless, apt satisfaction, stands drawn, by the Civil Court, that, the contemplated sums of money aptly refundable to the non derelicting contracting party, being recited therein only for the purpose, of securing the performance, of, the contract, and, not for the purpose, giving the defaulting party an option of, paying money, in, lieu of specific performance of contract. However, in, the drawing, of, the aforesaid satisfaction, by, the Civil Court concerned, it is, enjoined to mete deference to the requisite terms, of, the contract, and, also to other attending therewith circumstances. Consequently, while proceeding to draw a conclusion qua the sums of money contemplated in the purported contract of sale, borne in Ex.P-3, and, sums of money whereof, were purportedly contracted, to be refunded by the errant/derelicting contracting party, to the non derelicting contracting party, upon, the former breaching the obligations cast upon him, (vii) rather being contemplated, only, for the purpose of securing the performance of contract, and, not for the purpose of giving an option to the party, in default, to, pay money in lieu, of, specific performance of contract, (viii) and, when for making the aforesaid fathomings therefrom, this Court, is, also enjoined to mete apposite deference, to, the terms of the contract, and, other attending circumstances, (ix) thereupon, this Court is enjoined, to, not only comprehend ad nauseam, all the apt recitals, borne in the purported agreement to sell, borne in Ex.P-3, (x) AND in consonance wherewith, the, relief alternative, to the relief of primary decree of specific performance of contract, stood, rendered, (xi) for, hence thereafter determining whether the decree in respect of the apt refunds, rendered, by the learned first Appellate Court, being well founded or otherwise.

10. A perusal of Ex.P-3, makes, a, disclosure qua it not bearing, the, signatures of the plaintiff. The concomitant effect thereof, is, qua it being a unilaterally drawn agreement, (i) whereas, a contract of sale is enjoined, to be bilaterally drawn in ter se the contracting parties, and, thereupon, alone the plaintiff being equipped, with, a valid enforceable cause of action, to, hence validly espouse, for, rendition of a decree of specific performance, of, contract. Reiteratedly, hence, for want of, the, apt contract being bilaterally executed, (ii) thereupon, the plaintiff had no enforceable cause, of action, to make, any valid claim for rendition of a primary decree for specific performance of contract. Furthermore, upon, a reading, of, the mandate borne in Section 16 of the Specific Relief Act, qua, upon evidence emerging, vis-a-vis, the plaintiff acting in fraud of the contract, or other attending therewith circumstances, as, borne in the evidence existing on record, hence , also facilitating this Court, to make a conclusion qua sums of money, named therein, being not for the purpose of securing the performance of the contract, (iii) thereupon, this Court proceeds, to, allude to the apt recitals borne therein, wherein, there occurs a unilateral declaration, by the purportedly errant defendant, one Johanda Ram, the predecessor-in-interest of the defendants qua, on, 13.05.1992, a sum of RS.10,680/- being tendered by the

plaintiff in the Sub Treasury concerned, for non judicial stamp papers being released therefrom, for facilitating the scribings, of, the apt recitals thereon. Preeminently, therefrom, also with the plaintiff omitting to adduce the apt evidence, with, respect to his depositing, the aforesaid moneys, in the Sub Treasury concerned, for the apt purpose, (iv) and, whereas, emanations or adduction of aforesaid evidence, was, both mandatory, as well as, a prime necessity, for making a further firm conclusion, qua, the readiness and willingness of the plaintiff to perform his part of obligation, if any, as may be fastenable, upon him, under a unilaterally drawn purported agreement of sale, borne in Ex.P-3. However, omission of adduction of the aforesaid evidence, does constrain this Court, to unflinchingly galvanise, a candid conclusion qua the plaintiff being never ready or willing to perform his part of obligation, rather his, on a unilaterally drawn agreement to sell, borne in Ex.P-3, making legally inapt strivings, qua, the primary relief of rendition of a decree for specific performance of contract, being rendered qua him.

11. The above discussion, unfolds, 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. Accordingly, the substantial questions of law are answered in favour of the respondents/defendants, and, against the appellant/plaintiff.

12. In view of the above discussion, there is no merit in the present Regular Second Appeal and it is dismissed accordingly. In sequel, the judgement and decree rendered by the learned District Judge, Fast Track Court, Hamirpur, H.P., upon, Civil Appeal No. 91 of 1999/RBT 302 of2004, is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Saroj Bala ...Petitioner/JD.

Versus

Ishwar Chand (since deceased) through his legal heirs...Respondents/DH.

Civil Revision No. 126 of 2016.
Reserved on : 20th August, 2018.
Date of Decision: 31st August, 2018.

Code of Civil Procedure, 1908- Section 2(2)- Decree- Interpretation – Held, Executing Court cannot go behind decree- It is to execute decree as it stands – But when terms of decree are ambiguous, it is entitled to look into pleadings and judgment to construe decree – Decree granting sale of 1/4th undivided share of Judgment debtor (JD) in dwelling house in favour of Decree Holder (DH) - Meanwhile partition taking place between parties – D.H. obtaining possession of part of house falling in share – D.H. seeking to enforce decree of 1/4th share with respect to area which left with J.D. – Executing Court accepting plea of D.H. and incorporating necessary recitals in proposed sale deed – Petition against -On facts, held, Executing Court went wrong in going behind decree and granting relief which stood declined – Petition allowed – Order of Executing Court set aside. (Paras-5 and 6).

Case referred:

TopanmalChhotamal vs. Kundomal Ganga Ram and others, reported, in AIR 1960 SC 388

For the Petitioner: Mr. Desh Raj, Thakur, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The decree holder's petition, for, a direction being pronounced, upon, the respondent/petitioner herein, to, through a registered of conveyance, alienate her ¼th share, borne in the suit property, bearing Khasra Nos. 532, 534, 536, 537, and, Kh. No. 538, total measuring 81-06 sq. meters, corresponding, to, new Khasra Nos. 1005, 1007, 1008, 1009, 1010, situated in MohalRanital, Nahan, District Sirmaur, stood, decreed by the learned trial Court, and, the apt decree rendered by the learned trial Court, has, uncontrovertedly acquired conclusivity.

2. The decree holder/respondent herein, proceeded to, hence put to execution, the, conclusive binding decree, recorded by the learned trial Court, by his casting therebefore, an, execution petition. The proposed sale deed for its, hence, being ordered, to be completely executed, and, registered before the Sub Registrar concerned, was tendered by the decree holders, before the learned executing Court. However, the learned executing Court, had, after paragraph No.1, of, the apt draft of the sale deed, ordered for incorporation therein, the, hereinafter extracted contested recitals:-

> "the suit was decreed for selling ¼th share of the dwelling house detailed in Khasra Nos. 532, 534, 536, 537 and 538 which are now corresponding Khasra Nos. 1005, 1007, 1008, 1009 and 1010. The partition was entered between the parties and as per final decree shit land was partition and possession was give qua khasra Nos. 532, 5436, 537, 534/1, 534/2 and 534/3 to DH Ishwan Chand. Therefore, there was no need to purchase the same. Further more, the share which was in possession of the JD was agreed to sell by her to the extent of 1/4th share to the DH and share was to be taken from the are which was left with her. Thus, 1/4th share of area 1007/4 measuring 24.66 which is presently as Khasra Numbers 1696 is the land from which 1/4th share has to be given. This is in form of house. So entire house is to be given even if the area is less as DH had agreed that he is willing to accept 20.26 sq. meter instead of 24.66 sq. meters."

The afore referred mandate, as pronounced, in, the impugned order, is, forcefully contended by the learned counsel appearing for the judgment debtor, to rather beget transgression, of, the mandate, of, the apt conclusive, binding judgment, and, decree, where-within, rather the hereinafter extracted echoings hence stand borne :-

> "It is ordered that the petition is allowed and accordingly respondent is directed to sell her 1/4th share in the dwelling house in dispute comprising Khasra Nos. 532, 534, 536, 537 and 538, total measuring 81-06 sq. meters corresponding to new khasra Nos. 1005, 1007, 1008, 1009 and 1010, situated in MohalRanital, Nahan, District, Sirmour, H.P. to the petitioner at the market value prevalent in Nahan town now a days."

Besides he contends, that, in making the aforesaid contested mandate, in, the impugned order, (a) the learned executing Court, has, infracted the solemn principle, as, anvilled upon the legal premise qua the executing court being barred to go behind the decree, rather it being enjoined, to, in its fullest letter, and, spirit, hence implement it or put it to coercive

execution. In making the aforesaid espousal, the learned counsel appearing for the judgment debtor, places reliance, upon, a verdict of the Hon'ble Apex Court rendered on 3rd January, 2014, in a case titled as ***ShivshankarGurgar versus Dilip, bearing Civil Appeal No. 52 of 2014,*** the relevant portion whereof, stands extracted hereinafter:-

> "It is settled principle of law that the executing court cannot go beyond the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. This Court in Deepa Bhargava and Another v. Mahesh Bhargava and others, [(2009)2 SCC 294] held thus:-
>
> "9. There is no doubt or dispute as regards interpretation or application of the said consent terms. It is also not in dispute that he respondent judgment-debtors did not act in terms thereof. An executing Court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is....."""

3. Per contra, the learned counsel for the decree holder, has placed reliance, upon, a judgment rendered by the Hon'ble Apex Court, in a case titled, as, ***TopanmalChhotamal vs. Kundomal Ganga Ram and others***, reported, in ***AIR 1960 SC 388***, relevant paragraph No.4 whereof, stands extracted hereinafter:-

> "4. At the worst the decree can be said to be ambiguous. In such a case it is the duty of the executing Court to construe the decree. For the purpose of interpreting a decree, when its terms are ambiguous, the Court would certainly be entitled to look Into the pleadings and the judgment: see Manakchand v. Manoharlal, . In the plaint in the Agra suit, Suit No. 205 of 1949, not only relief was asked for against the firm, but also a personal decree was claimed against defendants 2 to 6. The said defendants inter alia raised the plea that a personal decree could not be passed against them because they were not made parties to the suit filed in the Chief Court, Sind, and were not personally served therein. The learned Civil Judge, Agra, in accepting the plea made the following observation:
>
> "The defendants 2 to 6 were not made parties in Suit No. 533 of 1947 and were not individually served in that case. I think, therefore, the plaintiff cannot get a personal decree against defendants 2 to 6."
>
> After citing the relevant passage from the decision of the Madras High Court in Sahib ThambiMarakayar v. Hamid Marakayar, ILR 36 Mad. 414, the learned Civil Judge concluded thus:
>
> "That being the law there is no reason for construing the decree obtained by the plaintiff in Suit No. 533 of 47 as creating a larger liability against the defendant partners of the firm than to make the partnership property in their hands liable. I hold, therefore, that a personal decree against defendants 2 to 6 cannot be given but only as regards the property of the firm defendant No. 1 which may be found in their hands. The plaintiff is thus entitled to a decree for Rs. 12,140-1-0 with costs further and pendente lite interest at 3 p. c. p. a. against defendant No. 1 as may be found in the hands of defendants 2 to 6."
>
> Then followed the decretal order. It is manifest from the pleadings and the judgment of the learned Civil Judge that when a personal decree was sought against respondents 2 to 6 on the same grounds that would have been open to the appellant for executing the decree against them under Order XXI, Rule 50, C. P. C., the learned Judge, for specific reasons mentioned by him,

> refused to give the appellant the said relief and expressly confined it to the assets of the firm in the hands of the partners."

4. The learned counsel appearing for the decree holder, hence, emphasizes (i) that with apt underlinings, standing, borne in ***TopanmalChhotamal*** case (supra), qua, upon, the apt decree being ambiguous, (ii) thereupon, it being the solemn duty of the executing court to construe, it, by its hence looking into the pleadings, as, cast in consonance therewith. He submits, that, the contested mandate borne, in, the verdict assailed herebefore, (iii) being hence construable, to, in tandem therewith, rather hence standing rendered, upon, the Executing Court hence discerning, the, compatible therewith pleadings. (iv) Conspicuously, given, the, apt decree being *ex facie* ambiguous, (v) thereupon, reiteratedly in tandem therewith, tenable latitude accruing, vis-a-vis, the executing court to interpret, it, by its discerning, the, apt pleadings, and, thereafter, he submits, that, in the aforesaid befitting endeavour, the learned executing Court rather not going behind the decree nor it omitting to execute in the fullest, its truest nuance.

5. However, this Court cannot accept the afore made submission, of, by the learned counsel appearing, for the decree holder, as the, judgment, whereon he places reliance, is, strictly confined, vis-a-vis, the facts borne therein, and, with the extant factual matrix rather being distinguishable therewith, is, hence rendered inapplicable hereat, (a) factual matrix therein, rather makes, a, clear display qua the apt decree thereat hence, making the apt candid hereinafter extracted declarations:-

> "any such property of the firm M /s KundomalGangaram as may be found in the hands of defendants No.2 to 6."

(a) and therein, the, Hon'ble Apex Court, hence, meteing deference thereto, and, also validating, the, pronouncement recorded by the Hon'ble High Court concerned, qua the concurrent therewith order of coercive execution, of, the decree, (b) whereunder, the property of defendant No.1 firm, as may have travelled into the hands, of, co-defendants No.2 to 6, was hence pronounced, to be, also executable thereagainst. The effect, of the Hon'ble Apex Court in the judgment relied, upon, by the counsel for the decree holder, rather validating the apt verdict rendered, by the Hon'ble High Court concerned, (c) whereunder, it in consonance with the apt mandate, borne in the decree, as, put to execution, had rather rendered an apt order, in, consonance therewith, (d) and, also obviously, in, the concluding portion of its verdict, had also rendered an expostulation of law, qua the executing court being barred to go behind the decree, (e) is, of theexecuting Court being barred to impose, a, liability, upon, the JD, conspiuously beyond the mandate of the decree, put to execution. The afore conclusion, borne in the last paragraph, of, the verdict rendered in ***TopanmalChhotamal*** case (supra), appears to stand overlooked by him, and, he has obviously hence faintly rested his submission, upon, paragraph No.4 of the verdict of the Hon'ble Apex Court, borne in ***TopanmalChhotamal***case (supra), (f) paragraph whereof, appears to stand recorded by the Hon'ble Apex Court, for discerning, from, the apt pleadings, the executability, of, the decree against the property of defendant No.1 firm, even when the apt properties, had travelled into the hands, of co-defendants No.2 to 6, and, hence the latter, stood, thereafter validly pronounced, rather in tandem with apt therewith recitals, borne in the apt decree, to be, amenable, for, ensuring apt realization(s). However, thereat imminently, even the discerning of the pleadings by the Hon'ble Apex Court, was apparently in strict consonance, with the mandate of the decree, and, was exercised merely, to clarify, the, mandate of the purported ambiguous decree. However, even if the counsel for the DH, makes a submission before this Court, that, the extant decree put to execution, is ambiguous, and, thereupon, in consonance, with, paragraph No.4, of, the verdict of the Hon'ble Apex Court, rendered in ***TopanmalChhotamal*** case (supra), it being amenable for this Court, to discern, from, the pleadings qua theirs carrying rather evincings,

in, apt consonance therewith, (g) and, for hence erasing purported ambiguities besides for validating the impugned order, (h) yet this Court would not succumb to his submission, given in contradistinction, to, the judgement supra relied upon by him, wherein, occurred, a, clear mandate, vis-a-vis, the apt decree standing pronounced, against, the property of the firm M/s KundomalGangaram, and, it being further decreed, to be, also realizable, upon, the apt decretal property, hence, evidently travelling in the hands, of, defendants No.2 to 6, (I) whereas, rather hereat, the apt decree making, the, afore apt candid, and, umabiguousechoings, wherefrom, the corollary is, qua with the apt mandate of the apt decree, being markedly unambiguous, thereupon, no allusion, vis-a-vis, the apt pleadings is imperative, (j) nor when in the concluding paragraph, of, the verdict of the Hon'ble Apex Court, the executing Court, is, permitted to go behind the decree, and further when hereat, there being no apt direction(s) in the apt decree, as, put to execution, rather hence bearing consonance with the verdict (supra), (k) thereupon, it was grossly impermissible, for, the learned executing Court, to , infract the mandate, of, the apt decree, given it being anvilled, upon, the pleadings, and, also the apt evidence reared by the decree holders, whereupon, rediscerning(s)or relookings into any part thereof, is obviously precluded. Consequently, the binding and conclusive decree, whereunder, the suit property was declared to be undivided, and, apt sale, qua 1/4th share in the dwelling house in dispute comprised in Khasra Nos. 532, 534, 536, 537 and 538, total measuring 81-06 sq. meters corresponding to new khasra Nos. 1005, 1007, 1008, 1009 and 1010, situated in MohalRanital, Nahan, District, Sirmour, H.P., alone comprised, the, apt executable decree, and, reiteratedly, in the learned executing Court, in making the hereinabove extracted contested underlined mandate, has, rather ex facie hence travelled behind the decree, and, also rendered a relief, which rather stood declined, vis-a-vis, the decree holder.

6. For the foregoing reasons, the instant petition is allowed, and, the order impugned before this Court is set aside. The parties are directed to appear before the learned trial Court on 20th September, 2018, and, the learned executing Court, is directed to decide afresh the execution petition, within three months, from today. All pending application also stand disposed of. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Gian Chand @ Penu .....Respondent.

Cr. Appeal No.234 of 2007
Decided on: 31.8.2018

Indian Penal Code, 1860- Sections 323, 354 & 506 –Hurt, Outraging of Modesty and Criminal Intimidation – Proof - Accused allegedly caught complainant when she was returning from fields, touched her breast and asked her to let him do wrongful act – Also snatched sickle from her and caused injuries to her besides intimidating her – 'R' and 'S' alleged to have reached spot on hearing cries of complainant – Trial Court convicting and sentencing accused of said offences – Addl. Sessions Judge however allowing his appeal and acquitting accused – Appeal by State – State raising plea of wrong appreciation of evidence by Addl. Sessions Judge – On facts, High Court found (i) improvements in statement of complainant given during trial vis-à-vis statement made in FIR (ii) complainant not making

reference of genesis of occurrence leading to injuries on her person in her MLC. (iii) 'R' and 'S' not corroborating prosecution case (iv) weapon of offence not shown to medical officer for proving that injuries could be caused with it (v) recovery of sickle, dhatu and Kilta made belatedly and at instance of complainant (vi) enmity between families of complainant and accused on account of land dispute – Held, appreciation of evidence as done by Addl. Sessions Judge not perverse – Appeal dismissed – Acquittal upheld. (Paras-9 to 17)

For the appellant: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur Dy. A.G., for the appellant.
For the respondent: Mr. Ajay Chandel, Advocate,

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral):

The instant appeal stands directed, against, the verdict, pronounced by the learned Additional Sessions Judge, Shimla, District Mandi, H.P. Camp at Rohru, in Criminal Appeal No. 14-R of 04/02, whereunder he reversed the judgment of conviction, and, consequential thereto imposition, of, sentence(s) upon the accused, as, recorded by the learned trial Court, vis-a-vis the offences charged, and, rather acquitted the accused. The State of Himachal Pradesh, is, aggrieved therefrom, hence has instituted the instant appeal before this Court.

2. Brief facts of the case are that in the evening of 18.4.2002 at about 6.30/6.45 PM, Smt. Sanendra was coming back home from her fields and when she had reached 2-3 fields above, on the way accused Gian Chand suddenly came and caught her. As the complainant turned back, the accused caressed his hand on her breast and asked her to let him commit a wrong act. When the complainant released her arm from the cluches of the accused, the accused subdued her and started giving beatings to her. The accused snatched the sickle from the hand of the complainant and inflicted a blow with it on her head. On her raising a hue and cry, Ravinder Kumar and Surender Kumar came. On seeing them, the accused fled from the spot. While fleeing, the accused threatened the complainant with death. Thereafter, the husband and father-in-law of the complainant also came there and took her to the house. As a result of the beatings complainant had sustained injuries on her head, arm, shoulder and back. The complainant went to the police station, Rohru and lodged FIR Ext. PW1/A. The investigation into the case was conducted by ASI Tej Ram. He went to the spot and prepared the site-plan Ext. PW8/A. He recorded the statements of witnesses supposed to be acquainted with the facts of the case. The medical examination of the complainant was got conducted from Dr. Satish Kumar. She was also subjected to X. Ray examination by the Radiologist Dr. P.C. Gupta. Medical-legal certificate Ext. PW9/A, report of the Radiologist is Ext. PW6/A and skygrams Ext. PW6/B to Ext. PW6/D were procured. The doctor had opined the injuries to be simple in nature. After the completion of the investigation, the challan was presented in the Court against the accused. Charge for commission of offences under Sections 354, 323, 506 of the Indian Penal Code was framed against the accused to which he pleaded not guilty and claimed for trial.

3. A charge for commission of offences, under, Sections 354, 323, 506 of the Indian Penal code, was, framed against the accused, whereto, he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses'. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code

of Criminal Procedure stood recorded, wherein, he pleaded 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 conviction qua the accused. However, in an appeal carried therefrom, by, the convict before the learned appellate Court, the latter Court reversed the findings of conviction, and, rather proceeded to acquit the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned appellate 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 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. The learned counsel appearing, for the respondent/ accused, has also 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 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, hence evaluated the entire evidence on record.

9. The testimony of the prosecutrix, for, hence (i) credence being meted thereto, was, enjoined to be proven to be bereft, of, gross embellishments and improvements, vis-a-vis, her previous statement recorded in writing, (ii) also enjoined emergence, of, proven corroborative therewith, hence, echoings standing borne, in, the testifications, of, the prosecution witnesses concerned, (iii) Nowat, for, gauging qua the testification of the prosecutrix standing not imbued with any vice, of, gross embellishments or improvements, vis-a-vis, her previous statement recorded in writing, (iv) the trite factum qua hers' in the FIR, rather making a disclosure qua her father-in-law, arriving at the spot, and, hers omitting to make any concurrent therewith testification, while hers stepping into witness box, rather visibly, and, apparently makes emergence, of, a gross embellishment, and, improvement, vis-a-vis, her previous statement recorded in writing. Furthermore, the initial version qua the occurrence, as, embodied in the FIR, is also falsified, by the factum of the prosecutrix, in, the MLC borne in Ext. PW-9/A, not, therein making any unfoldments, rather bearing apt concurrence qua the genesis, of, the occurrence, as set-forth in the apposite FIR.

10. She ascribes, qua, the accused, an incriminatory role, qua his, by user of sickle rather inflicting injuries upon her person and also ascribes, vis-a-vis, the accused, an incriminatory role, of, his belaboring her with kick and fist blows. The apt injuries stand pronounced, in Ext. PW9/A, and, thereupon the prosecutrix strives to prove, through, the afore exhibit qua the injuries, embodied therein, being a sequel of the accused belaboring her with kick and fist blows, and, also the apt injuries, being a sequel of the accused delivering sickle blows, upon, her person.

11. The prosecutrix would succeed, in, the aforesaid strivings (i) only, upon the learned APP concerned, during, the course of the examination-in-chief of PW9, rather producing before him, the relevant weapon of evidence, with user whereof, the apt injuries borne in Ext. PW9/A hence stood entailed, upon her person, and, thereafter PW9 meteing vivid concurrence therewith, yet, the learned APP concerned, rather failed to make the aforesaid endeavor. In aftermath, the alleged inflictions, by the accused upon the prosecutrix, of injuries as delineated therein, by his belaboring the prosecutrix with kick and fist blows, and, by his delivering rather sickle blows, upon, her person, rather stand

concluded to remain un-proven. Consequently, it is to be concluded qua the prosecutrix, grossly failing, to, prove the trite factum qua the injuries, borne in Ext. PW9/A, being a sequel of the accused hence belaboring her with kick and fist blows nor it can be concluded, qua his, by delivering sickle blows upon her person, his hence, inflicting the injuries, pronounced in Ext. PW9/A.

12. Be that as it may, the learned Additional Advocate General has contended with much vigor before this Court, that (i) the recovery memo Ext. PW-1/B, whereunder, the sickle Ext. P1, Dhatu Ext. P2 and Kilta, were recovered, and, recovery(s) whereof, stood effectuated from the site of occurrence, rather hence proving the genesis of the prosecution case. However, no valid dependence can be made thereon, by the learned Additional Advocate General, for the reason (a) given the items, as borne therein standing not recovered at the instance of the accused, rather, their standing recovered at the instance of the prosecutrix, (b) recovery(s) thereunder being made belatedly, since the taking place, of, the ill-fated occurrence, (c) the prosecutrix, in her testification, failing to make bespeakings, vis-a-vis, the accused after inflicting injuries upon her person, by his using the apt sickle, his leaving, it, at the site of occurrence, (d) her aforefailing, and, even her apt failings, qua her leaving kilta and dhatu at the site of occurrence, rather begets an inference qua the preparation of Ext. PW1/B, being a sheer concoction, deployed by the Investigating Officer concerned, in, connivance with the prosecutrix.

13. Furthermore, both Surender Singh PW2, and, Ravinder Kumar PW3, who, in sequel to their respectively hearing the outcries of the prosecutrix, rather, proceeded to the site of occurrence, reneged from their respectively recorded previous statements in writing, (a) both in their respectively rendered depositions, comprised in their respectively recorded cross-examinations, as, held by the learned APP concerned, bely the apt incriminatory parts, borne in their respectively recorded previous statements in writing, appertaining to the prosecutrix making disclosures to them, vis-a-vis, the apt penal misdemeanors, standing perpetrated, upon, her person by the accused. The effect thereof is (b) that the testification of prosecutrix, qua, after completion of the occurrence, and, upon arrival of the aforesaid PWs, at the site of occurrence, hers making the apt disclosures, to them, rather standing belied. In addition, though, the prosecutrix and the other PWs, omitted to in their respectively recorded testifications, hence made any disclosure therein, qua the prosectrux, being noticed by the husband of the latter, to be accostedby the aforesaid PWs, yet, the husband of the prosecutrix contradicts them, rather he makes echoings qua his noticing the prosecutrix, to stand accosted by the aforesaid PWs. The effect thereof, is, hence with the husband of the prosecutrix rather contradicting the aforesaid trite factum, thereupon it appears, that, the prosecutrix, in connivance with her husband, rather trying to falsely implicate the accused.

14. The aforesaid reasons, also acquire immense fortification, from the prosecutrix, in, her testification, as borne in her cross-examination, making acquiescences qua their being open enmity, and, inimicality, inter-se, her matrimonial family, and, the accused, and inimicality whereof, she articulates, to, arise from a dispute over the apt land. Consequently, with proven inimicality, inter-se, the matrimonial family of the prosecutrix, and, the accused, thereupon it appears qua hers', at the instance of her husband, falsely implicating the accused.

15. Last but not the least, the factum of user of sickle, Ext. P1, by the accused, and, also the factum, of, the relevant occurrence taking place, at, the site, of, occurrence, depicted in, Ext. PW8/A, is falsified, (a) by the Investigating Officer concerned rather failing to send, vis-a-vis, the SFL concerned, the sickle, for ensuring emergence of an apt opinion, therefrom qua it hence carrying the blood stains, of, the prosecutrix, (b) no blood, as stood,

spilled at the site of occurrence neither being collected nor standing sent to the SFL concerned for hence ensuring eruption, of, formidable evidence qua the authenticity, of, preparation of site plan, borne in Ext. PW8/A.

16. A wholesome analysis of evidence on record portrays qua the appreciation of evidence as done by the learned appellate Court, not, suffering from any perversity and absurdity nor it can be said qua the learned appellate Court in recording findings of acquittal hence committing any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate qua the findings of acquittal recorded by the learned appellate Court hence meriting any interference.

17. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned appellate Court is maintained and affirmed. Fine amount, if any, be refunded. Personal and surety bonds are discharged. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh .....Appellant.

Versus

Arvind alias Shambhoo& anr. .....Respondents/accused.

Cr. Appeal No. 464 of 2009.
Reserved on: August 28, 2018.
Date of decision: 31.8.2018.

Indian Penal Code, 1860- Sections, 307, 324 and 326 read with 34- Arms Act, 1959- Section 25- Indian Evidence Act, 1872- Section 9 - Identification of assailants – Victims assaulted by culprits at midnight while sleeping outside liquor vend – Trial Court acquitting accused by holding that identity of accused as assailants not established beyond doubts – Appeal by State – High Court found (i) incident having taken place at midnight (ii) Assault happened only for about two minutes (iv) accused not named as assailants in FIR, though complainant claims to be knowing them by nicknames (v) Accused also not named as assailants in MLCs (vi) one victim clearly admitting that when assaulted, he was not able to identify assailants – Held, identity of accused as assailants not established – Appeal dismissed – Acquittal upheld. (Paras-15 to 17)

For the appellant Mr. Narinder Guleria Addl. AG with Mr. Vikas Rathore, Addl. AG.

For the respondents Mr. J.P. Sharma and Mr. Jagan Nath, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

State of Himachal Pradesh aggrieved by the judgment dated 28.3.2009, passed by learned Addl. Sessions Judge, Una, District Una, H.P. in Sessions Trial No. 7 of 2007, whereby the respondents (hereinafter referred to as the accused) have been acquitted

of the charge framed against each of them under Sections 307, 326, 324 IPC read with Section 34 IPC and under Section 25 of the Indian Arms Act, has preferred the present appeal for setting aside the same on the grounds inter alia that the evidence produced by the prosecution has not been appreciated in its right perspective and to the contrary, the findings recorded on the basis of conjectures and surmises. There being no enmity of the prosecution witnesses with the accused who have deposed against them, their testimony has been ignored without assigning any reason. The testimony of injured witnesses Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3) qua identification of the accused persons and that it is they who alone were the assailants, has also been erroneously ignored. Undue weightage to the statement of photographer that the photographs were taken on 10.5.2006 has been given while acquitting the accused of the charge.

2. The facts of the case, in a nut shell, are that PW-1 a salesman was present in a liquor vend at JorbarBhatehar on 9.5.2006. One Bikram Jit Singh (PW-3), who happens to be the brother-in-law of Ajnesh Kumar (PW-7), another salesman deployed in the liquor vend, had also come to meet him. Since Ajnesh Kumar (PW-7) was away to Hoshiarpur, therefore, Bikram Jit Singh (PW-3) stayed in the liquor vend with Sunil Kumar (PW-1). Around 11:30 PM, they both were sleeping outside the liquor vend. Both accused came there and told Sunil Kumar (PW-1) that they intend to purchase liquor and that they will come back after some time. It is around 1:30 AM (midnight) when both Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3) were sleeping, the accused persons suddenly attacked them. Accused Arvind allegedly inflicted a knife blow on the chest of Sunil Kumar (PW-1) on left side whereas accused Brijesh inflicted darat blow on the person of Bikram Jit Singh (PW-3). They raised hue and cry and both accused allegedly fled away from the spot. The injured went to Police Post Chintpurni. The statement of Sunil Kumar (PW-1) Ext. PW-1/A was recorded under Section 154 Cr.P.C. They both thereafter were taken to hospital at Chintpurni for treatment. The medical aid was given to them in the said Hospital and referred to Zonal Hospital Una for better management. In the Hospital at Una, X-rays were conducted.

3. On the same day i.e. 10.5.2006, the police visited the spot at about 4-5 PM. The site plan Ext. PW-20/E was prepared. The blood stained Shirt (white coloured) Ext.P-1 and bed sheet Ext. P-2 produced by Sunil Kumar (PW-1) were taken into possession vide memo Ext. PW-1/B and PW-1/C. During further course of investigation, one blood stained T-Shirt Ext. P-5 belonging to Bikram Jit Singh (PW-3) was also taken into possession on 23.5.2006.

4. Accused Arvind Kumar allegedly made a disclosure statement on 25.5.2006 and got recovered knife Ext. P-3 from the bushes at a distance of 65 feet away from the liquor vend, the same was taken into possession vide recovery memo Ext. PW-8/A. The map of that place Ext. PW-20/E was also prepared. The police had also taken into possession the documents of the vehicle bearing registration No. HP-36-7216 allegedly used by the accused at the time of commission of the offence vide recovery memo Ext. PW-5/A.

5. During the interrogation of accused Brijesh alias Bonnu, he made disclosure statement on 8.6.2006 Ext. PW-10/A in the presence of witnesses that he could get recovered 'darat' (Ext. P-4). Consequently, the same was got recovered vide recovery memo Ext. PW-8/B which was sealed in a parcel and taken into possession. The spot map Ext. PW-20/L was also prepared.

6. On completion of the investigation, challan against both the accused was filed in the Court. The same on committal was received in Sessions Court at Una. Learned trial Judge on going through the record and hearing learned Public Prosecutor as well as learned defence counsel and on finding a prima facie case having been made out against the

accused persons, proceeded to frame charge against both of them for the commission of the offence punishable under Sections 307, 326, 324 read with Section 34 IPC and under Section 25 of the Indian Arms Act. They, however, pleaded not guilty and claimed trial. Consequently, in order to sustain the charge so framed against the accused, the prosecution has produced the oral as well as documentary evidence.

7. The material prosecution witnesses are both the injured Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3). PW-4 Jai Singh is another salesman who was working in the liquor vend with Sunil Kumar (PW-1). He, however, has not supported the prosecution case and turned hostile. PW-6 Hans Raj is a witness to the recovery of alleged blood stained T-Shirt and bed sheet (Ext. P-5) and (P-2), respectively, which were taken into possession vide recovery memo Ext. PW-3/A at the instance of injured witness Bikram Jit Singh (PW-3). PW-8 Ajay Kumar is the witness to the recovery of knife (Ext. P-3) allegedly made at the instance of accused Arvind Kumar and taken into possession vide recovery memo Ext. PW-8/A. He is also a witness to the recovery of 'darat' (Ext. P-4) which was taken into possession vide recovery memo Ext. PW-8/B at the instance of accused Brijesh. PW-9 Des Raj is a witness to the recovery of car No. HP 36-7216, taken into possession by the police vide recovery memo Ext. PW-9/A. PW-10 Yashpal has been examined to prove the disclosure statement Ext. PW-10/A allegedly made by accused Brijesh Kumar and on the basis whereof, he allegedly got the 'darat' (Ext. P-4) recovered. PW-12 Vipan Kumar is running a Studio under the name and style of Sharma Studio at Jorbar. According to him, he took photographs Ext. PW-12/A to PW-12/D on 10.5.2006 and also proved the negatives thereof Ext. PW-12/E to PW-12/H.

8. PW-13 Om Prakash alias Chhaju Ram is a Tea vendor having his shop at a distance of 300 meters from the liquor vend. On 10.5.2006, when he was sleeping on the roof of his shop, heard the cries "मार दिया-मार दिया" from the side of liquor vend. He woke up and replied that he is coming and when he reached on the spot, noticed that both injured were bleeding. He made woke up the other people and also arranged for a vehicle. The accused were brought to Police Post Chintpurni and taken to hospital. One more person was also with him. Both the injured disclosed that they have been attacked by some persons who have fled away.

9. PW-14 Sanjiv Kumar was posted as Radiographer at Regional Hospital, Una. He had conducted X-ray of injured persons vide X-ray films Ext. PW-14/A, PW-14/B and PW-14/C. Dr. O.P. Ramdev (PW-15) is a Radiologist and at the relevant time posted in RH Chintpurni. According to him, he examined the X-ray films and given his opinion Ext. PW-15/A and PW-15/B. There was no evidence of fracture.

10. PW-2 Dr. Parveen Kumar was the then Medical Officer, Civil Hospital, Chintpurni. As a matter of fact, it is he who had given medical first aid to both the injured at the instance of the police. He also issued MLC Ext. PW-2/B in respect of injured Sunil Kumar and Ext. PW-2/C in respect of injured Bikram Jit Singh. In his opinion, injures on the person of Sunil Kumar (PW-1) could have been caused with knife (Ext. P-3) and the injuries on the person of Bikram Jit Singh (PW-3) with 'darat' (Ext. P-4). PW-5 Const. Ashok Kumar is official witness as in his presence the car was taken into possession vide memo Ext. PW-5/A. PW-11 HC Rajesh Kumar at the relevant time was posted as MHC in PS Amb. The case property was deposited with him, which he later on sent to FSL Junga through Const. Ashok Kumar (PW-5). PW-16 Const. Nardev Singh has proved the rapatrojnamcha Ext. PW-16/A whereas PW-17 HC Pawan Kumar, I.O. has partly investigated the case. PW-18 SI Om Prakash has registered the FIR Ext. PW-17/B on the receipt of rukka Ext. PW-17/A and also filed the police report in the Court.

11. PW-19 Dr. Rachpal Singh is a private practitioner at Hoshiarpur. According to him, Bikram Jit Singh (PW-3) was admitted in his hospital on 10.5.2006 and discharged on 11.5.2006 vide discharge slip Ext. PW-19/A. The injury due to fracture of nasal bone was grievous in nature. His opinion obtained by the police is stated to be Ext. PW-19/B. PW-20 ASI Vishwas Kumar was posted as Incharge PP Chintpurni, Distt. Una at the relevant time and he has conducted the investigation and is the main investigating officer in this case.

12. On the other hand, both the accused in their statements recorded under Section 313 Cr.P.C. have denied the incriminating circumstances put to them as wrong either being incorrect or for want of knowledge. They also expressed their ignorance as to why the witnesses have deposed falsely against them. They, however, opted for not producing any evidence in their defence.

13. Learned trial Judge on completion of trial and hearing prosecution as well as defence has arrived at a conclusion that the identity of the accused as assailants is not at all established and as no case was found to be made out against them and hence acquitted of the charge framed against each of them.

14. On hearing Mr. Narinder Guleria and Mr.Vikas Rathore, learned Addl. Advocate Generals for the appellant-State and S/Sh. J.P. Sharma, Jagan Nath Advocates, learned defence counsel as well as on going through the evidence available on record, the short controversy which needs adjudication in the present appeal is as to whether irrespective of the identity of the accused persons being the assailants was satisfactorily proved on record, learned trial Court has misread and mis-appreciated the evidence and as a result thereof erroneously recorded the findings of acquittal against both the accused. In all fairness and in the ends of justice, the answer to this poser would be in negative for the reasons to be recorded hereinafter.

15. The statement under Section 154 Cr.P.C. Ext. PW-1/A of Sunil Kumar (PW-1) contains very first version of the prosecution case. The names of the accused as the assailants have not been disclosed in this document and rather it is recorded that someone came there and assaulted Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3) sleeping outside the liquor vend. Interestingly enough, had the complainant Sunil Kumar (PW-1) been in the knowledge that the assailants were none else but the accused he would have disclosed their names in Ext. PW-1/A. Otherwise also, it was mid night being 1:30 AM and both the injured were sleeping. The alleged assault was sudden and according to Sunil Kumar (PW-1), the injuries were inflicted for about 2 minutes only. It is un-believable that a person who was sleeping and woke up when assaulted could have identified the assailants in two minutes and that too during night time. No doubt, Sunil Kumar (PW-1) while in the witness box as PW-1 has stated that it is the accused who alone were assailants and assaulted him as well as Bikram Jit Singh (PW-3) during the night intervening 9/10.5.2006 at 1:30 AM, however, since their names have not been mentioned in the statement under Section 154 Cr.P.C. nor in a short duration of two minutes the assailants could have been identified during night hours, therefore, the statement so made by Sunil Kumar (PW-1) cannot be believed to be true by any stretch of imagination. The nickname of accused Arvind Kumar is Shambhoo, nothing to this effect has come on record. When cross-examined, he tells us that both the accused used to visit liquor vend earlier also, hence, were known to him by their nick names. According to him, their nick names were disclosed to the police, however, in the statement under Section 154 Cr.P.C. their names do not find mention and rather as per the statement so made, they were assaulted by someone. On the other hand, it is stated that he came to know about the real name of Shambhoo as Arvind when the said accused was in the police custody. When, as per his version, he had no enmity with the accused

persons and there is nothing on record about the motive, in such peculiar circumstances it cannot be believed that the assailants were the accused alone and none else. Though the suggestion that at the time of their medical examination they were not in the knowledge of the names of assailants has been denied being wrong, however, as per the history given to the doctor and recorded so in the MLC, the injuries were inflicted to them by some unknown persons. The reference in this regard can be made to the MLCs Ext. PW-2/B and PW-2/C. Therefore, had the names of the assailants been known to the injured, they would have disclosed the same to PW-2 Dr. Parveen Kumar at the time when subjected to medical examination.

16. Admittedly, the test identification parade was not got conducted by the police. The testimony of Bikram Jit Singh (PW-3) so far as identification of the accused being the assailants is not much relevant because they were not known to him. As per his version when assaulted he was not able to identify the assailants. In the same breath though it is stated that accused Brijesh is the same person who had assaulted him, however, on what basis he has stated so, learned Addl. Advocate General has failed to explain. He even did not disclose the number of maruti car being used by the accused persons at the time of occurrence. He was declared hostile. When cross examined by learned Public Prosecutor, it is stated that he did not disclose the registration number of the vehicle to the police nor any such statement was made by him. It is denied that the names of both the accused were known to him and rather he could over hear the name of one of the assailants as Bonnu uttered by Sunil Kumar (PW-1). He, therefore, has demolished the entire prosecution case.

17. Interestingly enough, PW-13 Om Prakash while in the witness box has stated that on hearing cries " मार दिया मार दिया", he rushed to the spot and noticed both the injured lying there in injured condition. They revealed to this witness that some unknown person had attacked them and fled away. Therefore, if the assailants were the accused, the injured particularly Sunil Kumar (PW-1) who claims that they used to come to the liquor vend earlier also would have disclosed their names at the very first available opportunity to do so i.e. in his statement recorded under Section 154 Cr.P.C. Admittedly, the police has not got conducted the identification parade. It is, therefore, not at all established that the assailants were the accused alone and none else and as such Learned trial Judge has rightly held them not to be the same persons who assaulted injured Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3).

16. True it is that as per the medical evidence, having come on record by way of testimony of PW-2 Dr. Parveen Kumar and PW-15 Dr. O.P. Ramdev, respectively, there were injuries on the persons of both Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3). The injuries in the opinion of PW-2 Dr. Parveen Kumar could have been caused with knife (Ext. P-3) and 'darat' (Ext. P-4). It is, however, not proved beyond all reasonable doubt that the injuries to them were inflicted by the accused persons alone. The story qua recovery of knife at the instance of accused Arvind whereas 'darat' at the instance of his co-accused Brijesh Kumar, also does not inspire any confidence for the reason that in a normal course, the accused after commission of the offence would have not thrown the weapon of offence nearby the spot i.e. at a distance of 65 feet. The remaining evidence produced by the prosecution also need not be discussed for the reason that the prosecution has miserably failed to prove the identity of the accused to be the assailants and also to connect them with the commission of the offence they allegedly committed.

17. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the personal bonds furnished by the accused shall stand cancelled and surety discharged. The appeal is accordingly disposed of.

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

RFA No. 152 of 2008 along with
RFA No. 154 of 2008.
Reserved on : 21st August, 2018.
Decided on : 31st August, 2018.

1. RFA No. 152 of 2008.

Sh. Vijay Puri .....Appellant/defendant.

Versus

Sh. Ajay Mittal &Ors ....Respondents/Plaintiff.

2. RFA No. 154 of 2008

M/s Divya Himachal Prakashan Pvt. Ltd and another .....Appellant/defendants.

Versus

Shri Ajay Mittal and another ....Respondents/plaintiff.

Tort - Defamation -Suit for damages – Good faith –Defence - Held, Defendant is enjoined to adduce evidence that libelous item besides being truthful was published after thorough verifications of its narratives, in good faith and for public good. (Para-6)

Tort-Defamation – Suit for damages - Public good – What is ? – Plaintiff posted as Principal Private Secretary to Chief Minister of State, transferred and posted as Principal Secretary of Department – Newspaper (D.1) publishing detailed write up concerning his transfer and attributing acts of misfeasance and nonfeasance on him - Article also suggesting that such act and conduct were cause of his transfer – News item alleging officer of having withdrawn huge sum towards medical bills of his brother - Public servant filing suit for damages by averring allegations made in write up to be altogether false, malicious and demeaning – Defendants taking plea of write up based on true facts and having been published in good faith for public good – Trial Court decreeing suit – Appeal against –On evidence, acts of nonfeasance as alleged in write up not established – Medical bills of his brother found reimbursed on claim raised by officer's Bhabhi, who herself was Govt. employee and entitled for medical claim – No evidence that plaintiff exercised any pressure for clearance of said medical bills- Held - Alleged medical bills had no connectivity with plaintiff – Defendants failed in establishing that libelous narratives were fair and preceded by close scrutiny qua truth thereof - Imputations of financial delinquency being false had effect qua reputation and esteem of plaintiff and same lowered his reputation in society. (Paras-8 & 9)

Tort- Defamation – Suit for damages – Good faith - Defence– News article published by defendants imputing that officer was having affinity towards RSS – Imputation said to be based on statement of opposition leader in Vidhan Sabha – And also that dissident group of Ruling Party had complained to Chief Minister of his arrogant behaviour- Defendant however admitting in cross-examination not having gone through record of proceedings of Vidhan Sabha wherein some Members had accused officer of having affinity towards RSS - Defendant also admitting that no Minister of Govt. accused officer of being arrogant in any of his Press briefings - Held, Plea of defendants of having published write up after due verification qua truth of its contents, not proved – News item could be construable to stand sparked by animodefamandi. (Para-10).

Case referred:

R. Rajagopal alias R.R. Gopal and another vs. State of Tamilnadu and others, (1994) 6 SCC 632

For the Appellant(s): Mr. Malay Kaushal, Advocate in RFA No. 154 of 2008 and Mr. Raman Prashar, Advocate, in RFA No. 154 of 2008.

For Respondent No.1: Mr. Surender P. Sharma, Advocate in both appeals.

Nemo for other respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit, for, rendition of a decree, for damages, arising from publication, of, libelous material, borne in Ex.P-3, stood, decreed by the learned trial Court. The defendants being aggrieved therefrom, hence, instituted separate appeals before this Court, hence, both the appeals are amenable, for, meteings, of, adjudication, under, a common verdict.

2. Briefly stated the facts of the case are that the plaintiff is a member of Indian Administrative Service (AS) and he was selected as such in the year 1982. It is averred that the plaintiff was appointed as Principal Secretary to the Chief Minister of Himachal Pradesh, in March, 1998, and, he joined as such on April, 28, 1998. Besides, working as Principal Secretary to the Chief Minister, the plaintiff was also working as Secretary to the Government in the Department of Excise and Taxation, Information and Pubic Relations and Language, Art and Culture etc. It is averred that having completed three years as Principal Secretary to the Chief Minister, the plaintiff was relieved from such post on December 1, 2001. It is averred that the transfer orders were published in various Newspapers on December, 2, 2001. It is averred that defendant No.1 got published his comments on the transfer orders on December 3, 2001, under the heading, "AFSARSHAHI KA GHERA TODA DHUMAL NEIN, ASANTUSHT KHUSH". The comments made by defendant No.1 in the write-up qua the plaintiff are stated to be highly malicious, derogatory, defamatory and factually incorrect which are reproduced here as under:

I) That, not only the dissidents, but the supporters of the Chief Minister were against the style of functioning of Ajay Mittal. Fora long time, Health Minister, J.P. Naddaand Excise and Taxation Minister Praveen Sharma had been trying that Ajay Mittal should be transferred from the post of Principal Secretary";

ii) That, Mohinder Singh, Ex. PWD Minister was also not satisfied with te style of functioning of Ajay Mittal. Recently he had alleged that the State Government had lost crores of Rupees on account of State Bureaucracy. As Excise and Taxation Minister, former Minister, Mohinder Singh had withdrawn exemption granted to M/s Gujrat Ambuja Cement and given notice to them to deposit Rs.35 crores. The matter was carried to the Hon'ble High Court where the Management of Gujrat Ambuja was directed to Rs. 9 crores. The accusation of Mohinder Singh is that the experienced lawyers were not engaged intentionally by the Officers. Further, it is claimed that in order to avoid engaging of experienced lawyers in the High Court, all the senior officers proceeded on leave and the plaintiff was also one of the Senior Officers;

iii) That Ex Chief Minister Virbhadra Singh had also objected to Ajay Mittal being a supporter of R.S.S; and

iv) That "Even his RSS links could not work in favour of Ajay Mittal who is involved in allegations accusing him of getting paid Rs.24 lacs of medical bills in the name of his brother.

It is averred that the aforesaid allegations were incorrect and malicious. It is averred that the write-up has lowered the plaintiff in the eyes of general public by painting him as an arrogant officer As regard Shri Mohinder Singh, it is averred that the plaintiff had very good relations with him right from the year, 1990 when he was posted as Deputy Commissioner, Mandi. It is averred that during the last three and half years, the plaintiff has availed long leave only on three occasions, firstly in June/July, 1999, on account of treatment of his wife and, secondly in the first half of the year 2000, when he had to remain present at Vellore for attending upon his younger brother who was suffering from M.D.S and was fighting for his life at Christian Medical College and Hospital, Vellore in Tamilnadu. It is averred that the defendants have wrongly alleged that the plaintiff had proceeded on leave under the pressure of Shri Nadda or Shri Sharma. As regard the reimbursement of the medical bills, it is averred that whatever was admissible under the Rules of Government was reimbursed to him and his wife. It is averred that whole write-up leaves a very foul taste in the mouth. The same is stated to be yellow journalism to defame and demoralize the whole bureaucracy, especially the plaintiff. The allegations are stated to be false and without any proper verification and have been made to lower him in the esteem of his friends, colleagues and acquaintances.

3. The defendants contested the plaintiff's suit and filed written statement, wherein, they have taken preliminary objections, qua maintainability, suit lacks material particulars, estoppel, publication is fair and bonafide etc. On merits, the averments qua the plaintiff being member of Indian Administrative Service and his posting in different departments have not been denied. It is also admitted that in the issue of December 3, 2001, the defendant No.1 got published the comments on the transfer orders of the plaintiff. It is denied that the write up qua the plaintiff is highly malicious, derogatory, defamatory and factually incorrect. It is averred that the work of the Pres sis specialized and very sensitive one. It is averred that a Citizen has a right to know about the activities of the State, the instrumentalities, the Departments and the Agencies of the State. It is alleged that it was generally the rumors of the corridors of the Himachal Pradesh Secretariat that he Principal Secretary to the Chief Minister has been shifted as certain Ministers were not happy with his working style. It is alleged that had the present plaintiff enjoyed good relations, he would not have been shifted from the Post of Secretary to the Government in the Departments of Excise and Taxation. It is alleged that the publication of the said write-up is fair and bonafide comment on a matter of public interest and is a honest expression of opinion made in good faith and for the good of the public and the defendants have no grudge against the plaintiff. It is alleged that the it was the duty of the Senior Officers including the present plaintiff to engage a Senior Advocate for State in the Hon'ble High Curt to defend the cause of State. It is averred that PWD Minister, Sh. Mohinder Singh had written a letter on June 23, 1999 to the Chief Minister as well as to the present plaintiff wherein some of the senior officials of the Department including the plaintiff were held responsible. It is averred that during the Budget Sessions of 2002, in the debate on the budget, the former Speaker and sitting MLA of the Congress, Thakur Kaul Singh had specifically asked for the clarification whether there has been any reimbursement of Rs.24 lacs in the Education Department. It is averred that it is the function of the Press to disseminate news from as many different facts and colours as possible. It is denied that the plaintiff is entitled for the damages of Rs.10 lacs. It is alleged that the present plaintiff wanted to use 'Divya Himachal' as a mouthpiece for his vested interests and when the defendants did not toe his lines, they were engaged in the present suit. It is averred that various Newspapers had published the same new item with fervor intensity, but the plaintiff has targeted only the defendants which shows that the plaintiff is acting with ulterior motive and vested interest.

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

1. Whether the plaintiff has been defamed and demoralized as alleged, jointly and severally by the defendants?OPP
2. Whether the suit as framed is not maintainable?OPD.
3. Whether the plaintiff has no locus standi to file the suit?OPD.
4. Whether the plaintiff is estopped from filing the suit by his own act and conduct?OPD
5. Whether the plaint is not properly valued for the purposes of court fee and jurisdiction?OPD.
6. Whether the pu9blication in question is based on true and bona fide comment on a matter of public interest and is an honest expression of opinion made in good faith for the good of the public?OPD.
7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence, decreed the suit of the plaintiff/respondent herein. Now the defendants/appellants herein, being aggrieved therefrom, have instituted separate Regular First Appeals, before, this Court, wherein they assail the findings recorded, in its impugned judgment and decree, by the learned trial Court.

6. This Court would proceed to validate, the, verdict pronounced by the learned trial Court, upon, firm evidence, making candid upsurgings, vis-a-vis, the defendants/appellants herein, with, an *animodefamandi* hence proceeding to print libelous material, borne in Ex.P-3, in the newspaper concerned. Contrarily, for exculpating, the apt tortuous liability, arising from the defendants, purportedly committing, the, tort, of, libel, (a) they were enjoined to adduce evidence, vis-a-vis, the libelous item(s) being truthful, and, it, being published after theirs thoroughly recoursing, apt incisive verifications, of truth, vis-a-vis, all the narratives borne therein, (b) besides were also enjoined to adduce cogent evidence, in display, of, the purported libelous item(s), rather standing published in good faith, and, for public good.

7. The plaintiff in discharge of the onus cast, upon, him, vis-a-vis, the libelous items borne, in Ex.P-3, emanating from or being engendered, by an active *animodefamandi,* reared against him, by the defendants, (a) proceeded to step into the witness box, and, in his deposition, borne in his examination-in-chief, he has denied, the, truth, of, all the narratives borne in Ex.P-3, (b) and, had also voiced therein, that, his transfer, was, in pursuance, to the norms appertaining, to, transfer, of, public officers, (c) besides has made a candid testification therein qua his being, a, Senior IAS Officer, and, his holding various responsible positions. He has hence made strivings, to make communications therein, vis-a-vis, his with integrity, honesty, and, efficiency, and, without any adverse remarks being borne in his ACR concerned, rather serving the Government of Himachal Pradesh, in, various capacities, (d) and, the libelous material being wholly untruthful, rather, it, lowering his esteem, and, reputation, amongst his colleagues, and, in society, (e) besides belittling his caliber and acumen, as an able administrative officer. He was subjected, to, a thorough incisive cross-examination by the counsel for the defendants, and, therein he has denied, qua his intentionally, omitting to engage the services, of the ablest senior lawyers, for, hence defending the State, in certain cases, and, he has further denied qua his holding membership of RSS, as long as, he continued to serve, in the government. The testification rendered, by the plaintiff, is, meted corroboration by the testifications, of PW-3, and, of PW-4.

8. The defendant(s) in proof of the contention(s) as, reared in the written statement, and, appertaining to the plaintiff, illegally withdrawing a sum of Rs.20 lacs, as, medical reimbursement, in the name of his brother, through DW-1, rendered testification(s), in consonance therewith, and, hence maintain qua the aforesaid narratives, borne in Ex.P-3, rather being truthful. However, both their contention(s), and, their evidence, and, as borne in, the, self serving testification of DW-1, in support thereof, rather stand omnibusly belied, by documentary proof being adduced, qua the "Bhabhi" of the plaintiff, serving as a government employee, and, hers securing releases, of, medical reimbursement, comprised in a sum of Rs.10 lacs, and, thereupon, the aforesaid medical reimbursement, markedly holds no connectivity with the plaintiff. The effect thereof is qua the apt defence, of, truth, reared, vis-a-vis, the afore made narratives, borne in Ex.P-3, is hence eroded, (a) and, when hence imputations, of financial delinquency are falsely made, vis-a-vis, the plaintiff, the concomitant effect thereof, is, obviously qua the reputation, and, esteem, of, the plaintiff, in, society, rather being lowered. Further corollary thereof, is, the defendants' propagation, in the written statement, and, rendering, of, testification(s) in concurrence therewith, qua the aforesaid material being published, after, verification of truth thereof, and, it being published, for public good, and, in good faith, also hence being rendered omnibusly falsified. In aftermath, the plaintiff, was, in the defendants with an evident *animodefemandi*, hence, printing the libelous material, hence *entitled* to stake computation, of pecuniary damages, as, aptly decreed, vis-a-vis, him.

9. The other part of the narratives, borne in Ex.P-3, are comprised in the factum of the plaintiff, being, a member of the RSS, (a) and, his failing to engage efficient, and, ablest lawyers, for, defending the government cases, before, the courts of law, (b) and, his transfer being made, at the behest, of, dissidents within the ruling regime, (c) and, predominantly, the, then Chief Minister, hence, side lining him, for, unsettling his grip, vis-a-vis, the administrative step up, of the times. The plaintiff, has, in his testification, corroborated by PW-2 and PW-3, rendered echoings qua his serving, the, government with efficiency, integrity and honesty, and, no adverse entries, during, his long span of service with the government, being borne in the ACRs concerned. The aforesaid statement also merits vindication, (d) given the defendants not placing on record any ACRs, appertaining to the plaintiff, and, theirs making bespeakings, vis-a-vis, the malignancy, of, the plaintiff, and, in his hence ably, and, honestly rather discharging the duties, as, appertaining to his public office. Dehors the above, the defendant could exculpate, the, computation of pecuniary damages, visited, upon them, upon, theirs establishing, (e) that the afore libelous narratives, borne in Ex.P-3, being fair, and, being in public good, and, publication(s) thereof being preceded by close scrutiny, qua truth thereof. Defendant Vijay Puri, during, the course of his examination-in-chief, tendered his affidavit, wherein, he has rendered echoings qua the apt reimbursement, of, the bills being rather discussed to be made, only upon, the plaintiff exerting influence, given, his thereat, holding the prime post, of, Principal Secretary, to the Chief Minister. Further, he made echoings therein qua many objections being raised but ultimately the bills being cleared. However, he has not been able to make, any disclosure therein, (a) that, the aforesaid releasing, of, reimbursements, towards medical bills, rather occurring, despite, theirs being proscribed to be releasable to the apt claimants, (b) and, theirs being merely released by the officer concerned, upon, the plaintiff exerting pressure, upon, the official concerned, (c) evidence whereof, was, comprised in the official concerned, stepping into the witness box. However, the defendants,w ere, unable to adduce the aforesaid evidence. Therefore, it is concludable, that, the defendants without caring, to, ascertain the truth, of the apt therewith narratives, as, borne in Ex.P-3, theirs rather with utter recklessness, and, with a patent *animodefamandi,* ensuring its publication, in the apt newspaper, (d) thereupon, the estimation and esteem, of the plaintiff, being lowered in the public, and, amongst his friends, and, colleagues, as testified by PW-2, and, PW-3.

10. Be that as it may, DW-1, on his being subjected to cross-examination, has acquiesced to, a suggestion qua the State Government instituting, a criminal complaint against him, vis-a-vis, the matter borne in Ex.P-3, and, thereafter it being withdrawn, at, the behest of the, then Chief Minister. He has also made voicings therein qua his making, a, request to the then Chief Minister, to withdraw, the apt criminal complaint, as, anvilled upon Ex.P-3. Even he has conceded qua his making the apt application, for withdrawal, of the criminal complaint, arising, from publication of Ex.P-3, to, the then Chief Minister. The effects thereof, qua the defendant, given his not holding, the relevant defence, to face the apt criminal charge, for, his committing, the, apt offences, under, the Indian Penal Code, his hence making the aforesaid endeavour, (i) thereupon, the propagation made by him, in his affidavit qua his after verification, and, in public good, rather ensuring the publication, of Ex.P-3, in the relevant newspaper, also, naturally foundering, (ii) rather it being evident qua his hence, holding, the apposite*animodefamandi*, in, publishing Ex.P-3. He has also admitted an apt suggestion, that, Mohinder Singh, the then PWD Minister, not, making any press statement bearing concurrence with the news item, borne in Ex.P-3, and, nor Mr. Praveen Sharma, making any apt press statement. In his cross-examination, he also proceeds, to acquiesce, to a suggestion qua his not going, through, the proceedings, as occurred on the relevant date, in, the Himachal Pradesh Legislative Assembly, whereat, the former Chief Minister Shri Virbhadra Singh hence made statements rather carrying imputations, vis-a-vis, the plaintiff qua his being, a, member of RSS. The effect thereof, is, qua the defendants' exculpatory contention, vis-a-vis, Ex.P-3 being printed after due verification qua its truth, rather not holding any veracity, with, a further concomitant effect, qua Ex.P-3 being neither published in public good nor in good faith, rather its publication being construable, to, stand sparked by *animodefamandi*.

11. The learned counsel appearing for the respondents, has contended with much vigour, before, this Court that in forming the aforesaid conclusion, (i) that, unless the apt purported libelous material, is cogently proven, to be published in public good, and, in good faith, and,, its publication, being preceded, by, a thorough verification, vis-a-vis, its truth, the, defendants being amenable, to, be beset with a decree of damages, (ii) whereas, hereat with evident wants thereof, rather enabling this court, to compute damages, arising from hence, proven libel, vis-a-vis, the plaintiff, this Court, is, enjoined, to, draw succor, from, the verdict of the Hon'ble Apex Court, reported in ***R. Rajagopal alias R.R. Gopal and another vs. State of Tamilnadu and others***, reported in ***(1994) 6 SCC 632***, the relevant portion thereof stands extracted hereinafter:-

> "(3) There is yet another exception to the rule in (1) above-indeed, this is not an exception but an independent rule. In case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their officials duties. Tis so even where the publication is based upon facts and statements which are not true, unless the officials establishes that the publication was made (by the defendant) with reckless disregard for truth. IN such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable to damages. It is equally obvious that in matters not relevant to the discharge of his duties. The public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It is needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and

legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule."

The espousal, is accepted, given the afore decision, hence, satiating his submission.

12. During, the pendency of the instant appeals, before this Court, the appellants/defendants instituted an application, (a) borne under the provisions of Order 41, Rule 27 of the CPC, application whereof bears CMP No. 2297 of 2018, in, RFA No. 152 of 2008, (b) wherein they sought leave of the court, to place on record, the, apt proceedings, drawn, on the relevant day, in, the H.P. State Legislative Assembly, wherein, the former Chief Minister Virbhadar Singh, has made reference, to the plaintiff, qua his being member of RSS, (c) thereupon, the defendants/appellants herein hence make strivings, that Ex.P-3 being hence published in good faith, and, for public good, and,its publication being preceded by a thorough verification, of, the facts appertaining therewith. Even though, the aforesaid endeavour, even if belated, may be vindicable by this Court, importantly, when on the apt leave being granted, for its being permitted to be tendered, in evidence, it, may be facilitative, for, this Court, to, render firm findings, upon, the apt issue. However, with the printing of Ex.P-3, occurring on 2nd December, 2001, and, whereas the proceedings, wherein, the apt reference, is, made by the former Chief Minister Shri Virbhadar Singh, vis-a-vis, the plaintiff being a member of the RSS, rather standing drawn much prior thereto, (i) thereupon, when the aforesaid proceedings were available to be adduced, as evidence before the learned trial Court concerned, yet theirs remaining unadduced thereat, (ii) rather with DW-1 in his cross-examination, making apt acquiescence, to, suggestion(s) qua his, not, from the apt proceedings, hence verifying, the, truth, of, narratives borne in Ex.P-3, (iii) thereupon, per se with his conceding qua hence the narratives borne in Ex.P-3, being falsely printed, for want of, verification of truth thereof, (iv) thereupon, the leave as sought for adduction, into evidence, the proceedings drawn, a year prior, to the printing, of, Ex.P-3 is to be construed to be belated, and, a sheer contrivance, on, the part of the defendants, to untenably, unsettle the grip of the acquiescences, afore made, by DW-1, during the course his being held to cross-examination. Consequently, CMP No. 2297 of 2018 in RFA No. 152 of 2008, is, dismissed.

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

14. In view of above discussion, there is no merit in the instant appeals and they are dismissed accordingly. In sequel, the judgment and decree rendered by the learned District Judge, Shimla, upon, Civil Suit No. 30-S/1 of 2001 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.

Anita Beri ..Petitioner.
Versus
Rakesh Mohindra& others ..Respondents.

CMPMO No. 276 of 2016
Decided on: 03.08.2018

Code of Civil Procedure, 1908- Section 151- Order XVIII Rule 4(1)(c)- Evidence by way of affidavit – Amendment of affidavit – Whether permissible? –Held-No- Trial Court allowing application of defendant for effecting amendment in affidavit containing his examination-in-chief – Petition against – Held, aforesaid rule permits party to withdraw affidavit evidence before commencement of cross-examination – It does not empower Court to permit any amendments therein – Order set aside – Petition allowed. (Para-5).

For the Petitioner: Mr. S.D. Vasudeva Senior Advocate with Mr. Sanjay Dutt Vasudeva, Advocate.
For the Respondents: Mr. P.S. Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiff No. 2/petitioner, herein alongwith another another plaintiff, namely, Smt. Anita Sood, has filed a civil suit before the learned Trial Court, for, rendition of a decree of declaration against the defendants/respondents No. 1 & 2, herein, and viz-a-viz the suit property. Apparently, the suit has progressed up to the stage of recording of defendants' evidence, on, the relevant issues.

2. The learned Counsel appearing for the defendants contended qua extantly, the learned trial Judge, rather permitting the defendants, to, adduce evidence on the relevant issues. However, before the defendants could proceed to take the necessary steps for adducing their evidence on the relevant issues, they, preferred an application, cast under the provisions of Section 151 of the Code of Civil Procedure, whereunder they sought leave of the Court, to amend the affidavit instituted, on 24.06.2014,before the learned trial Court, for theirs' hence making averments therein, rather bearing consonance with the verdict pronounced by the Hon'ble Apex Court upon S.L.P No. 29621/2014. The learned trial Judge had accepted the contention of the learned Counsel, for the defendants, and, had proceeded to allow the aforesaid application. The petitioner, being aggrieved therefrom, has hence motioned this Court through the instant petition.

3. The learned Counsel for the appearing parties have been heard, at length.

4. The reasons, as assigned by the learned trial Judge, in making an affirmative order, upon, the apposite application, is, grooved in the afore-reared contention cast in the apposite application, besides is grooved in the factum that with the relevant affidavit, in respect whereof, an amendment was concerted, being not, standing yet, tendered into evidence, by the witnesses concerned hence stepping into the witness box, thereupon rather, with it merely existing on file, concomitantly, it being permissible, for him to proceed to allow the application. Apparently, the learned Trial Judge has anchored his reasonings, upon, the mandate borne in Order XVIII Rule 4 ,1(c) of CPC, provisions whereof stand extracted hereinafter.

> "A party shall however have the right to withdraw any of the affidavits so filed at any time prior to commencement of cross-examination of that witness, without any adverse inference being drawn based on such withdrawal:
>
> PROVIDED that any other party will be entitled to tender as evidence and rely upon any admission made in such withdrawn affidavit.]"

5. However, any dependence thereupon, by the learned trial Judge is blatantly fallacious, as, even thereunder, a, mere liberty is afforded to the litigant concerned, to, seek permission to withdraw, any, of the affidavit(s), as, may be instituted, permission whereof, being afordable only prior to the commencement of cross-examination of the witnesses' concerned, yet no statutory empowerment, is, bestowed upon Courts, to, permit any amendments therein. Consequently, the aforesaid provision also does not bear out, the reason assigned by the the learned trial Judge, in his, making an affirmative order upon the defendant's application. In sequel, the reason assigned by the learned trial Judge, is, perverse, and, requires it being quashed and set aside. However, the defendants are at liberty to make an appropriate application in accordance with law, before the learned trial Judge, for the relevant purpose. In view of the above, the petition is allowed. Pending applications, if any also stand disposed of.

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

ICICI Lombard General Insurance Company Limited ...Appellant
Versus
Reena Devi and others ...Respondents

FAO(MVA) No. 317 of 2015
Decided on: September 4, 2018

Motor Vehicles Act, 1988- Section 166- Motor Accident – Death – Application- Compensation – Assessment - Claims tribunal assessing monthly income of deceased at Rs.6,000/- per month and granting increase of 50% towards future prospects – Tribunal also awarding Rs.1 lac for loss of consortium, and Rs.25,000/- towards funeral expenses – Accident taking place in 2011 – Liability imposed on insurer – Insurer in appeal and challenging award – Held, Claims Tribunal in absence of any evidence, went wrong in assessing monthly income of deceased at Rs.6,000/- and also in awarding 50% increase towards future prospects and compensation under conventional heads – Monthly income of deceased assessed at Rs.4,600 per month @ Rs.151 per day, 40% increase given towards future prospects – Compensation under conventional heads i.e. loss of consortium, funeral expenses etc. also modified in tune with ***National Insurance Co. Ltd. Vs. Pranay Sethi, AIR 2017 SC 5157*** – Appeal partly allowed – Award modified. (Paras- 8, 11, 13 and 22).

Cases referred:

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157
Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents : Mr. Ashok Kumar Thakur, Advocate, for respondents No. 1 to 3.
Ms. Anjana Khan, Advocate, for respondent No.4.
Mr. AvinashJaryal, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

CMP No. 7868 of 2018

By way of instant application, applicant-Leela Devi, who is mother of the deceased Sonu Kumar, has sought her impleadment as respondent No.5. Learned counsel for the appellant states that he does not intend to file reply to the application and has no objection in case application is allowed and applicant is arrayed as respondent No.5 in the present appeal. Learned counsel for the appellant invites attention of the Court to para-31 of the impugned award, wherein aforesaid person has been held entitled to Rs.3,00,000/- being mother of deceased and a first class legal heir, however, it seems that her name was not added in the memo of parties in the Award.

2. Accordingly, the application is allowed. Applicant-Leela Devi is arrayed as respondent No.5 in the present appeal. Registry to carry out necessary corrections in the memo of parties. Application stands disposed of.

FAO No. 317 of 2015

3. By way of appeal at hand, appellant has challenged Award dated 17.1.2015 passed by Motor Accident Claims Tribunal(III) Shimla, H.P. in MAC Petition No. 141-S/2 of 2012, whereby compensation to the tune of Rs. 15,12,000/ - has been awarded in favour of the claimants-respondents No. 1 to 3 and one Smt. Leela Devi (now arrayed as respondent No.5) alongwith interest at the rate of 7.5% , from the date of petition till the date of realization.

4. Facts of the case, as emerge from the record are that one Sonu Kumar, aged 31 years, husband of respondent No.1 and father of respondents No.2 and 3, died in a motor vehicle accident on 22.10.2011 at Kholgali towards ChhailaMor involving Pick-up bearing registration No. HP-63A-0683, owned and being driven by respondent No. 4 Ajay Kumar, which was insured with the appellant-Insurance Company. It is alleged in the claim petition filed by respondent No. 1 to 3 that after purchasing readymade garments at Shimla, deceased Sonu Kumar hired the above mentioned vehicle, which was being driven by respondent No.4. Due to rash and negligent driving on the part of respondent No.4. Vehicle in question fell down the road resulting into death of Sonu Kumar on the spot. It is alleged that deceased, who was 31 years of age at the time of accident, was earning Rs.20,000/- per month and as such compensation to the tune of Rs.20,00,000/- was sought by respondents No. 1 to 3.

5. Respondent No.4, while resisting the claim petition, admitted the factum of hiring of the vehicle by Sonu Kumar, however, allegations of rash and negligent driving were denied by the aforesaid respondent.

6. Appellant-Insurance Company, while resisting the claim petition, took preliminary objections of maintainability, petition being bad for non-joinder of parties and vehicle being plied in violation of the terms of the insurance policy, driver of the vehicle not having a valid and effective driving licence and further that the driver was driving the vehicle under the influence of liquor. Age, occupation and income of deceased were denied. Amount claimed as compensation was stated to be highly exaggerated.

7. Learned Tribunal below, on the basis of pleadings of the parties, framed following issues on 17.4.2013:

> "1) Whether the respondent No. 1 was driving his vehicle No. HP-63A-0683 in a rash and negligent manner and committed accident at Khol-galli towards Chhaila, thereby causing death of Sonu Kumar, as alleged? ... OPP.

2) If issue No. 1 is proved in the affirmative, to what amount of compensation the petitioners are entitled being wife, daughter and son and from whom? OPP

3) Whether the petition is not maintainable, against the respondent in the present form, as alleged?OPR-1&2

4) Whether the petition is bad for non-joinder of necessary parties, as alleged? OPR-2.

5) Whether the respondent No.1 was plying the vehicle in question against the terms and conditions of the policy? If so its effect? .OPR-2.

6) Whether the respondent No.1 was not having valid and effective driving licence at the time of driving of the vehicle when it met with an accident, as alleged, if so its effect? ... OPR-2.

7) Whether the respondent No.1 was driving the vehicle under the influence of liquor on the day of accident, as alleged, if so its effect? ... OPR-2.

8) Relief."

8. Learned Tribunal below, on the basis of evidence led on record by the respective parties, allowed the petition and awarded a sum of Rs. 15,12,000/- alongwith interest at the rate of 7.5% per annum, i.e. Rs.13,87,200/- on account of loss of income/dependency after applying multiplier of 17, Rs.1,00,000/- under the head of loss of consortium, Rs.25,000/- under the head of funeral expenses. The amount of compensation has been apportioned amongst the claimants and respondent No.5 in the following manner i.e. Rs.5,12,000/- to respondent No.1, Rs.3,50,000/- each to respondents No.2 and 3 and Rs.3,00,000/- to respondent No.5.

9. Being aggrieved and dissatisfied with the compensation awarded by the learned Tribunal below, appellant-Insurance Company has approached this court in the instant proceedings, praying therein for setting aside the award.

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

11. As per the claim put forth by respondents No.1 to 3, deceased Sonu was earning Rs.20,000/- per month, however, respondent No.1, while appearing as PW-1 deposed that her husband was earning Rs.15,000/- per month. It is an admitted fact that no evidence was led on record to prove income of the deceased. The learned Tribunal below has taken the income of the deceased at Rs.6,000/- per month. Though respondent No. 1 has not mentioned the age of the deceased in the claim petition but in the post-mortem report age of deceased has been shown as 33 years and as such, multiplier of 17 has been applied by the learned Tribunal below. While computing the loss of dependency, the learned Tribunal below has taken the income of deceased at Rs.9,000/- after granting an addition of 50% (Rs.6000+Rs.3000) and after deducting 1/4th amount towards self-expenses, the learned Tribunal below has calculated total loss of dependency at Rs.81,600/- per annum (Rs.6800 x 12).

12. In this regard, learned counsel representing the appellant-Insurance Company has drawn the attention of this court to the fact that in the year 2011, when accident in question took place, income of deceased could be taken at Rs.4600/- per month only since the rate of daily wages at the relevant time was Rs.151/-. Learned counsel for the appellant-Insurance Company further stated that the addition of 50% made by the learned

Tribunal below to the income of the deceased is also not correct and same ought to have been 40%.

13. Having perused the law laid down by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, this court is persuaded to agree with the contention of 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 the learned counsel representing the appellant-Insurance Company 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."

14. After weighing the rival contentions vis-à-vis law laid down in **Pranay Sethi**, this court finds that the income of the deceased has wrongly been taken at Rs.6,000/- per month in the absence of any evidence having been led, except the bald statement of PW-1 and as such, same deserves to be taken at Rs.4600/- per month. Similarly, an addition of 50% to the income of deceased has wrongly been made, which ought to have been 40%. As such, this Court deems it fit to modify the amount awarded under this head as under:

Income of the deceased	= Rs.4600/- (Rs.151(daily) x 30= Rs.4530 or Rs.4600
Addition of 40%	= Rs.4600 x 40% = Rs.1840/-
Total income	=Rs.6440/-
1/4th Deduction	= Rs.6440/- x ¼ = Rs.1610/-
Net Income	=Rs.4830/- per month (Rs.57,960/- per annum)

15. Now, so far as question of multiplier is concerned, though the learned counsel representing the appellant-Insurance Company has contended that same ought to have been 16 as per **Sarla Verma** case, but this court deems it fit to uphold the multiplier applied by learned Tribunal below, which has been applied as per Schedule II of the Act. Therefore, the total loss of dependency would come to Rs.57960x17= Rs.9,85,320/-.

16. So far grant of consortium to respondent No.1 on account of death of her husband is concerned, learned Tribunal below has awarded an amount of Rs.1,00,000/- under the aforesaid head which is in view of the law laid down by the Hon'ble Apex Court in **Pranay Sethi**, ought to have been Rs.40,000/- and as such, this Court deems it fit to modify the amount awarded under the head of loss of consortium to Rs.40,000/- and as such, award under challenge is further modified to the extent of grant of loss of consortium.

17. Under the head of funeral charges also, this court is of the view that amount has been awarded on higher side, which deserves to be modified and as such, same deserves to be modified to Rs.15,000/- instead of Rs.25,000/-.

18. Learned counsel for the respondents No.1 to 3 have raised another issue i.e. no amount has been granted under the head of loss of estate and as such this Court also deems it fit to grant an amount of Rs.15,000/- under the head of 'loss of estate'. Otherwise also, the Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, has held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. 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."

19. Consequently, in view of aforesaid modification made herein above, respondents No.1 to 3 and 5 are held entitled to following amounts under various heads:

1.	Loss of dependency	**Rs.9,85,320/-**
2.	Loss of consortium	**Rs.40,000/-**
3.	Loss of estate	**Rs.15,000/-**
4.	Funeral charges	**Rs.15,000/-**
	Total	**Rs.10,55,320/-**

20. The amount shall be apportioned amongst respondents No.1 to 3 and 5, as under:

1. Respondent No.1 =Rs.3,55,320/-
2. Respondents No.2 and 3 =Rs.2,50,000/- each
3. Respondent No.5 = Rs.2,00,000/-

21. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld.

22. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award dated 17.1.2015 passed by Motor Accident Claims Tribunal(III) Shimla, H.P. in MAC Petition No. 141-S/2 of 2012, is modified to the above extent only.

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

Karan Mattoo .....Petitioner

Versus

Himachal Pradesh University and others .....Respondents

CWP No. 1999 of 2018
Decided on: 04.09.2018

Constitution of India, 1950- Articles 14, 15 and 226- Admission to MBBS and BDS Courses – 'Kashmiri Migrant' – Who is? – Petitioner seeking admission in MBBS/BDS course(s) in colleges situated in State against quota of 'Kashmiri Migrants' – Prospectus defining 'Kashmiri Migrant' as person forced to leave Jammu & Kashmir due to terrorism

and forced to reside or rehabilitate in other parts of country – Prospectus requiring candidate to produce certificate on prescribed proforma, issued by District Magistrate of area where he is residing after migration – Petitioner not annexing such certificate - In his online application, petitioner seeking admission against General Category Seat(s) – Petition dismissed. (Paras-2 & 5).

For the petitioner	Mr. Kartik Kumar, Advocate.
For the respondents:	Mr. Neel Kamal Sharma, Advocate for respondents No. 1 and 3. Mr. Narinder Guleria and Mr. Vikas Rathore, Addl. A.Gs for respondents No. 2 and 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Reply stands filed, which is taken on record.

2. The petitioner claims himself to be a Kashmiri migrant, which in terms of Item No. 11(vii) of the prospectus, Annexure P-2 'means a person forced to leave Jammu and Kashmir due to terrorism and forced to reside or rehabilitate in other parts of the country'. In Medical/BDS colleges situated in the State, one seat is reserved in MBBS course, whereas, two in BDS course. In order to seek admission against the said seats, a candidate is required to produce the certificate on the prescribed format Appendix A-10 to the prospectus duly issued by the competent authority i.e., District Magistrate/Deputy Commissioner of the area where on migration he/she is residing.

3. The grouse of the petitioner as brought to this Court in this writ petition, in a nut-shell, is that though he is a Kashmiri migrant, however, denied admission against the seats reserved for this category in MBBS/BDS course. His further complaint is that one seat reserved for this category in BDS course has been de-reserved and shifted to the MBBS course and now two candidates have been admitted from this category in MBBS course, whereas, one in BDS course.

4. Mr. Neel Kamal Sharma, learned Standing Counsel, on instructions, denies this part of the petitioner's case as according to him, only one candidate has been admitted in MBBS course and two in BDS course as per the Roster of reservation in the prospectus.

5. Otherwise also, in the online application, Annexure P-8, the petitioner had sought admission from the category general (un-reserved), as is apparent from the entries against column No. 31 of this document. No doubt, against column No. 19, he has claimed himself to be a child of J&K migrant, however, he never sought admission from this category. Interestingly enough, the certificate Annexure P-3 reveals that he is permanent resident of J&K State. However, this certificate is not in consonance with Appendix A-10 to the prospectus, as nothing has come therein that he has been declared J&K migrant due to terrorism and residing or rehabilitated in some other part of the country. On this score also, he is not eligible to seek admission against the seat(s) reserved for the category of migrants of J&K.

6. We, therefore, find no merit in this writ 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 SURESHWAR THAKUR, J.

NanheKhan & another ....Petitioners.

Versus

Chattar Jeet Singh ....Respondent.

Civil Revision No. 143 of 2018
Decided on : 5.9.2018

Code of Civil Procedure, 1908- Order XVII Rules 1 & 3 - Closure of evidence – Rent Controller closing evidence of tenants on ground that several opportunities already granted to them- Petition against- Held- Petitioners had taken steps for summoning their witnesses, who either remained unserved or despite service omitted to record their presence – Rent Controller should have directed counsel to take fresh steps and also ordered issuance of notices under Order XVI Rule 12 of Code against absentee witnesses for ensuring their presence, instead ordering closure of evidence – Petition allowed – Order set aside – Rent Controller directed to permit tenants to take fresh steps for ensuring presence of their witnesses and record their evidence. (Paras-1 and 2)

For the petitioners: Mr. Neeraj Gupta, Advocate.
For the respondent: Mr. Naresh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

After closure of the landlord/petitioner's evidence, the respondents/tenants, petitioners herein, had, examined one witness, for, discharging the apt onus, on the relevant issue(s). However, thereafter, the respondents/tenants, petitioners herein, despite, taking steps, for ensuring, effectuation of service, upon, the other respondents' witnesses, could not ensure their presence before the learned Rent Controller, (a) as they remained either un-served, (b) besides one RW namely Sh. Sant Ram, despite, service rather omitting, to, his record appearance before the learned Rent Controller. Exfacie, hence despite the counsel for the respondents/tenants, petitioners herein, making apt strivings,' for ensuring adduction of respondents' evidence, on the relevant issues, the learned Rent Controller concerned, has, ordered for closure of the respondents' evidence, (c) on the per-se flimsy pretext that despite several opportunities being granted to the respondents for producing their evidence, theirs' yet failing to produce their evidence. Reiteratedly, the aforesaid discussion rather discloses qua the respondents', rather not omitting, to, take the relevant steps. However the respondents' witnesses could not either be hence served or despite service, they/he omitted, to record his/their presence, and, thereupon, rather the learned Rent Controller concerned, was, enjoined to direct the counsel for the respondents to take fresh steps, and, also order for issuance of notice, under, Order 16 Rule 12 CPC, upon, the absenting served witnesses, for, the latter hence recording his/their appearance before it, instead, of ordering, for, closure, of, the respondents' evidence.

2. In aftermath, the impugned order, suffers, from a gross perversity and absurdity. Accordingly, the petition is allowed, and, the impugned order is quashed and set aside. The learned Rent Controller is directed to permit the petitioners herein to, after taking the requisite steps, for ensuring the presence of respondents' witnesses, record the apt evidence, on the relevant issues. The learned Rent Controller is further directed to,

pronounce its verdict, upon the apt rent petition, within six weeks, after closure, of, evidence. All pending applications, also stand disposed of.

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

CWPs No.374 of 2014 & 3634 of 2015
Reserved on: 24.5.2018
Re-heard on: 5.9.2018
Date of Decision : September 5, 2018

CWP No.374/2014

Prem Chand Sharma & others ...Petitioners.

Versus

Union of India & others ...Respondents.

CWP No.3634/2015

Smt. Vidya Devi & others ...Petitioners.

Versus

Union of India & others ...Respondents.

Constitution of India, 1950- Article 226- **National Highways Act, 1956-** Section 3D- Four laning of Parwanoo-Shimla National Highway – Writ petition - Courts interference in Survey Plan- Justiciability – Petitioners seeking either complete realignment of proposed four laning of Parwano-Shimla National Highway or substantial changes therein to save some built up constructions at Kandaghat and falling between Kaithlighat-Dhalli-Byepass road – Also challenging order of competent Authority dismissing their objections and representation with respect to Kandaghat-Byepass – Petitioners alleging widening work as illegal for want of permission/clearance from Local Panchayats, Department of Wild Life/ Forest, State Pollution Control Board etc. and also on ground that work would adversely affect ecology and tourism – High Court found (i) Project Proponent obtaining clearances from State Pollution Control Board and Ministry of Environment and Forest, Govt. of India – Notification under Section 3D of Act issued after hearing objections of petitioners - Alignment of road done after considering facts so as to minimize loss and damage to environment, cost of constructions, location and local topography etc. - Latest alignment of road based on objective assessment of material collected by experts – Courts neither experts nor do they have expertise to adjudge suitability of alignment of road - Petition dismissed. (Paras-16 to 23 & 37).

Constitution of India, 1950- Article 226- **National Highways Act, 1956-** Section 3D- Acquisition of land for public purpose – Challenge thereto – Courts interference – Scope- Held, exercise of power under Article 226 of Constitution of India being discretionary must be exercised only in furtherance of interest of justice and not merely for making out legal point- Public interest must outweigh private interest- Wherever Court finds acquisition vitiated on account of non-compliance with some legal requirement, it can award damages on lump sum basis instead of quashing acquisition proceedings. (Para-31).

National Highways Act, 1956- Section 3D- **Land Acquisition Act, 1894**- Section 4- Acquisition of land for public purpose- Objections to acquisition – Nature and scope under two Acts – Held, right of filing objections under Highways Act restricted and limited to right

of claimant whose land stands acquired – This right is restricted to use of land for public purpose unlike general right conferred under Land Acquisition Act. (Para-35).

Cases referred:

Girias Investment Private Limited & another v. State of Karnataka & others, (2008) 7 SCC 53

Rameshwar & others v. Jot Ram & another, (1976) 1 SCC 194

Ramniklal N. Bhutta& another v. State of Maharashtra & others, (1997) 1 SCC 134

SubhashgirKhushalgirGosavi& others v. Special Land Acquisition Officer & others, (1996) 8 SCC 282

Union of India v. Kushala Shetty & others, (2011) 12 SCC 69

Competent Authority v. Barangore Jute Factory & others, (2005) 13 SCC 477

For the Petitioners	:	Mr. B.C. Negi, Senior Advocate, with Mr. Suneet Goel, Advocate, in CWP No.374 of 2014. Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, in CWP No.3634/2015.
For the Respondents	:	Mr. Rajesh Kumar Sharma, Assistant Solicitor General of India, for the Union of India. Ms. Jyotsna RewalDua, Senior Advocate, with MsCharu Bhatnagar, Advocate, for the National Highway Authority of India. Mr. Ashok Sharma, Advocate General, with Mr. Ajay Vaidya, Senior Additional Advocate General; and Ms Rita Goswami, Mr. Adarsh Sharma & Mr. Nand Lal Thakur, Additional Advocates General, for the State.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Since common issues and questions of fact and law are involved, these petitions are being disposed of vide common judgment.

2. In CWP No.374 of 2014 (hereinafter referred to as the First Petition), petitioners, who are residents of Kandaghat, District Solan, Himachal Pradesh, have prayed, inter alia, for the following reliefs:

> "(i) That this Hon'ble Court may kindly be pleased to issue a Writ of Certiorari quashing undated order Annexure P 9 passed by the Competent authority rejecting the representations/objections of the petitioners under National Highways Act, 1956, and direct the Competent Authority to pass fresh order on the said objections/representations filed by the petitioners under the provisions of National Highways Act, 1956. This Hon'ble Court may also be pleased to quash by way of issuance of writ of Certioreri subsequent notification dated 11.9.2013 Annexure P 10 issued under Section 3D of the National Highways Act, 1956.
>
> (ii) That this Hon'ble Court may be pleased to direct Respondents to carry out fresh survey of Kandaghat Tehsil Kandaghat District Solan for the purpose of four laning of Parwanoo Shimla National Highway and ensure that the proposed By Pass i.e. Kandaghat By Pass is constructed in a manner which does not results in demolition of the

properties of the petitioners situated in Kandaghat, by actually constructing the By pass from fromKilometres 115.200 to Kilometres 118.700 rather than constructing the same in the manner as is being done presently."

3. Annexure P-10 (Page-136) is the Notification dated 11.9.2013, issued under Section 3D of the National Highways Act, 1956 (hereinafter referred to as the Act) and Annexure P-9 (Page-134) is the order, rejecting the petitioners' objection with regard thereto.

4. Petitioners in CWP No.3634 of 2015 (hereinafter referred to as the Second Petition), who are residents of Dhalli area, District Shimla, Himachal Pradesh, have prayed, inter alia, for the following reliefs:

"a) That the Respondents may be ordered and directed to consider the claims and objections of the present petitioners as well as all other similarly situated persons hailing from the area in between Kaithlighat to Dhalli and take a fresh decision in the light of submissions made in this Petition and the present proposal and plan for construction of Four Lane road from Kaithlighat to Dhalli through the tunnel and above mentioned villages may kindly be set aside and quashed. They may be directed to produce entire record.

b) That appropriate orders and directions may be issued to the Respondents to afford proper opportunity of hearing to the petitioners and all other similarly situated persons and take a decision for change of survey of four-lanning from Kaithlighat to Shimla and make necessary alterations and modifications so that the main Shimla Town is closely brought on this four-lane road instead of adopting present proposal for the construction of four lane road from Kaithlighat through tunnels via Domechi- Sihunta-Gusan-Shurala-Kamla Nagar (Bhattakuffar) - Chamiana-Dhalli portion.

c) Directions may be issued to the Respondents that they should comply with and act upon the prescribed procedure in letter and spirit in the matter of Environment and all other essential factors keeping into consideration the requirements and needs of Tourism, Forest, Defence, Public Utility and should thoroughly examine the scope of reduction of expenditure as involved and also to examine the point of reduction of distance of road through different survey."

Significantly, here the petitioners do not seek quashing of any particular notification under the Act.

5. In effect, in the first Petition, petitioners desire that road be constructed, as per the original proposal, i.e., from Km. 115.200 to Km. 118.700, instead of Km. 116.780 to Km. 118.130 on the portion commonly known as 'Kandaghat Bypass', so as to save the existing structures owned and possessed by several owners, whereas in the Second Petition, petitioners seek total realignment of the road to avoid demolition of 146 houses on the portion commonly known as 'Kaithlighat-Dhalli Bypass Road', with a suggestion to construct the existing highway, crossing through Shoghi-Tara Devi-Tuti Kandi Bypass, as a four-lane highway.

6. For the purpose of convenience, we discuss the facts, emanating from the first petition. On 27.2.2013, Ministry of Road Transport and Highways, New Delhi, issued Notification, under Section 3A of the Act, proposing to widen as four-lane, the existing National Highway 22 (NH-22) for the section commonly known as 'Solan to Shimla', falling

within the range of Km. 106.000 to Km. 131.000. In April, 2013, villagers, including the petitioners, filed objections thereto, inter alia, suggesting (a) that width of the road be reduced from 45 metres to 30 metres, just as it was so done in the sector from Parwanoo to Solan, (b) road Kandaghat Bypass be realigned, so as to save the existing structures, (c) in any event, a fresh alignment be carried out on the Chambaghat-Kaithlighat sector, so as to avoid the road passing through a busy area.

7. Pursuant thereto, in the month of April, 2013 itself, a meeting took place amongst the officials and the villagers. Also in the month of May, 2013, the site was re-inspected, and after considering all objections, on 11.9.2013, Notification, under Section 3D of the Act, was published.

8. Quite apparently, most of the objections raised by the petitioners, were rejected on 25.7.2013, with the Authority deciding to carry out the work of four-laning of Kandaghat Bypass from Km. 116.780 to Km.118.130 instead of Km.115.200 to Km.118.700.

9. Before this Court, Mr. G.D. Verma and Mr. B.C. Negi, learned Senior Advocates, lay challenge to the actions of the respondents on the following grounds:

(1) Action in widening the road is ex-facie illegal for no clearances/permissions stand obtained from (i) local Panchayat, (ii) Department of Wild Life/ Forest, (c) State Pollution Control Board.

(2) Construction of the proposed road (i) would cause immense loss to (a) flora and fauna, (b) entire ecology, (ii) equally, heritage character of the topography would be damaged, (iii) would adversely affect tourism and lastly (iv) no re-habilitation scheme stands proposed for the benefit of aggrieved parties, for the compensation awarded is grossly inadequate.

10. On the other hand, opposing such submissions, Ms Jyotsna RewalDua, learned Senior Advocate, has argued that (a) objections of the petitioners were squarely dealt with, in accordance with law, (b) construction activity is being carried out squarely in terms and under the provisions of the Act and more specifically after obtaining environmental clearance, despite there being no requirement with thereto, under the Act.

11. Certain facts are not in dispute. In relation to widening of Solan-Kaithlighat road, Notification under Section 3D of the Act already stands issued. Status, with regard to acquisition of land on this sector, as on May, 2018, was as under:

i	Total land required	110.93 hect.
ii	Total Private land to be acquired	34.41 hect.
iii	3(A) Notified	34.41 Hect
iv	3(D) Notified	32.78 hect [notification for 1.63 Hect submitted to NHAI Hq]
v	3(G) Announced	31.32 hect.
vi	Amount of award deposited till date	Rs432.75 Crs,
vii	Disbursement by CALA	Rs.340 Cr

Also, work stands allotted to a contractor, vide communication dated 28.3.2018, in relation to which Agreement dated 11.4.2018 is executed. Total cost of the Project is `598 Crores. Out of km. 106.000 to km. 131.000 of length of the road, subject matter of the present petition is just 1.3 kms. (approximately).

12. Status of acquisition of land, in relation to four-laning of Shimla Bypass Section from Kaithlighat to Dhalli, is as under:

Sl no	Particulars	In Solan Dist	In Shimla Dist	Total in Both Districts
i	Total land required	4.6872 Ha [Pvt land]	125.92 Ha [40.30 Forest land + 85.62 Pvt Land]	130.62 Ha
ii	Total Private land to be acquired	4.6872 Ha	85.62 Ha	90.3072 Ha
	Forest Land	-	40.30 Ha	40.30 Ha
iv	3(D) Notified	4.6872	69.1107	73.7979
v	3(G) Notified	4.6872	69.1107	73.7979
vi	Amount of award deposited till date	38 Crs	567.20 Crs	605.20 Crs
vii	Disbursement by CALA	34	450	484 Crs

13. Even for this sector work stands allotted and the same is in progress.

14. At this juncture, we may take note of certain statutory provisions. The Act was enacted to provide for declaration of certain highways to be the national highways and for matters connected therewith. It's a Central Legislation enacted pursuant to Entry-23 of List-I of the Constitution of India. By virtue of Section 3A, wherever the Central Government is satisfied that for a public purpose, any building/land is required for operation of the National Highway, it may declare its intent to acquire the same. Pursuant thereto, by virtue of Section 3B, person authorized by the Central Government is empowered to inspect the said land/building. Keeping in view the principles of natural justice, by virtue of Section 3C, the owner of such building/land has a right to file objections. With the same being considered, the Central Government is empowered to issue Notification, declaring acquisition of the land as per Section 3D and pursuant thereto, take possession in terms of Section 3E. It is not that no compensation is required to be paid to the owners. Such right vests under the Act and by virtue of Section 3G the amount of compensation is required to be determined by the competent authority and paid to the owner. The amount, so determined, by virtue of Section 3H, is to be deposited with the competent authority, who is duty bound to disburse the same to the rightful claimants/owners. All National Highways are to vest with the Union of India and the Central Government is duty bound to properly maintain the same.

15. Coming to the contentions raised by the learned counsel, we must, firstly, deal with the issue of non-obtaining of statutory permissions under the Environmental Laws of the land.

16. Hence, we must straightway refer to the Notification dated 22.8.2013 (Page-252), in terms of which projects for expansion/widening of National Highways upto the

required limit within which the instant project falls. Such fact is not in dispute. We notice that the Project Proponent has obtained environmental clearances from the Himachal Pradesh State Pollution Control Board, vide communications dated 28.1.2013 and 24.1.2013 (Pages 264 & 266) and the Ministry of Environment and Forests, Government of India, dated 30.8.2013 (Page 255). No other clearances are required in law.

17. We notice that objections of the petitioners, filed under Section 3A of the Act, were duly examined, and rejected with due application of mind. The Authority did comply with the procedure prescribed under Section 3C of the Act and only whereafter, declaration of acquisition of land under Section 3D was issued.

18. To satisfy our conscience, we called for the record for ascertaining as to whether houses/structures of the petitioners could be saved with a minor adjustment or realignment of the project i.e. expansion of the national Highway. We are of the considered view that it cannot be so done, more so for the reason that decision to implement the project on the basis of latest alignment of the track/road is based on objective assessment of the material collected by the experts and it is the body of experts who took such a decision, in public interest, to construct the road from Km. 116.780 to Km. 118.130, instead of Km. 115.200 to Km. 118.700, for if the road were to be constructed as per the original proposal, it would entail huge expense. Also following facts stand considered (a) minimize the loss and the damage to the environment, (b) minimize the cost of construction, (c) account for the geographical locations and local topography, including maintaining gradual gradient, and (d) prevent the road to be taken through deep gorges.

19. Petitioners, possibly cannot, in fact have not alleged any bias or malafides. Also, there is no material on record to rebut the collective wisdom of a body of experts, indicating viability of an alternate route, accounting for all the factors, so considered, while forming final opinion with regard to the situs of the road in terms of latest alignment.

20. We may observe that even though there is no averment of malice in fact or law against anyone of the persons, muchless the respondents, impleaded herein, but even otherwise on this issue, the Apex Court in *Girias Investment Private Limited & another v. State of Karnataka & others,* (2008) 7 SCC 53, has observed that "*There can be two ways by which a case of malafides can be made out; one that the action which is impugned has been taken with the specific object of damaging the interest of the party and, secondly, such action is aimed at helping some party which results in damage to the party alleging malafides.*"

Which in the instant case, we find to be none in existence.

21. Further dealing with similar facts, the Apex Court in *Kushala Shetty (supra)* has observed that

> "25. The plea of the respondents that alignment of the proposed widening of National Highways was manipulated to suit the vested interests sounds attractive but lacks substance and merits rejection because except making a bald assertion, the respondents have neither given particulars of the persons sought to be favoured nor placed any material to prima facie prove that the execution of the project of widening the National Highways is actuated by mala fides and, in the absence of proper pleadings and material, neither the High Court could nor this Court can make a roving enquiry to fish out some material and draw a dubious conclusion that the decision and actions of the appellants are tainted by mala fides."

22. Petitioners have placed on record a Chart (Page-329), indicating comparative disadvantages of the Kandaghat Bypass, highlighting that though road was to be

constructed as per Option No.3, but in fact at the ground level, is being so done as per Option No.2.

23. This fact stands refuted by the Project Proponent, vide affidavit dated 25.7.2017 (Page 332), inter alia, stating that whilst most of the claimants have received their compensation, though road is being constructed as per Option No.3, but the length stands reduced from Km.115.200-118.700 to Km.116.780-118.130. This reduction to the extent of 1.360 km. is in consonance with the permissions accorded by the statutory authorities. Necessity for realigning and reducing the length of the road was only to minimize the damage to public property and protect the "World Heritage Kalka-Shimla Railway Track". What is also stated is that property of the petitioners is situate at around Km.117, hence, it would really not matter as to whether the road commenced from Km.115.200 or Km.116.780, for the said property, falls within the alignment of the road leading upto Km.118.700.

24. Hence, we see no reason to interfere in the said sector.

25. Petitioners in the Second Petition emphasize that widening of the existing road, instead of the proposed new road, would immensely benefit the commuters, taking advantage of the existing infrastructure, including the markets, places of public utility, i.e. Bus Stand, etc. Also, it would reduce or minimize the commercial value and utility of the already developed localities.

26. Well, diminishing value of the property cannot be a ground for challenging construction of a road from another area. And public convenience is a factor which stands considered by the respondents. We also notice that on the Kaithlighat-Dhalli Bypass sector, decision to construct a road through new site was based upon several factors, including intent to decongest the track through the existing settlements, also leading to the international borders of India on the Tibet sector. At this juncture, we may also observe that work for construction of the road already stands allotted and is in progress.

27. We are of the considered view that Notification, acquiring the land/superstructure, and endeavour to take over possession thereof, is only after proper and complete examination of the material collected and collated by the experts. In fact, such decision is that of the experts, considering the technical feasibility of construction from all angles, resultant damage to property, disturbance to the public, safety of road users, geometrics of the road, etc. Proposal mooted by the petitioners, according to the respondents, is technically not feasible. We find no fault in that regard.

28. It is not that petitioners are deprived of compensation, which stands determined in accordance with law, and if anyone of them is aggrieved thereof, they can resort to statutory remedy, which in any case, is not subject matter of challenge before this Court, nor is any particular fact pleaded with respect thereto.

29. We notice that the Act does not envisage rehabilitation of such of those persons whose property, in the shape of superstructure, stands acquired, for under sub-section (7) of Section 3G, factor for determining compensation stands specified. In any event, at the cost of repetition, we clarify, it shall be open for any one of the aggrieved persons to take recourse to such remedies, which they are otherwise entitled to, in accordance with law.

30. Reliance on *Rameshwar & others v. Jot Ram & another,* (1976) 1 SCC 194, in the given facts, is of no consequence, for we do not find the action of the respondents to be illegal, warranting necessity of passing an order with regard to existence of the status as on the date of filing of the petitions.

31. The Apex Court in *Ramniklal N. Bhutta& another v. State of Maharashtra & others,* (1997) 1 SCC 134, in almost similar circumstances, wherein land stood acquired for a public purpose, prescribed certain guidelines to be followed by the Court in interfering with the process of acquisition of land for a public purpose. They being – (a) exercise of power under Article 226 of the Constitution of India being discretionary in nature, (b) which must be exercised only in furtherance of interest of justice and not merely for making out a legal point, (c) public interest must outweigh private interest, (d) wherever the Court finds acquisition to be "vitiated on account of non-compliance with some legal requirement", which the persons interested are entitled to, it can award damages, on lump sum basis, instead of quashing the acquisition proceedings, (e) for quashing of acquisition is not only the mode of redress, (f) balancing of competing interests, must be kept in mind.

32. The grounds can be multiplied, but it is also a settled principle of law that only in the rarest of rare cases, where the action is ex-facie illegal and tainted with malafides, should the Court interfere.

33. The Courts are neither experts nor do they have expertise to adjudge suitability of alignment of a road, which is best left to be decided by the body of experts. {*SubhashgirKhushalgirGosavi& others v. Special Land Acquisition Officer & others,* (1996) 8 SCC 282}.

34. The Apex Court in *Union of India v. Kushala Shetty & others,* (2011) 12 SCC 69, has observed as under:

> "28. Here, it will be apposite to mention that NHAI is a professionally managed statutory body having expertise in the field of development and maintenance of National Highways. The projects involving construction of new highways and widening and development of the existing highways, which are vital for development of infrastructure in the country, are entrusted to experts in the field of highways. It comprises of persons having vast knowledge and expertise in the field of highway development and maintenance. NHAI prepares and implements projects relating to development and maintenance of National Highways after thorough study by experts in different fields. Detailed project reports are prepared keeping in view the relative factors including intensity of heavy vehicular traffic and larger public interest. The Courts are not at all equipped to decide upon the viability and feasibility of the particular project and whether the particular alignment would subserve the larger public interest. In such matters, the scope of judicial review is very limited. The Court can nullify the acquisition of land and, in rarest of rare cases, the particular project, if it is found to be ex-facie contrary to the mandate of law or tainted due to mala fides."
>
> Emphasis supplied.

35. Right of filing objections under the Act is restricted and limited to the right of a claimant whose land stands acquired under the provisions of the Act. Right under the Act is restricted only to the use of the land for the purpose, unlike a general right conferred under the Land Acquisition Act. {*Competent Authority v. Barangore Jute Factory & others,* (2005) 13 SCC 477 (Para-8)}.

36. In the instant case, we do not find any possibility of the petitioners' land being excluded from the process of acquisition. Such land is necessarily required for the public purpose, which stands acquired with the completion of all formalities. It is true that the order, rejecting the objections, does not assign any reason, but then we do not interfere

with such action only on this ground, for we have satisfied ourselves with regard to sufficiency of the material on record.

37. It is true that the severity of pain of displacement is experienced only by the displaced person, as even after rehabilitation or resettlement at another place or colony, an oustee/displaced person is perceived to be an alien for generations. Socio psychological effect of displacement cannot be compensated in terms of money. However, at the same time it is also a hard fact that in larger public interest and for the purpose of betterment of the society and development of the nation, private interests have to give way to larger public interest.

Hence, we find no merit in the present petitions, which are hereby dismissed.

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

Smt. Santosh Devi and others. ....Appellants/Non objectors.
Versus
1. Sh. Hari Singh ....Respondent No.1/Non objector.
2. New India Assurance Company Ltd. ....Respondent No.2/Cross Objector.

CMP(M) No. 622 o 2018 in
Cross-objections No.....of 2018 in
FAO No. 554 of 2017.
Decided on: 7.9.2018

Code of Civil Procedure, 1908- Order XLI Rule 22- Cross-objection- Filing of – Limitation – Commencement – Held, This provision has dual purposes, First to grant time of one month or even such further time as Appellate Court may deem fit to allow and secondly, to put party or his pleader at notice that appeal has been admitted and fixed for hearing – Once such notice served, period of limitation will start running – Post-admission notice made returnable for 15.3.2018, clearly mentioning that case fixed for hearing for 15.3.2018 – Notice served upon cross-objector on 19.1.2018 – Cross objection filed on 2.5.2018 held barred by limitation – Ordered not to be taken on record. (Paras- 4, 7 and 10)

Case referred:
Mahadev Govind Gharge and others Vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 SCC 321

For Appellants/ Non objectors : Mr. P.S. Goverdhan, Advocate.
For respondent No.1/ Non Objector : None.
For respondent No.2/Cross Objector : Mr. Jeevan Kumar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

CMP(M) No. 622 of 2018.

This is an application filed under Section 5 of the Limitation Act for condonation of delay in filing the cross-objections, which are stated to be barred by 94 days.

However, strangely, when this application was taken up for consideration, learned counsel for the cross-objector/Insurance Company, rather than making his submissions praying for condonation of delay in filing the cross objections has argued that there is no need for any condonation of delay in filing the cross objections, as the same are within limitation. On more than one occasion, this Court called upon the learned counsel for the cross objector to make up his mind as to whether he wants to make his submissions for condonation of delay in filing the cross objections or not. Learned counsel for the cross objector has insisted that he shall not be making any submissions for condonation of delay, as the cross objections are within limitation.

2. It is pertinent to mention at this stage that as per averments made in the application for condonation of delay in filing the cross objections, they are barred by 94 days. Learned counsel for the cross objector has argued that summons stood served upon the cross objector-Insurance Company on 19.1.2018, but as it was not mentioned in the said summons so served on the cross objector-Insurance Company on 19.1.2018 that the matter was to be finally heard on a date already fixed by the Court, therefore, there was no question of there being any delay in filing the cross objections, because the limitation for filing cross objections starts running from the date when a notice is served upon the respondent from the Court, wherein it is expressly mentioned that a date has been fixed for the matter to be finally heard and such date is reflected in the notice itself. In support of his contention, learned counsel has relied upon the judgment of Hon'ble Supreme Court of India in ***Mahadev Govind Gharge and others Vs, Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka,*** (2011) 6 SCC 321.

3. No other point was urged.

4. I have heard learned counsel for the cross objector-Insurance Company. It is not in dispute that summons stood served upon the cross objector-Insurance Company on 19.1.2018 and the cross objections have been filed on 2.5.2018, i.e., beyond the statutory period of 30 days', after service of notice upon the party.

5. Order XLI Rule 22 of the Code of Civil Procedure, 1908 provides that any respondent, though he may not have appealed from any part of the decree, may, *inter alia*, file such objections in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time, as the Appellate Court may see fit to allow.

6. Hon'ble Supreme Court of India in Mahadev Govind Gharge's (supra) has held in para 45 as under:-

> *"There appears to be a dual purpose emerging from the language of Order 41 Rule 22 of the Code. Firstly, to grant time of one month or even such further time as the appellate court may see fit to allow; and secondly, to put the party or his pleader at notice that the appeal has been admitted and is fixed for hearing and the court is going to pronounce upon the rights and contention of the parties on the merits of the appeal. Once such notice is served, the period of limitation under Order 41 Rule 22 of the Code will obviously start running from the date. If both these purposes are achieved any time prior to the service of a fresh notice then it would be an exercise in futility to issue a separate notice which is bound to result in inordinate delay in disposal of appeals which, in turn, would be prejudicial to the appellants. A law of procedure should always be construed to eliminate both these possibilities."*

7. As per the said judgment of Hon'ble Supreme Court language of Order 41 Rule 22 of the CPC has dual purpose, i.e., firstly to grant time of one month or even such

further time as the Appellate Court may see fit to allow and secondly to put the party or his pleader at notice that the appeal has been admitted and is fixed for hearing. Hon'ble Supreme Court has held that once such notice is served, period of limitation will start running.

8. In the present case, the appeal was admitted on 29.12.2017 and post admission notices were issued to the respondent returnable for 15.3.2018. The fact that the appeal stood admitted by the Court and actual date notices were sent to the respondent is self speaking that notice of admission stood issued, as also date for hearing to decide the right of the parties stood fixed by this Court at the time of admission of the appeal. The contents of notice issued to the cross objector-Insurance Company made it aptly clear that the case was fixed by this Court for hearing of the appeal on 15.3.2018 or on any subsequent date. The relevant portion of the notice is reproduced herein below:-

"IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA-I.

(Order 41, Rule 14 of Act No. V of 1908, Chapter XVIII Rule 1 & 2)

(APPELLATE CIVIL JURISDICTION)

F.A.O. (MVA) 554/2017

Santosh Devi &ors. ...Appellant(s).....

Versus

Sh. Hari Singh &ors. ...Respondent(s).....

Appeal from the Judgment/Order of the Court of Ld. Motor Accident Claims Tribunal(I), Solan, Distt. Solan, (H.P), Dated 31.07.2017

R-1 Sh. Hari Singh, son of Amar Singh, resident of Village Androali, Post Office Bhojnagar, Tehsil and District Solan, H.P.

(Owner cum Driver of Vehicle Maruti Car No. HP-14D-0529)

R-2 The New India Assurance Company Ltd. Through its Branch manager, The Mall Solan, Tehsil and District Solan, H.P.
(Insurer of Vehicle) Maruti Car No. HP014D-0529)

Take notice that an appeal from the award dated in the case 31.07.2017 has been presented by Sh.Pratap Singh Goverdhan Advocate(s) and registered in this Court that the 15th March 2018(15.03.2018) (A.D.) has been fixed by this Court, for hearing of the appeal and that the case will be laid before the Court on such date or on any subsequent day.

If you do not engage counsel, notice of any alternation in the date fixed for the hearing of this appeal will be given to you by Registered post. You should inform Deputy Registrar, or this Court, within one month of the receipt of this notice of appeal, of your address for service during this appeal. If you fail to furnish such address, your address, as contained in this notice of appeal which is the address given in the Memo of appeal will be deemed to be your correct address and all further notice posted to the latter addresses by Registered post will be deemed to be sufficient for the purpose of the appeal.

If no appearance is made on your behalf by yourself, your counsel or by someone by law authorized to act for you in this appeal, it will be heard and decided exparte in your absence.

Given under my hand and the seal the Court this 10th January, 2018.

Encls: Copy of appeal attached."

9. The contents of notice thus clearly and categorically demonstrate that in the notice issued by this Court (which was served upon the respondent/cross-objector on 19.1.2018), it clearly stood mentioned that this Court had fixed the case for hearing on 15.3.2018 or any other subsequent date.

10. As from the date of receipt of notice in which the date of hearing was also mentioned, the cross objections have not been filed within the statutory period of 30 days. Despite there being an application for condonation of delay, the same has not been pressed by learned counsel for the cross objector and he has strenuously argued that there is no delay in filing of the cross objections. In my considered view, the submissions raised, in this regard, by learned counsel for the cross objector are totally misconceived. As is evident from facts enumerated herein above, by no stretch of imagination, it can be said that cross objections filed by the cross-objector are within limitation, yet the application filed for condonation of delay has not been pressed by the learned counsel.

In these circumstances, this Court has no option but to dismiss the prayer made by learned counsel for the cross-objector/Insurance Company to take the cross objections on record. Similarly, application filed under Section 5 of the Limitation Act is also dismissed as not pressed.

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

State of H.P. .....Appellant.
Versus
Hem Raj .....Respondent.

Cr. Appeal No. 420 of 2010
Decided on : 7.9.2018.

Punjab Excise Act, 1914 as applicable to State of H.P.- Section 61(1)(a)- Recovery of country made liquor without licence – Proof – Accused tried for offence on allegations of carrying three cartons (36 bottles) of country liquor without permit at mid night – Trial Court acquitting accused on ground that cartons as produced before Court not bearing any seal and case property thus not linked with him – Appeal against – Held, seizure memo clearly indicating separating, seizing and sealing of three bottles of liquor by Investigating Officer and sending of same to CTL – Report of expert not disputed – Non-joining of independent witnesses understandable as occurrence took place at midnight – Evidence on record proves conscious and exclusive possession of accused qua three liquor bottles (sample bottles) – Appeal allowed – Acquittal set aside – Accused convicted of said offence. (Paras- 10 to 12).

For the Appellant: Mr. Hemant Vaid, Additional Advocate General with Mr. Vikrant Chandel, Deputy Advocate General.

For the Respondent: Mr. Rajiv Rai, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh, against, the impugned judgment, of, 19.10.2009, rendered by the learned Judicial Magistrate, Ist Class, Arki, Tehsil Arki, District Solan, H.P., in criminal case No. 31/3 of 2009, whereby the respondent (for short 'accused') stood acquitted by the learned trial Court, for, an offence punishable under, Section 61(1) (a) of Punjab Excise Act (as applicable to State of H.P.).

2. Facts in brief are that on 17.9.2008, at about 11.00 p.m. H.C Amrender Singh alongwith C. Surjeet Singh and H.H.G Ramesh Chand were present at Kunihar Bazar, Hatokot in connection with routine patrolling duty. On 18.9.2008 at about 12.30 a.m., at Kunihar Bazar, accused was found to be carrying three carton boxes on his head. Accused was stopped by the police and was asked about his whereabouts, to which he told his name to be Hem Raj. The boxes carried by the accused were checked and on checking it was found that each box was containing 12 bottles each of country made liquor marka "Himachal No.1" of 750 ml each. In total the accused was found in possession of 36 bottles of country made liquor Marka "Himachal No.1". Out of 36 recovered bottles, 3 bottles were separated by the police for chemical analysis and thereafter were sealed with seal impression "A". Rukka was sent to Police Station, Arki, on the basis of which FIR No. 75/008 was registered. Spot map was prepared. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused was charged by the learned trial Court for his committing, an, offence punishable, under, Section 61(1) (a) of Punjab Excise Act, to which he pleaded not guilty, and, claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded, wherein, he pleaded innocence, and, claimed false implication. However, he did not choose to lead any evidence, in, defence.

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

6. The learned Deputy 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 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 apt recovery memo is borne in Ex. PW-1/B, and, thereunder recovery of 36 bottles of country liquor, hence, stood effectuated, from, the conscious and exclusive possession of the accused. However, no disclosure is borne in Ex.PW-1/B, qua the seizing officer, in, contemporaneity to his effectuating recovery thereunder, of, three carton boxes, carrying therewithin 36 bottles of liquor, rather also embossing apt seals thereon. Consequently, at the time of their production in Court, they were not carrying any seals, hence, the prosecution is obviously rather disabled, to, connect the recovery thereof, made under, Ex.PW-1/B vis-a-vis the stage of its production in Court. Reiteratedly, the embossing of seals upon three carton boxes, was, imperative for the prosecution, being facilitated, to, connect the apt recovery made, under, Ex.PW-1/B, vis-a-vis, its production in Court. Reiteratedly, for want thereof, obviously the learned trial Court was enabled, to, conclude, that, the prosecution hence failing, to, connect the apt recovery(s) made under PW-1/B, vis-a-vis, production thereof in Court, besides hence made a firm apt conclusion qua the accused being entitled to acquittal.

10. Be that as it may, a close perusal of recovery memo borne in Ex.PW-1/B, makes a clear revelation qua amongst 36 bottles of liquor carried in three carton boxes, three bottles being separated therefrom, and, theirs being sealed in a cloth parcel, whereon, seal impression(s) carrying English alphabet 'A' stood embossed, and, thereafter under an apt road certificate, borne in Ex.PW-4/C, the aforesaid sample bottles were sent to CTL concerned, and, the Chemical Examiner concerned, under, Ex.PW-5/C hence proceeded, to, make an opinion qua the afore-referred number of sample bottles, of, liquor hence carrying therein alcohol. The aforesaid report of the CTL concerned, is, perse admissible in evidence, in, concurrence with the mandate of Section 292 of Cr.P.C, hence the opinion borne in Ex. PW-5/C, is, both readable besides admissible.

11. At this stage, the learned counsel for the accused has made a vigorous submission before this Court, that, no penal culpability is attracted vis-a-vis the accused, (i) even with respect to three bottles of liquor, in respect whereof, an affirmative opinion was formed by the C.T.L concerned (ii) given the investigating Officer concerned or the seizing officer, not associating independent witnesses, despite, their evident availability, at the site of occurrence, especially when the relevant seizure was made, at Kunihar Bazar. The aforesaid submission is not accepted given (a) the apt seizure occurring at mid night, whereat, it was obviously not possible for the investigating officer concerned, to, associate inhabitants, of, the apt busy locality, in, the apt seizure proceedings (b) the learned defence counsel, not, after the exhibition of report of CTL borne in PW-5/C, in Court, making any endevour for eliciting, from, the CTL concerned, the, seals borne, in, the three sample bottles, for, his therefrom hence establishing qua lack of concurrence vis-a-vis descriptions in respect thereof, as, borne in the seizure memo, with, the one(s) borne therein, (c) wherefrom an inference is sparked qua the learned defence counsel hence acquiescing qua the opinion borne in Ex.PW-5/C, being a valid opinion rendered, by the CTL concerned, vis-a-vis the sample bottles, transmitted qua it, under road certificate borne in PW-4/C, (d) and, his also acquiescing qua carrying(s) of description(s), vis-a-vis, all seal impressions, reflected therein, hence bearing concurrence, with, apt descriptions thereof, occurring in seizure memo borne in PW-1/B.

12. The crux of the above discussion, is, that the appeal is allowed, and, the impugned judgment rendered by the learned trial Court, whereby, it recorded findings of acquittal, qua the accused, stands reversed, and, set aside. Accordingly, the accused stands convicted, vis-a-vis, three sample bottles, hence, for an, offence punishable under Section 61(1) (a) of Punjab Excise Act (as applicable to State of H.P.). Let the accused/convict be produced on 28.9.2018 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 SANDEEP SHARMA, J.

Shriram General Insurance Company Limited ..Appellant
Versus
Smt. Preeto Devi and others ..Respondents

FAO(MVA) No. 367 of 2014
Decided on: September 10, 2018

Motor Vehicles Act, 1988- Section 163-A- Motor accident – Death of driver – Compensation – No fault liability – Deceased dying while driving bus– Legal representatives filing claim application under Section 163-A of Act –Claims Tribunal fastening liability on Insurer - Appeal against-Insurance Company resisting claim on ground that he was negligent in his driving – Held, Plea of negligence cannot be raised by insurer in proceedings under Section 163-A of Act – Reliance on FIR and mechanical report indicating that there was no mechanical defect in vehicle is misplaced – However, award of compensation under 'loss of estate' reduced to Rs.2,500/- as per Second Schedule of Act – Appeal partly allowed – Award modified. (Paras- 10 to 12 and 16)

For the Appellant : Mr. Rakesh Kumar Chaudhary, Proxy Counsel.
For the Respondents : Mr. Virender Chauhan, Proxy Counsel.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal under Section 173 of the Motor Vehicles Act is directed against Award dated 4.7.2013 passed by the learned Motor Accident Claims Tribunal, Chamba Division, Chamba, (HP) in M.A.C. Petition No. 33 of 2012, whereby learned Tribunal below has held respondents No.1 and 2/claimants, (hereinafter, 'claimants') entitled to compensation to the tune of Rs.4,87,000 alongwith interest at the rate of 7.5 percent per annum from the date of filing of the petition i.e. 28.3.2012 till its realisation.

2. Briefly stated the facts as emerge from the record are that the claimants being legal heirs of one Jaipal, preferred a petition under Section 163-A of the Motor Vehicles Act, 1988 (hereinafter, 'Act') before the Motor Accident Claims Tribunal, Chamba Division, Chamba, (HP), seeking therein compensation to the tune of Rs.10.00 Lakh from the appellant-Insurance Company as well as respondent No.3, on account of death of Jaipal. On 10.8.2011, at about 8.40 am, deceased Jaipal died near Village Seri, Pargana Tissa, Tehsil Churah, District Chamba, while driving Vehicle bearing registration No. HP-73-2784 (passenger bus). Claimants claimed that deceased was driving the ill-fated vehicle in a careful and cautious manner. When vehicle reached near Seri, it suddenly developed mechanical defect due to which he lost control over the vehicle and accident took place causing death of deceased Jaipal. Claimants further claimed that at the time of death, deceased was 25 years of age and his monthly income as driver was Rs.3300/-. Claimants being widow and son of deceased prayed for compensation from the appellant-Insurance Company as well as respondent No.3 alongwith interest at the rate of 9% per annum.

3. Respondent No.3 herein i.e. Gurbachan Singh (respondent No.1 before the learned Tribunal below), who is owner of the bus, opposed the claim petition on the ground of maintainability, locus standi and alleged that petition has been filed solely with a view to grab money. Respondent No.3 also denied the most of the contents of the petition for want of knowledge and claimed that amount claimed by the claimants is excessive and imaginary and without any basis. Respondent No.3 also claimed that at the time of accident, vehicle in question was insured with the appellant-Insurance Company, as such, compensation, if any, is payable by the appellant-Insurance Company.

4. Appellant-Insurance Company opposed the claim of the claimants on the ground that deceased i.e. driver of the vehicle was not having a valid and effective driving licence at the time of accident and as such claimants are not entitled for any compensation. Appellant-Insurance Company also claimed that respondent No. 3, owner of the vehicle contravened the provisions of Motor Vehicles Act and Rules as such, committed breach of insurance policy and as such, is not liable to be indemnified.

5. Learned Tribunal below, on the basis of pleading of parties, framed following issues on 1.10.2012:

> "1. Whether deceased Jaipal died due to use of the vehicle bearing No. HP 73-2784 near Village Seri PargnaTissa, Tehsil Churah District Chamba on 10.8.2011? OPP
>
> 2. If issue No. 1 is proved in affirmative, as to what amount of compensation the petitioners are entitled to and from whom? OPP
>
> 3. Whether the driver of the vehicle was not holding a valid and an effective driving licence to drive the same at the relevant time, as alleged, if so its effect? OPR2
>
> 4. Whether the vehicle in question was being driven in violation of the terms and conditions of the Insurance Policy as alleged, if so, its effect thereto? OPR2
>
> 5. Relief."

6. Subsequently, on the basis of evidence led on record by the respective parties, learned Tribunal below, awarded a sum of Rs.4,87,000/- to the claimants, vide impugned award, and also held them entitled to interest at the rate of 7.5 percent per annum from the date of filing petition i.e. 28.3.2012 till the date of realisation. Learned Tribunal below also held that since bus bearing No. HP73-2784 was duly insured with the appellant-Insurance Company vide Ext. R-4 (Policy) and as such, it is liable to indemnify claimants on behalf of respondent No.1. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein for setting aside the impugned award.

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

8. Having carefully perused the material available on record, this Court is not persuaded to agree with the contention raised by Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that claimants, who happen to the legal heirs of deceased driver, were not entitled to compensation under Section 163 of the Motor Vehicles Act. Mr. Thakur, while referring to the evidence available on record made an attempt to persuade this Court to agree with his contention that accident occurred due to rash and negligent driving of deceased and as such, claimants being his legal heirs are not entitled to compensation claimed by them under Section 163A of the Act *ibid*.

9. Hon'ble Apex Court in **United India Insurance Co. Ltd.** versus **Sunil Kumar &Anr**, while answering reference i.e. "*Whether in a claim proceeding under Section 163A of the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act") it is open for the Insurer to raise the defence /plea of negligence? "* has categorically held that in the proceedings under Section 163A of the Act, it is not open for the insurance company to raise defence of negligence on the part of claimant. Following paragraphs of aforesaid judgment can be usefully extracted herein:

> "7. As observed in Hansrajbhai V. Kodala (supra) one of the suggestions made by the Transport Development Council was "to provide adequate compensation to victims of road accidents without going into long drawn procedure." As a sequel to the recommendations made by the Committee and the Council, Section 140 was enacted in the present Act in place of Section 92A to 92E of the Old Act. Compensation payable thereunder, as under the repealed provisions, continued to be on the basis of no fault liability though at an enhanced rate which was further enhanced by subsequent amendments. Sections 140 and 141 of the present Act makes it clear that compensation payable thereunder does not foreclose the liability to pay or the right to receive compensation under any other provision of the Act or any other law in force except compensation awarded under Section 163A of the Act. Compensation under Section 140 of the Act was thus understood to be in the nature of an interim payment pending the final award under Section 166 of the Act. Section 163-A, on the other hand, was introduced in the New Act for the first time to remedy the situation where determination of final compensation on fault basis under Section 166 of the Act was progressively getting protracted. The Legislative intent and purpose was to provide for payment of final compensation to a class of claimants (whose income was below Rs.40,000/- per annum) on the basis of a structured formula without any reference to fault liability. In fact, in Hansrajbhai V. Kodala (supra) the bench had occasion to observe that:
>
> > "Compensation amount is paid without pleading or proof of fault, on the principle of social justice as a social security measure because of ever-increasing motor vehicle acci- dents in a fast-moving society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided un- der Section 140 for no-fault liability and determination of compen- sation amount on fault liability was taking a long time. That mis- chief is sought to be remedied by introducing Section 163-A and the disease of delay is sought to be cured to a large extent by afford- ing benefit to the victims on structured-formula basis. Further, if the question of determining compensation on fault liability is kept alive it would result in addi- tional litigation and complications in case claimants fail to establish liability of the owner of the de- faulting vehicles."
>
> 8. From the above discussion, it is clear that grant of compensation under Section 163-A of the Act on the basis of the structured formula is in the nature of a final award and the adjudication thereunder is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. This is made explicit by Section 163A(2). Though the aforesaid section of the Act does not specifically exclude a possible defence of the Insurer based on the negligence of the claimant as contemplated by Section 140(4), to permit such defence to be introduced by

the Insurer and/or to understand the provisions of Section 163A of the Act to be contemplating any such situation would go contrary to the very legislative object behind introduction of Section 163A of the Act, namely, final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time. In fact, to understand Section 163A of the Act to permit the Insurer to raise the defence of negligence would be to bring a proceeding under Section 163A of the Act at par with the proceeding under Section 166 of the Act which would not only be self-contradictory but also defeat the very legislative intention.

9. For the aforesaid reasons, we answer the question arising by holding that in a proceeding under Section 163A of the Act it is not open for the Insurer to raise any defence of negligence on the part of the victim."

10. Since in the judgment (supra), Hon'ble Apex Court has categorically held that plea of negligence can not be raised by the insurer in proceedings under Section 163A of the Act *ibid*, this Court sees no force in the argument of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that the learned Tribunal below committed grave illegality while ignoring the FIR lodged at the time of accident, perusal whereof clearly reveals that the vehicle in question was being driven rashly and negligently by the deceased at the time of accident. Similarly, no reliance, if any, can be placed upon Ext. PW-3/A i.e. mechanical examination report, wherein it has been held that accident has not occurred because of mechanical defect.

11. This court also does not find any force in the argument of the learned counsel representing the appellant-Insurance Company that the learned Tribunal below has wrongly applied multiplier of 18, while calculating loss of dependency. The Second Schedule to the Motor Vehicles Act provides for multiplier of 18 in case, age of the deceased is more than 25 years and less than 30 years. Ext. R2 clearly shows that the date of birth of the deceased was 27.5.1985 and accident has taken place on 10.8.2011, as such, on the date of accident, deceased was well above 25 years of age and as such, multiplier of 18 has rightly been applied by the learned Tribunal below.

12. Learned counsel for the appellant-Insurance Company has raised another objection that the learned Tribunal below has wrongly awarded a sum of Rs.5,000/- under the head of 'loss of estate' whereas same ought to have been Rs.2,500/- After having gone through the Second Schedule of the Act, is clear that under the general damages in case of death, a maximum of Rs.2,500/- can be awarded under the head of loss of estate and as such, award passed by the learned Tribunal below is modified to this extent only.

13. Consequently, in view of aforesaid modification made herein above, claimants are held entitled to following amounts under various heads:

1.	Loss of dependency	**Rs.4,75,000/-**
2.	Loss of consortium	**Rs.5,000/-**
3.	Loss of estate	**Rs.2,500/-**
4.	Funeral charges	**Rs.2,000/-**
	Total	**Rs.4,84,500/-**

14. The amount shall be apportioned amongst the claimants in equal shares.

15. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld.

16. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award dated 4.7.2013 passed by the learned Motor Accident Claims Tribunal, Chamba Division, Chamba, (HP) in M.A.C. Petition No. 33 of 2012, is modified to the above extent.

Pending applications, if any, are also disposed of.

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

Bhoop Ram ....Petitioner.
Versus
Parminder Singh ....Respondent.

Criminal Revision No. 28 of 2016

Reserved on: 28.08.2018
Decided on: 11.09.2018

Negotiable Instruments Act, 1881- Section 138- **Indian Evidence Act, 1872-** Section 73- Dishonour of cheque – Handwriting on cheque – Comparison with specimen/admitted handwriting of accused – Refusal of prayer of accused by Trial Court – Revision against – Held, 'Fair trial' encapsulates valuable right of fair and proper opportunities to adduce evidence in support of defence – By not sending cheque for opinion of handwriting expert, valuable right of accused to rebut case stood diminished – Petition allowed – Order of Trial Court set aside – Application allowed. (Paras- 3 and 4)

Case referred:
T. Nagappa vs. Y.R. Muralidhar, AIR 2008 Supreme Court 2010

For the petitioner: Mr. S.D. Sharma, Advocate.
For the respondent: Mr. Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge

The present revision petition is maintained by the petitioner/accused (hereinafter referred to as "the petitioner") under Sections 397 and 401 Cr.P.C. against order dated 14.12.2015, passed by learned Judicial Magistrate 1st Class, Solan, in Case No. 475-3 of 2012, dated 14.12.2015, on application filed under Sections 45 to 47 of the Indian Evidence Act.

2. The brief facts, giving rise to the present revision petition, can succinctly be summarized as under:

As per the petitioner, he was Ward Member, village Shallot, Sub Tehsil Junga, District Shimla, H.P., and was entrusted with the work of hiring machines for construction of link roads under the Member Parliament Local Area Development Scheme.

The petitioner apprised the complainant/respondent (hereinafter referred to as "the respondent") that he will be paid only after grant is released under the Member Parliament Local Area Development Scheme. Thereafter, the JCB machines of the respondent were hired for construction of the road. Subsequently, the respondent maintained a case against the petitioner under Section 138 of the Negotiable Instruments Act qua cheque No. 0088666, dated 12.07.2012, amounting to Rs.4,00,000/- (rupees four lac). The petitioner again apprised the respondent that he has no personal liability qua the payment for construction of roads and the amount will be paid under the Member Parliament Local Area Development Scheme, through the concerned authorities, i.e., concerned Gram Panchayat. During the pendency of the case before the learned Trial Court, the petitioner moved an application under Section 45, 46 and 47 of the Indian Evidence Act, seeking opinion of the handwriting expert, though it was to be filed under Section 243 Cr.P.C. However, no orders were passed on the application and ultimately on 14.12.2015, the learned Trial Court dismissed the application, hence the present petition preferred by the petitioner.

3. Heard. The learned counsel for the petitioner has argued that the learned Trial Court wrongly rejected the application seeking opinion of handwriting expert. He has further argued that by dismissing the application, which was filed seeking opinion of handwriting expert, the learned Trial Court has curtailed valuable right of the petitioner of "*fair trial*". To support his arguments, the learned counsel for the petitioner has placed reliance on the judgment of Hon'ble Supreme Court rendered in ***T. Nagappa vs. Y.R. Muralidhar, AIR 2008 Supreme Court 2010,*** wherein, vide para 9, it has been held as under:

> ***"9.*** *The learned Trial Judge as also the High Court rejected the contention of the appellant only having regard to the provisions of Section 20 of the Negotiable Instruments Act. The very fact that by reason thereof, only a prima facie right had been conferred upon the holder of the negotiable instrument and the same being subject to the conditions as noticed hereinbefore, we are of the opinion that the application filed by the appellant was bona fide.*
>
> *The issue now almost stands concluded by a decision of this Court in Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) [(2007)2 SCC 258] (in which one of us, L.S. Panta,J., was a member) wherein it was held:*
>
> > *"12. Section 243(2) is clear that a Magistrate holding an inquiry under Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to sure justice should be*

scrupulously followed, and the courts should be jealous in seeing that there is no breach of them."

He has further argued that the impugned order is violative of fundamental right engrained under Article 21 of the Constitution. Thus, the impugned order is liable to be set aside. He has argued that the learned Trial Court deprived the petitioner of his valuable right to rebut the cheque, as the cheque, upon which the edifice of the respondent's case rests, is a strong material for rebutting the case. The learned counsel for the petitioner has prayed that the impugned order be set aside and the prayer for seeking opinion of the handwriting expert be allowed. Conversely, the learned counsel for the respondent has argued that the petitioner has admitted his signatures on the cheque, so no purpose will be served by sending the cheque to hand writing expert. He has further argued that the application seeking opinion of the hand writing expert was filed after closer of the evidence and with a purpose to delay the matter. Lastly, it is prayed that the petition sans merits and the same be dismissed.

4. After carefully considering the overall aspects of the case in hand and the law, as settled in ***T. Nagappa's case*** (supra), this Court does not find that the comparison of the handwriting expert on the cheque will be prejudicial to the respondent and the same, in any manner, will delay the proceedings. The learned Trial Court, by not sending the cheque for opinion of the handwriting expert, has diminished the valuable right of the petitioner to rebut the same. This Court, keeping in eye over the fact that *"fair trial"* encapsulates valuable right of fair and proper opportunities allowed by the Court to adduce evidence in support of defence and denial of that right indeed is denial of fair trial, deems it fit to allow the present petition. Thus, in view of the above, the petition is allowed and the impugned order is set aside and the application of the petitioner, seeking opinion of the handwriting expert, pertaining to the writing on the cheque, is also allowed.

5. The parties are directed to appear before the learned Trial Court on ***26.09.2018.***

6. In view of the above, the petition stands disposed of, so also pending application(s), if any.

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

Bhupesh Sharma .....Petitioner.

Vs.

Bharat Petroleum Corporation Limited and others .....Respondents.

CWP No.: 383 of 2018
Reserved on: 21.08.2018
Date of Decision: 11.09.2018

Constitution of India, 1950- Article 226- LPG distributorship – Allotment – Courts interference – Scope – Candidature of petitioner for LPG distributorship rejected by Corporation on ground that land offered during Field Verification of Credentials (FVC) by him could not be considered for Show-room since he was neither owner nor same taken by him by way of registered lease from its owner for 15 years as contemplated in Unified Guidelines– Challenge thereto- Petitioner contending that there is no difference between

'rent agreement' and 'lease agreement' – Held, Brochure on Unified Guidelines expressly contemplates that land over which Show-room is to be constructed should either be owned or should be on lease with incumbent for minimum period of 15 years by way of registered lease deed, then it is incumbent upon him to fulfill said conditions – Petitioner appended "unregistered rent agreement' with application– Petitioner not eligible as per criteria contained in Brochure – Decision of Corporation cannot be faulted with - Petition dismissed. (Paras-7, 8 and 10)

For the petitioner: Mr. Raman Sethi, Advocate.
For the respondents: Ms. Vandana Mishra, Advocate, for respondents No. 1 and 3.
Mr. Rajesh Sharma, Assistant Solicitor General of India, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel (Judge):

By way of this writ petition, the petitioner has prayed for the following reliefs:

"A. Quash and set aside the letter dated 9.2.2018, Annexure-P5 rejecting the candidature of the petitioner being illegal, arbitrary, biased and unconstitutional;

B. Quash and set aside all other consequential acts and deeds including the forfeiture of the amount of deposit of Rs.40,000/- which has been done pursuant to issuance of Annexure-P5;

C. Direct the respondents to consider the candidature of the petitioner in terms of letter dated 10.1.2018 Annexure-P4 and issue letter of intent of the petitioner being the successful candidate for allotment of the LPG Distributorship for location Nerua, Tehsil Chopal, District Shimla (H.P.);

D. Direct the respondents to produce entire records of this case for the kind perusal of this Hon'ble Court;

E. Direct the respondents to pay costs of this litigation; and

F. Such other and further relief which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may also kindly be granted in favour of the petitioner and against the respondents."

2. Case of the petitioner is that respondent-Bharat Petroleum Corporation Limited invited applications for LPG Distributorship (Gramin) at Nerwa, Tehsil Chopal, District Shimla vide advertisement dated 13.08.2017. He applied for the same, as he fulfilled the criteria laid down in the advertisement. Further as per the petitioner, vide Annexure P-4, dated 10.01.2018, he was informed by the respondent-Corporation that he had been declared as successful candidate in the draw of lots, which was conducted on 09.01.2018 for selection of LPG Distributor at the subject location. His grievance is that thereafter vide impugned communication Annexure P-5, dated 09.02.2018, his candidature has been rejected on the ground that the land offered by the petitioner in the course of Field Verification of Credentials (FVC) could not be considered for showroom, as the petitioner has executed a rent agreement on 12.09.2017 for a period of 15 years with Sh. Rajinder Sood, resident of VPO & Tehsil Nerwa, District Shimla against a building measuring 12 X 10 meters instead of registered lease deed for show room for a period of 15 years. As per the petitioner, rejection of his candidature on the ground so mentioned in the impugned letter is arbitrary and not sustainable in the eyes of law, as there is no difference between "rent

agreement" and "lease agreement". It is in this background that the petitioner has filed this petition praying for the reliefs already mentioned hereinabove.

3. In its reply filed by the respondent-Corporation, it has justified its decision by submitting that candidature of the petitioner was rejected as in the course of Field Verification, it was found that land details/documents furnished by the petitioner with regard to LPG show room were incorrect. As per the respondents, the land upon which the LPG show room was proposed to be constructed, was neither owned by the petitioner nor the same was taken by way of a registered lease by him from its owner for a period of 15 years, as was contemplated in Unified Guidelines for Selection of LPG Distributors (Annexure P-2).

4. We have heard the learned counsel for the parties and have also perused the documents appended with the petition.

5. Clause 1(w) of the definitions of Unified Guidelines for Selection of LPG Distributors reads as under:

> *"1 (w). "Ownership" or "Own" for godown/showroom for SheheriVitrak, RurbanVitrak, GraminVitrak and DurgamKshetriyaVitrak Type of Distributorship means having:*
>
> *a. Ownership title of the property*
>
> *Or*
>
> *b. Registered lease deed having minimum 15 yrs of valid lease period commencing on any day from the date of advertisement up to the last date of submission of application as specified either in the advertisement or corrigendum (if any).*
>
> *Additionally, applicants having registered lease deed commencing on any date prior to the date of advertisement will also be considered provided the lease is valid for a minimum period of 15 years from the date of advertisement. The applicant should have ownership as defined under the term 'Own' above in the name of applicant/member of "Family Unit" (as defined in multiple dealership/distributorship norm of eligibility criteria)/parents (includes Step Father/Step Mother), grandparents (both maternal and paternal), Brother/Sister (including Step Brother & Step Sister), Son/Daughter (including Step Son/Step Daughter), Son-in-law/Daughter-in-law; of the applicant or the spouse (in case of married applicant) as on last date for submission of application as specified either in the advertisement or corrigendum (if any). In case of ownership/co-ownership by family member(s) as given above, consent in the form of a declaration from the family member(s) will be required."*

A perusal of the same demonstrates that ownership for godown/showroom means either having ownership title of the property or a registered lease deed of the land for minimum period of 15 years commencing on any day from the date of advertisement up to last day of submission of the application.

6. Application form filled by the petitioner is on record as Annexure P-3 and documents appended with the same demonstrate that with regard to the land over which a show room was to be constructed, the petitioner had entered into a "rent agreement" dated 12th September, 2017 with one Sh. Rajinder Sood for a period of 15 years. This rent agreement is undisputedly unregistered.

7. Clause 6 of the application form for appointment of LPG Distributors, as filled by the petitioner, reads as under:

> *"6. If you are applying for SheheriVitrak, RurbanVitrak and GraminVitrak, provide the following details of land for Showroom or Ready Built Showroom at the advertised location (owned or leased for minimum 15 years). In case land belongs to member of Family Unit, attach Undertaking as per Appendix-4.*

Name(s) of the owner of land/showroom or leaseholder	Relationship with applicant	Date of registration of sale deed/gift/lease/date of	Address of the location of the land for show room	Khasra No./Survey No.	Dimensions # Length in metre	Breadth in metre
Bhupesh Sharma	Self	12.09.2017	VILLAGE AND POST OFFICE NERUA, TEHSIL CHOPAL, DISTRICT SHIMLA, HP.	1335/341	11	10

A perusal of this Clause demonstrates that in Column No. 3 of the same, the date of registration of sale deed/gift/lease with regard to the details of land for showroom or ready built showroom was required to be provided. Contents of this Column are as per the terms of the Unified Brochure, wherein also "Ownership" means either ownership title of the property or a registered lease deed for a minimum period of 15 years, as envisaged therein.

8. In the present case, when admittedly, no registered lease deed was appended with the application form by the petitioner qua the land over which a show room was to be constructed, then the decision of the respondent-Corporation, rejecting his candidature on the ground that the requirement of land was not satisfied by the petitioner as per the eligibility criteria, as mentioned in Clause-8(n) of Brochure on Unified Guidelines for Selection of LPG Distributors cannot be faulted with.

9. The relevant portion of the impugned order is quoted hereinbelow:

> *"This is in reference to your application reference No. BPC03101026612092017 for award of Regular LPG distributorship at Nerua, District Shimla, HP.*
>
> *Your application was found to be eligible and you were declared as selected candidate in the process of online draw held at Shimla, Himachal Pradesh on 09.01.2018.*
>
> *As per the procedure, Field Verification of Credentials (FVC) was carried out by a committee of one officer. As per the FVC report, following variance was observed:*
>
> *The land offered cannot considered for showroom as you have executed rent agreement on 12.09.2017 commencing from 12.09.2017 to 11.09.2032 (15 years) with Sh. Rajinder Sood, R/o VPO & Tehsil Nerua, Distt. Shimla against a building measuring 12 X 10 M (open space) at VPO & Tehsil -*

Nerua, Distt. Shimla instead of registered lease deed for show room for a period of 15 years. (Reference clause no. 5.2.3 of Unified Guidelines for LPG Distributorship 2016).

Hence, the requirement of land is not satisfied as per the eligibility criteria for applicants as mentioned in clause no. 8(n) of Brochure on Unified Guidelines for selection of LPG distributors. The same is reproduced below:

The applicant should 'Own' a suitable shop for Showroom of minimum size 3 metre by 4.5 mete in outer dimension or a plot of land for construction of showroom of mIn view of the above, your candidature stands rejected and the amount of Rs.40000/- deposited with the Corinimum size 3 metre by 4.5 metre as on the last date for submission of application as specified either in the advertisement or corrigendum (if any) at the advertised location i.e. within the municipal/town/village limits of the place which is mentioned under the column of 'location' in the advertisement.

The term 'own' has been defined in clause no. 1(w) of Brochure on Unified Guidelines for selection of LPG distributors. The same is reproduced below:

a. Ownership title of the property

Or

b. Registered lease deed having minimum 15 yrs of valid lease period commencing on any day from the date of advertisement up to the last date of submission of application as specified either in the advertisement or corrigendum (if any).

In view of the above, your candidature stands rejected and the amount of Rs.40000/- deposited with the Corporation stands forfeited in line with clause No. 26(a) & 26(b) of the Brochure on Unified Guidelines for selection of LPG distributors."

10. It is not the case of the petitioner that the contents of impugned order are not in consonance with the provisions of the Brochure on Unified Guidelines for Selection on LPG Distributors. For our satisfaction, we have alongwith learned counsel for the petitioner, gone through the provisions of the Brochure and the same expressely envisages that for the purpose of showroom, either the land has to be owned by the applicant or there has to be a registered lease deed minimum for a period of 15 years in his favour. The contention of the learned counsel for the petitioner that there is no difference between "a rent agreement" and "a lease deed", in our considered view, has no force. When the Brochure expressly contemplates that the land over which the showroom has to be constructed, should either be owned, as provided in the Brochure or should be on lease with the applicant for a minimum period of 15 years by way of a registered lease deed, then, it is incumbent upon an applicant to fulfill the said conditions. Any violation thereof, will render an applicant ineligible. Incidentally, there is no challenge in the petition to the Clauses of the Brochure.

11. We further hold that simply because the petitioner was intimated at one stage by the respondent-Corporation that in the draw of lots, he stood declared as a successful candidate, did not confer upon him an indefeasible right for being awarded the LPG distributorship, because as per the terms of the Brochure, the grant of dealership was *inter alia* dependent upon the field inspection, as envisaged in the Brochure.

In view of the findings returned hereinabove, as we do not find any merit in the present petition, the same is accordingly dismissed. No order as to costs.

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

Hari Chand ....Petitioner.
Versus
H.P. State Co-Operative Bank Limited and another ....Respondents.

Criminal Revision No. 181 of 2017
Reserved on: 29.08.2018
Decided on: 11.09.2018

Negotiable Instruments Act, 1881- Section 138- Dishonour of cheque – Complaint – Cheque, whether for consideration?- Accused issuing dishonoured cheque towards loan of his son for repayment- Accused also stood guarantor in said loan case – Trial Court convicting accused for offence under Section 138 of Act and Sessions Judge upholding his conviction and sentence – Revision – Accused contending that he was merely 'guarantor' of his son and cheque was merely guarantee towards payment of loan – Held, accused guarantor of his Son with respect to loan taken from complainant - Son did not discharge his loan liability – Cheque issued by accused to discharge that liability and same recoverable from him also – Cheque issued for consideration – Accused rightly convicted and sentenced– Revision dismissed – Judgments of Lower Courts upheld – (paras-5 to 11)

Case referred:
Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited, (2016) 10 SCC 458

For the petitioner: Mr. Malay Kaushal, Advocate.
For respondent No.1: Mr. Sushant Vir Singh, Advocate.
For respondent No. 2/State: Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocates General.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge

The present revision petition is maintained by the petitioner/accused (hereinafter referred to as "the accused") under Sections 397, 401 read with Section 482 Cr.P.C. against judgment dated 12.06.2017, passed by the learned Sessions Judge, Bilaspur, H.P., in Criminal Appeal No. 14/10 of 2016 (C. No. 26/2016), whereby the judgment of conviction, dated 23/25.05.2016, passed by the learned Chief Judicial Magistrate, Bilaspur, District Bilaspur, H.P. in Criminal Case No. 121/3 of 2011, was upheld.

2. The brief facts, giving rise to the present revision petition, can succinctly be summarized as under:

H.P. State Co-operative Bank, Beri, through its the then Branch Manager (complainant-Bank) maintained a complaint under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 against the accused in the

learned Trial Court. As per the complainant, in the month of November, 2008, the accused alongwith his son, namely Dinesh Kumar, made a request to the complainant-Bank for grant of personal loan amounting to Rs.1,50,000/- (rupees one lac fifty thousand). After completion of formalities, the loan was sanctioned. The loan was to be paid back in 84 equal installments of Rs.2800/- per month @ 13.75% interest. Subsequently, Dinesh Kumar did not pay the installments and he became defaulter. The accused, approached the complainant-Bank for repayment of the loan, as he stood guarantor to the loan and issued cheque No. 831361, dated 25.07.2011, for an amount of Rs.2,15,000/- (rupees two lac fifteen thousand) of State Bank of India, Sunder Nagar Branch, for liquidating the liability of his son. On 02.08.2011 the cheque was received by the complainant-Bank and the same was dishonoured due to *"exceeds arrangement"*. Thus, the complainant-Bank issued legal notice dated 30.08.2011. Thereafter, as the complainant-Bank failed to get the payment, a complaint was filed against the accused under the provisions of Section 138 of Negotiable Instruments Act, 1881. After conclusion of the trial, the accused was convicted to undergo simple imprisonment for a period of four months and to pay a fine of Rs.3,00,000/- out of which a sum of Rs.2,95,000/- was ordered to be remitted as compensation to the complainant-Bank. The accused was further ordered to undergo simple imprisonment for a period of one month in case of default in payment of fine. Feeling aggrieved and dissatisfied, the accused preferred an appeal before the learned Appellate Court. However, the learned Appellate Court, vide its judgment dated 12.06.2017, dismissed the appeal preferred by the accused by upholding the judgment of the learned Trial Court, hence the present revision petition maintained by the accused.

3. Heard. The learned counsel for the petitioner has argued that the learned Trial Court as well as the learned Appellate Court without appreciating the evidence, which has come on record, and without appreciating the fact that respondent No. 1 has failed to prove the case against the petitioner convicted him. He has further argued that it is on record that the cheque was issued only as a guarantee and not for the payment of the loan amount. Conversely, the learned counsel for respondent No. 1 has argued that the cheque was issued for the payment of amount due and presumption of truth is also attached to the cheque, which was not encashed due to *"exceeds arrangement",* thus no interference in the judgments passed by the learned Courts below is required. Lastly, it is prayed that the petition sans merits and the same be dismissed.

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

5. The complainant-Bank has placed on record cheque, bearing No. 831361, dated 25.07.2011, amounting to Rs.2,15,000/- and the same was dishonoured on the ground of *"exceeds arrangement"*. Thereafter, the complainant-Bank issued demand notice to the accused and the same was signed by him. The record shows that the accused stood as guarantor of his son, Dinesh Kumar, for obtaining loan of Rs.1,50,000/-.

6. CW-1, Shri Digvijay Singh, Branch Manager H.P. State Co-operative Bank, has deposed that the accused issued the cheque for liquidating the financial liability of his son, as he stood guarantor to his son. This witness has further deposed that son of the accused failed to pay the loan amount, so the accused issued cheque for discharging the financial liability of his son. CW-2, Shri Naresh Kumar, Manager, State Bank of India, Sundernagar, District, Mandi, has deposed that the cheque was dishonoured on the ground *"exceeds arrangement"* and there was no amount in the bank account of the accused. Thus, this witness has also corroborated the case of the complainant-Bank.

7. The accused examined himself as DW-1. He admitted that in the bank he signed the documents, as a guarantor. He feigned his ignorance that his cheque was dishonoured, as there were insufficient funds in his bank account. He has admitted his signatures on the cheque as well as on the acknowledgement. He has further admitted that he did not pay any amount to the complainant-Bank. The accused has also examined his son Dinesh Kumar as DW-2. DW-2 deposed that he took loan from the complainant-Bank and the accused stood as his guarantor. This witness denied that his father has issued any cheque. This witness, in his cross-examination, admitted that on 26.11.2008 he took loan of Rs.1,50,000/- from the complainant-Bank and his father stood as his guarantor. He has further admitted that after paying 2-3 installments, he did not pay further installments. He has further deposed, in his cross-examination, that he had the knowledge that in case he fails to pay the loan amount, his father will be saddled to pay the loan amount, as he stood his guarantor.

8. Now, after meticulously examining the evidence, which has come on record, it is clear that the accused stood guarantor of his son, Dinesh Kumar, for loan amount of Rs.1,50,000/-, and all the documents were executed qua the loan with the complainant-Bank. It is also clear from the evidence that said Dinesh Kumar did not discharge his loan liability, as he failed to pay the installments of the loan. It has also come on record that Dinesh Kumar knew that in case he fails to discharge his financial liability, then the same would be recovered from his father, who stood his guarantor. The accused signed the cheque and he has also not disputed the same. The accused has also admitted that he signed the acknowledgement, through which legal notice qua demand was issued to him. Thus, the above material is suffice to conclude that in order to extinguish the financial liability of Dinesh Kumar, the accused issued cheque amounting to Rs.2,15,000/-.

9. The next set of evidence establishes that the cheque issued by the accused was dishonoured on the ground of *"exceeds arrangement"* and despite issuance of notice he could not pay the cheque amount. In fact, after receipt of the notice, the accused did not do anything, thus his sleeping over the financial liability, in itself is a proof that he admitted his liability to pay the cheque amount.

10. The Hon'ble Supreme Court in ***Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited, (2016) 10 SCC 458,*** vide paras 9 to 11, it has been held as under:

> ***"9. 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 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.***
>
> ***10. 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.

11. Judgment in Indus Airways is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described as "security" in the loan agreement. In applying the judgment in Indus Airways , one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque."

Indeed, issuance of cheque and admission of signature thereon would invoke presumption of legally enforceable debt in favour of holder and the accused needs to rebut such presumption. However, in the case in hand, the accused failed to rebut such presumption.

11. In view of the law, as has been extracted hereinabove, and after carefully examining the material, which has come on record, this Court comes to the conclusion that the judgments passed by the learned Courts below are the result of proper appreciation of facts and the same are well within the confines of law. The judgments need no interference, as the complainant-Bank has proved the offence under Section 138 of the Negotiable Instruments Act, 1881 against the accused.

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

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

Ichhia Sharma and Ors. .....Appellants

Versus

Khuddi Devi and Ors. .....Respondents

FAO No. 373 of 2017

Decided on: 11.9.2018

Code of Civil Procedure, 1908- Order XLI Rule 23 - Remand – Justifiability - Additional District Judge (ADJ) remanding suit to trial court with direction to appoint local commissioner and obtain demarcation report – Additional District Judge holding that demarcation report on record was obtained by plaintiff behind back of defendants – Appeal against – Held, Findings of ADJ contrary to facts on record – Defendants did not join demarcation proceedings despite notice – Their appeal against demarcation report also stood dismissed by Collector, wherein he admitted correctness of demarcation report given by Kanungo – Impugned order being of wholesale remand not sustainable – Order of remand set aside – ADJ directed to decide appeal on merit. (Paras-2, 5 and 6)

Code of Civil Procedure, 1908- Order XXVI Rules 9 and 14(3)- Local investigation – Appointment of fresh commissioner – Procedure – Held, Court cannot appoint new commissioner without setting aside earlier report of local commissioner. (Para-8)

For the Appellant	:	Mr. B.S. Chauhan, Senior Advocate, with Mr. MunishDatwalia, Advocate.
For the Respondents	:	Mr. Surinder Saklani, Advocate, for respondents No.1, 3 and 4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant appeal filed under Order 43 Rule 1 (U) of the CPC is directed against the judgment dated 24.6.2017, passed by the learned Additional District Judge-II, Mandi, H.P. (Jogindernagar Court) in Civil Appeal No. 114 of 2016, whereby case has been remanded to the learned trial Court with a direction to appoint the Local Commissioner at the cost of the defendants and obtain demarcation in accordance with law and decide the case afresh after giving opportunity to both the parties.

2. Having heard learned counsel representing the parties and perused material available on record vis-à-vis impugned judgment dated 24.6.2017, passed by the learned first Appellate court, this Court is persuaded to agree with Mr. B.S. Chauhan, learned Senior Counsel, representing the petitioner that impugned remand order passed by the court below is not sustainable being a wholesale remand. Impugned order reveals that learned first appellate Court having appreciated the evidence available on record arrived at a conclusion that demarcation report placed on record by the plaintiff was obtained at the back of the defendants and as such, same could not be taken into consideration by the learned trial Court while adjudicating the controversy at hand.

3. The question that *"whether demarcation was conducted associating the defendants or same was conducted at their back"* would be decided by this Court later on the basis of material available on record, but even if it is presumed that demarcation was conducted at the back of the defendants, even then in that eventuality, learned first appellate Court had two options; first, to appoint Local Commissioner and get the land demarcated; second, issue direction to the learned trial Court to appoint the Local Commissioner and return the specific finding on that issue, but in the case at hand, learned first appellate Court while issuing direction to the lower court not only directed it to appoint Local Commissioner, rather issued direction to decide the case afresh, which was not permissible.

4. Order dated 11.5.2017, passed by the learned first appellate Court suggests that an application under Order 26 Rule 9 CPC was filed by the defendants, but same was dismissed by the learned first appellate Court by observing therein that it is the duty of the

party to produce the best evidence before the court and court will not procure the evidence for the parties. Impugned order further reveals that court also observed that appellants had ample opportunity before the learned trial Court to make his defence and since he has not challenged the demarcation report, no fruitful purpose would be served if any Local Commissioner is appointed at this stage. Court below dismissed the application being premature and ordered that in case, this Court deems it necessary, prayer for appointment of Local Commissioner shall be considered and decided at the time of hearing of the appeal.

5. It is quite apparent from the perusal of the aforesaid order that learned appellate court below was aware of the fact that against the demarcation report placed on record by the plaintiff, defendants had filed an appeal before the competent court of law and same was dismissed. Similarly, it appears that though court below while passing impugned judgment took note of Ext.PX i.e. order dated 20.1.2011, passed by the Collector Sub Division Padhar, Mandi in the appeal having been filed by the defendants under the HP Land Revenue Act against the order of Assistant Collector Second Grade in Missal No. 22/08 decided on 31.5.2008, but still proceeded to return a finding that defendant Hukam Chand, never came to be issued notice at the time of demarcation conducted on the spot at the behest of the plaintiffs, which finding is totally contrary to the record. Impugned order further discloses that learned first appellate court also took note of the Ext.PW4/A i.e. order dated 31.5.2008 passed by the Assistant Collector, IInd Grade, wherein it stands recorded that despite issuance of notice, defendant Hukam Chand failed to associate himself with demarcation proceedings. It also stands recorded in the aforesaid order that defendant Hukkam Chand in his statement stated before the revenue authority that he had acquired prior intimation with regard to the demarcation from the notice affixed on his house He also stated that though demarcation was conducted in his absence, but demarcation has been conducted strictly on the basis of revenue record and he has no objection qua the same.

6. Having carefully perused documents Ext.PX and Ext.PW4/A, this Court is in agreement with contention of learned senior counsel representing the petitioner that in view of the aforesaid evidence available on record, there was no requirement, as such, for the learned first appellate Court to remand the matter back to the learned trial Court with a direction to appoint Local Commissioner. Once it stood proved on record that defendant was afforded opportunity to associate himself at the time of demarcation and he in appeal having been preferred by him had admitted factum with regard to his having no objection to the demarcation report given by the Kanungo, it was not open for the first appellate Court to remand the matter back to the learned trial Court with a direction to appoint the local commissioner. Moreover, as stands duly proved on record, order passed by the Assistant Collector, 2nd Grade, was further upheld by the Sub Divisional Collector in the appeal having been preferred by the defendants and as such, court below had no occasion to issue direction for appointment of local commissioner to conduct demarcation.

7. It is also not in dispute that till date, no appeal, whatsoever, has been filed by the defendants against the order passed by the Sub Divisional Collector in the appeal having been filed by him and as such, order passed by the Assistant Collector, IInd grade, has attained finality.

8. Leaving everything aside, careful perusal of order 26 Rule 14 (3) CPC, clearly reveals that court cannot appoint new commission without setting aside earlier report of the local commissioner, but in the case at hand, perusal of impugned judgment passed by the learned first appellate court nowhere suggests that demarcation report placed on record by the plaintiffs was ever set-aside by him before issuing direction for conducting fresh

demarcation and as such, on this count also, impugned order passed by the court below deserves to be set-aside.

9. Consequently, in view of the detailed discussion made herein above, appeal is allowed and impugned judgment passed by the learned first appellate Court dated 24.6.2017 in Civil Appeal No. 114 of 20156 is quashed and set-aside and the matter is remanded back to the learned first appellate Court to decide the appeal afresh on the basis of material available on record, especially Ext.PX and Ext.PW4/A. Needless to say, any observations made hereinabove shall not be construed to be a reflection on the merits of the main appeal before the court below and shall remain confined to the disposal of this case alone.

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

M/s Mona Enterprises ..... Appellant
Vs.
M/s BanarsiDass& Sons ..... Respondent

FAO No. 94 of 2018
Date of decision: 11.09.2018.

Code of Civil Procedure, 1908- Order V Rule 2- Order IX Rule 13- Ex-parte decree – Setting aside of – Due service – Meaning – Trial Court dismissing defendant's application for setting aside ex-parte decree on ground that he was duly served through Registered Letter and despite service did not contest suit – Appeal against – High Court found that registered letters sent to defendant though did contain 'Summons' but did not contain copy of plaint – Held, it is obligatory on part of court to have sent copy of plaint and other documents appended thereto in terms of Order V Rule 2 of Code to defendant – Order of Trial Court illegal – Appeal allowed – Order set aside – Ex-parte decree also set aside – Trial Court directed to restore suit and proceed from date when ex-parte proceedings were carried out. (Paras-2 to 7)

Case referred:
Nahar Enterprises vs. Hyderabad Allwyn Ltd. and another (2007) 9 SCC 466

For the Appellant : Mr. Rajesh Mandhotra, Advocate.
For the respondent : Mr. G. R. Palsra, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (Oral)

Shorn of all unnecessary details, the factual matrix of the case, in brief, is that the appellant/defendant suffered exparte money decree and the application filed for setting aside exparte decree has been ordered to be dismissed on the ground that since the RAD Exts. RW1/A and RW1/C containing the summons had been sent at the proper and correct address and contains endorsement "Refused", therefore, it is proved on record that the appellant/defendant was duly served and since he failed to contest the suit despite service, the Court had no option but to have proceeded exparte against him.

2. Now, adverting to the RAD Exts. RW1/A and RW1/C, these admittedly contained summons that was sent to the defendant calling upon him to appear in the Court and file his written statement but it did not contain the copy of the plaint, whereas it is obligatory on the part of the Court to have sent a copy of the plaint and other documents appended thereto, in terms of Order 5, Rule 2 CPC, which reads as under:-

> "*Copy of plaint annexed to summons* – Every summons shall be accompanied by a copy of the plaint."

3. Identical question came up before the Hon'ble Supreme Court in ***Nahar Enterprises vs. Hyderabad Allwyn Ltd. and another (2007) 9 SCC 466***, wherein it was observed as under:-

> *"8. The learned counsel appears to be correct. When a summons is sent calling upon a defendant to appear in the court and file his written statement, it is obligatory on the part of the court to send a copy of the plaint and other documents appended thereto, in terms of Order 5 Rule 2 CPC.*
>
> *9. Order 5 Rule 2 CPC reads as under:-*
>
> > *"2. Copy of plaint annexed to summons.- Every summon shall be accompanied by a copy of the plaint."*
>
> *10.The learned Judge did not address itself the question as to how a defendant, in absence of a copy of the plaint and other documents, would be able to file his written statement……"*

4. In view of the aforesaid exposition of law, it can be conveniently held that the learned Court below has committed an illegality in dismissing the application for setting aside the exparte decree. It was a fit case where the Court should have exercised its jurisdiction under Order 9 Rule 13 CPC.

5. However, having said so, it cannot be ignored that the respondent/plaintiff has been put to burden of contesting not only this application before the learned trial Court but the proceedings before this Court and, therefore, deserves to be compensated reasonably.

6. Accordingly, the appeal is allowed and the ex parte judgment and decree dated 28.09.2012 in a Civil Suit No. 2 of 2010, is ordered to be set aside, however, it shall be subject to the appellant/defendant paying costs of Rs.25,000/- to the respondent/plaintiff on the next date of hearing. Parties to appear before the learned trial Court on **24.09.2018**.

7. The proceedings before the learned trial Court is restored to its original number and shall now proceed from the date when the exparte proceedings were carried out against the appellant/defendant.

8. However, before parting, it needs to be observed that since the suit was filed in the year 2010, the learned trial Court shall make all endeavour to dispose of the same as expeditiously as possible, in no event later than **30.06.2019**.

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

M/s Uttam Traders Ranghri …Appellant

Versus

Tule Ram alias Tula Ram …Respondent.

Cr. Appeal No. 140 of 2018
Judgment Reserved on: 04.09.2018
Date of decision : 11.09.2018.

Negotiable Instruments Act, 1881 (Act) - Sections 138 and 142- **Partnership Act, 1932-** Section 69- Dishonour of cheque – Complaint by unregistered firm – Maintainability – Accused arguing before High Court that complainant being unregistered firm can not maintain complaint under section 138 of Act – Held, Unregistered firm cannot approach Court for enforcement of any right arising from Contract – Civil proceedings for recovery of money would be barred by virtue of sub Section 2 of Section 69 of Partnership Act – But proceedings under Section 138 of Act cannot be treated as Civil Suit for recovery of cheque amount – Complaint not hit by Section 69 of Partnership Act. (Paras-20 to 30)

Cases referred:

M.M.T.C.Ltd. And another vs. Medchl Chemicals and Pharma (P)Ltd. And another (2002) 1 SCC 234

Samrat Shipping Co. Pvt. Ltd. vs. Dolly George (2002) 9 SCC 455

M/s Haryana State Co.Op., Supply and Marketing Federation Ltd. vs. M/s Jayam Textiles and another AIR 2014 SC 1926

Kerala Arecanut Stores vs. Ramkishore and Sons, AIR 1975 Ker 144

Amit Desai and another vs. M/s Shine Enterprises and another 2000 Cri. L.J. 2386

BSI Ltd. vs. Gift Holdings Pvt. Ltd. (2000) 2 SCC 737

Gurcharan Singh vs. State of Uttar Pradesh and another, 2002, Cri.L.J. 3682

Beacon Industries vs. Anupam Ghosh, ILR 2003 KAR 4325

Capital Leasing and Finance Co. vs. Navrattan Jain, (2005) 4 RCR (Cri) 330

Gowri Containers vs. S.C. Shetty 2008 Cri. L.J. 498

Dabasree Das Baishnab vs. FI Multimedia Consultants, 2011 (1) Crimes (HC) 131

R Vijayan vs. Baby and another (2012) 1 SCC 260

Karthick and Company vs. Vadivel Sizing and Weaving Mills (Pvt.) Ltd. (2013) 7 RCR, (criminal) 140

Rani Kapoor vs. M/s Silvermount (2017) Vol. 242 DEL.363

For the Appellant : Mr. Maan Singh, Advocate.
For the Respondent : Mr. Mukul Sood, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Two questions arise for consideration in this appeal:

(i) whether the application filed by the appellant to place on record the partnership deed can be allowed especially after the learned trial Magistrate has acquitted the respondent for the offence punishable under Section 138 of the Act, only on account of the managing partner of the appellant having failed to establish that he was one of the partners of the complainant-firm and duly authorised by it to file the complaint.

(ii) Whether a partner of an unregistered partnership firm can maintain a complaint under Section 138 of the Negotiable Instruments Act.

2. However, before answering these questions, certain facts need to be noticed.

3. The appellant-complainant filed a criminal complaint under Section 138 of the Negotiable Instruments Act (for short NI Act) against the respondent on the allegation that it was a partnership firm having its office at Village Ranghri, Manali and Sh. Aakash Ahuja was a partner of the said firm, who had been duly authorised to present the complaint. It is submitted that the accused/ respondent had purchased construction material i.e. cement, steel etc. from 01.06.2015 to 29.09.2015 from the appellant-firm and having an outstanding liability of Rs.5,00,000/- for which he issued and handed over cheque bearing No.378401 dated 24.9.2015 to the appellant. However, on presentation, the cheque was returned being dishonoured vide memo dated 24.9.2015 with remarks 'funds insufficient'. Even after issuance and receipt of legal notice dated 8.10.2015, no payment was made by the respondent. Hence, the complaint.

4. On the basis of the preliminary evidence adduced by the appellant, the respondent was summoned by the learned trial Magistrate vide order dated 23.11.2015 and on finding a prima-facie case, notice of accusation was put to the respondent, to which he pleaded not guilty and claimed trial.

5. In support of his case, the complainant-firm examined Aakash Ahuja as a witness and closed its evidence. Thereafter, the statement of the respondent under Section 313 Cr.P.C. was recorded wherein he denied the case of the complainant-firm. However, in defence, respondent did not lead any evidence.

6. As observed above, the learned trial Magistrate dismissed the complaint solely on the ground that Sh. Aakash Ahuja one of the partners of the complainant-firm had failed to prove that he was one of the partners of the complainant-firm and duly authorised by it to file the complaint and acquitted the respondent.

7. Aggrieved by the acquittal, the complainant has filed this appeal alongwith which an application under Section 391 Cr.P.C. being Cr.MP.No. 464 of 2018 has been filed to place on record the copy of partnership deed. It is vehemently argued by Mr. Maan Singh, learned Counsel for the appellant-complainant that the learned trial Magistrate erred in dismissing the complaint and acquitted the respondent on purely hypertechnical grounds and, therefore, the appeal may be accepted and the judgment of acquittal be set-aside.

8. On the other hand, Mr. Mukul Sood, learned counsel for the respondent would argue that no fault can be found with the order of acquittal passed by learned Court below and even in case the application for leading additional evidence is to be allowed, even then the same is of no avail as admittedly the partnership deed in question is an unregistered one.

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

9. As already observed above, the following two questions arise for consideration:

(i) *whether the application (Cr.M.P. No.464 of 2018 filed by the appellant to place on record the partnership deed can be allowed especially after the learned trial Magistrate has acquitted the respondent for the offence punishable under Section 138 of the Act, only on account of the managing partner of the appellant having failed to establish that he was one of the partners of the complainant-firm and duly authorised by it to file the complaint.*

(ii) Whether a partner of an unregistered partnership firm can maintain a complaint under Section 138 of the Negotiable Instruments Act.

10. I would firstly like to answer the question No.1, as admittedly the second question would arise for determination only if the first question is answered in favour of the appellant.

11. Section 391of the Code of Criminal Procedure reads thus:

> "**391. Appellate Court may take further evidence or direct it to be taken.-** (1)*In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*
>
> *(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.*
>
> *(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.*
>
> *(4)The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."*

12. In ***M.M.T.C.Ltd. And another vs. Medchl Chemicals and Pharma (P)Ltd. And another (2002) 1 SCC 234***, the Hon'ble Supreme Court held that the only eligibility criteria prescribed by Section 142 for maintaining a complaint under Section 138 is that the complaint must be by the payee or the holder in due course and once this criteria is satisfied as the complaint is in the name and on behalf of the appellant Company. Therefore, even presuming that initially there was no authority, still the company can, at any stage, rectify that defect at a subsequent stage, and the company can send a person who is competent to represent the Company. It is apt to reproduce the relevant observations as contained in paras 11 and 12 of the judgment, which reads thus:

> *"11. This Court has, as far back as, in the case of Vishwa Mitter v. O. P. Poddar reported in (1983) 4 SCC 701, held that it is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This criteria is satisfied as the complaint is in the name and on behalf of the appellant Company.*
>
> *12. In the case of Associated Cement Co. Ltd. v. Keshvanand (1998) 1 SCC 687, it has been held by this Court that the complainant has to be a corporeal person who is capable of making a physical appearance in the court. It has been held that if a complaint is made in the name of a incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court. It is held that the court looks upon the natural person to be the complainant for all practical purposes. It is held that when the*

complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complaint to represent the former in court proceedings. It has further been held that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can represent the company. It has been held that it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. Thus, even presuming, that initially there was no authority, still the Company can, at any stage, rectify that defect. At a subsequent stage the Company can send a person who is competent to represent the company. The complaints could thus not have been quashed on this ground."

13. Likewise in ***Samrat Shipping Co. Pvt. Ltd. vs. Dolly George (2002) 9 SCC 455***, the Hon'ble Supreme Court termed the dismissal of the complaint at the threshold by the Magistrate on the ground that the individual through whom the complaint was filed had not produced the certified copy of the resolution of the Board of Directors of the Company authorising him to represent the Company before the Magistrate has also not justified and termed this exercise to be "too hasty an action". It is apt to reproduce the observation as contained in para 3 of the judgment, which reads thus:

"3. Having heard both sides we find it difficult to support the orders challenged before us. A Company can file a complaint only through human agency. The person who presented the complaint on behalf of the Company claimed that he is the authorised representative of the company. Prima facie, the trial court should have accepted it at the time when a complaint was presented. If it is a matter of evidence when the accused disputed the authority of the said individual to present the complaint, opportunity should have been given to the complainant to prove the same, but that opportunity need be given only when the trial commences. The dismissal of the complaint at the threshold on the premise that the individual has not produced certified copy of the resolution appears to be too hasty an action. We, therefore, set aside the impugned orders and direct the trial court to proceed with the trial and dispose it off in accordance with law. Parties are directed to appear before the trial court on 31.01.2000."

14. Similar matter of dishonour of cheque came before three Judge Bench of the Hon'ble Supreme Court in ***M/s Haryana State Co.Op., Supply and Marketing Federation Ltd. vs. M/s Jayam Textiles and another AIR 2014 SC 1926*** wherein it was held that the dismissal of the complaint for mere failure to produce authorisation would not be proper and an opportunity ought to be granted to produce and prove the authorisation. It is apt to reproduce the apposite observations as contained in paras 6 and 7 of the judgment, which read thus:

"*6. Having heard learned counsel for the parties and after perusing the material on record, we find that admittedly authorisation by the Board of Directors of the appellant-Federation was not placed before the Courts below. But, we may notice that a specific averment was made by the appellant-Federation before the learned Judicial Magistrate that the said General Power of Attorney has been filed in connected case being CC No. 1409/1995, which has neither been denied nor disputed by the respondents. In any case, in our opinion, if the Courts below were not satisfied, an opportunity ought to have been granted to the appellant-Federation to place the document containing*

authorisation on record and prove the same in accordance with law. This is so because procedural defects and irregularities, which are curable, should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. {See Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh, (2006) 1 SCC 75}. : (AIR 2006 SC 269 : 2005 AIR SCW 5851).

7. In view of the fact that in spite of arbitration award against the respondents, there was non-payment of amount by the respondents to the appellant-Federation, and also in the light of authorisation contained in Annexure–P/7, we are of the opinion that, in the facts and circumstances of the case, an opportunity should be given to the appellant-Federation to produce and prove the authorisation before the Trial Court, more so, when money involved is public money. We, therefore, set aside the judgments of the Courts below and remit the matters back to the Trial Court with a direction to conduct trial afresh taking into consideration the authorisation placed before us and dispose of the matter as expeditiously as possible in accordance with law."

15. Bearing in mind the aforesaid exposition of law, I am of the considered view that the appellant-applicant ought to be granted one chance to place and prove on record the partnership deed. Accordingly, Cr.M.P. No. 464 of 2018 is allowed.

16. As regards the second question, Section 69 of the Partnership Act, deals with the effect of non-registration of the firm and reads thus:

"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-sections (1) and (2) shall apply also to claim of set-off or other proceeding to enforce a right arising from 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 realise the property of a dissolved firm; or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, (2 of 1909).or the Provincial Insolvency Act, 1920, (5 of 1920). to realise the property of an insolvent partner.

(4) This section shall not apply-

(a) to firms or to partners in firms which have no place of business in 1[the territories to which this Act extends], or whose places of business in 2 [the said territories] are situated in areas to which,

by notification under 3[section 56], this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882,(15 of 1882) or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, (9 of 1887) or to any proceeding in execution or other proceeding incidental to or arising from any ch suit or claim."

17. On the issue whether an unregistered partnership firm is entitled to maintain a complaint under Section 138 of the Act, the law is not consistent as different views have been expressed by various High Courts.

18. Learned Division Bench of the Kerala High Court in ***Kerala Arecanut Stores vs. Ramkishore and Sons, AIR 1975 Ker 144***, was ceased of a question whether the suit by a partner of an unregistered firm for recovery of money claimed on dishonour of the cheque endorsed in favour of the firm would be maintainable or would be barred under Section 69 (2) of the Partnership Act, holding the suit to be maintainable. It was held as under:

"10. Reference has been made to these provisions to indicate that the obligation of the drawer of a cheque as well as the indorser to the indorsee who is the holder in due course arises by virtue of statutory provisions. It is not as if there is any privity of contract between the maker of a cheque and the holder in due course. Any right of action available to such holder is not under any contract, for he would be a third Party to the contract and would not come within one of the exceptions enabling a third party to a contract to sue. But he is entitled to sue on his cheque by reason of the right conferred upon him by the statute. In fact, in the case of an indorsement of a pronote or of a cheque it is not an assignment of the debt as such but only of the property in the note or the cheque and it is by virtue of obtaining such property in the note or the cheque that the indorsee sues thereon. It is not necessary to advert to the several decisions which indicate that a person suing on a negotiable instrument is not suing by virtue of the assignment of the debt. That, we think, is well settled and therefore we are not referring to the decisions cited by counsel on this point. It is sufficient to state here, for the purpose of this case, that the right of action available to an indorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions the right to sue the maker of the cheque and also the indorser. If that be the case the right that is sought to be enforced does not arise from a contract. It is not a suit by the indorsee to enforce a right arising out of a contract and therefore the bar under Section 69 (2) of the Partnership Actwill not operate in such a case."

19. However, Division Bench of Andhra Pradesh High Court in ***Amit Desai and another vs. M/s Shine Enterprises and another 2000 Cri. L.J. 2386***, did not concur with the view taken by the Kerala High Court while dealing with a case of dishonour of the cheque where the complainant firm was having business dealings with the accused and the firm was not registered. It is held that the suit cannot be instituted and it was observed as under:

> "15. *The learned counsel Mr. C. Padmanabha Reddy further relied upon a ruling reported in Kerala Arecanut Stores v. M/s. Ramkishore and Sons & Another AIR 1975 Kerala 144. Their Lordships of Kerala High Court were pleased to hold that a suit by a partner for recovery of money on dishonour of cheque endorsed in favour of the firm is not barred. The learned counsel further relied upon a ruling reported in Abdul Gafoor vs. Abdurahiman, (1999) 2 Andh. LT (Cri.) 196. The learned Single Judge of Kerala High Court was pleased to hold that section 69 (2) of the Partnership Act is applicable only where the civil rights are invoked and not in criminal cases. Non-registration of the firm has no legal bearing on the criminal case. With due respect to the learned Single Judge of Kerala High Court, we prefer to deffer with the views expressed by him. Explanation to Section 138 of the Negotiable Instruments Act specifically laid down that the debt or other liability means a legally enforceable debt or other liability. Enforcement of legal liability has to be in the nature of civil suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered firm, the bar equally applies to criminal case as laid down in explanation (2) of Section 138 of the Negotiable Instruments Act.*
>
> *16. Considering the above legal aspect, we hold that it is a fit case wherein this court can exercise the powers under section 482Cr.P.C. for quashing the criminal case. Accordingly we quash C.C.No.88/97 which was filed against the petitioners herein and pending in the Court of the Judicial Magistrate of First Class, Madanapalle. Thus, the Criminal Petition is allowed."*

20. At this stage, it would be apposite to refer to the decision of the Hon'ble Supreme Court in ***BSI Ltd. vs. Gift Holdings Pvt. Ltd. (2000) 2 SCC 737***, wherein the Hon'ble Supreme Court while clarifying the distinction between criminal and civil proceedings held that criminal prosecution is neither for recovery of money nor for enforcement of any security, Section 138 of the NI Act is a penal provision convicting and sentencing an offender for commission of the offence on proof of the guilt established after a criminal trial.

21. In ***Gurcharan Singh vs. State of Uttar Pradesh and another, 2002, Cri.L.J. 3682,*** a learned Single Judge of Allahabad High Court was dealing with an identical case between M/s Sterling Novelty Products, Moradabad (U.P.) a partnership firm and International Gifts Ltd. a company at Ontario, Canada, of which Gurcharan Singh was the President and had been made an accused. Gurcharan Singh petitioned the High Court and raised a dispute that respondent-firm was not registered and therefore, could not maintain the complaint. The learned Single Judge discussed Section 69 of the Partnership Act. It also considered the judgment rendered in Amit Desai (supra) and observed that the said judgment had not discussed the law involved except Section 69. The learned Single Judge thereafter referred to the judgment of the Hon'ble Supreme Court in the matter of BSI Ltd. (supra) and on the basis of the observations made therein, concluded that even if M/s Sterling Novelty Products was not a registered firm, the bar created under Section 69 of the Partnership Act had no application and the proceedings under Section 138 of the Act, were still maintainable.

22. In ***Beacon Industries vs. Anupam Ghosh, ILR 2003 KAR 4325***, it was held as under:

> *"5. A careful reading of Section 69(2) of the Partnership Act clearly shows that an unregistered partnership firm is barred from filing a civil suit and there is no bar as such to file a private complaint and it is purely criminal liability on the*

part of the person who has issued the cheque. Even if the cheque issued by a partner of an unregistered firm for legally recoverably debt or otherwise and if such cheque dishonoured when it was presented for encashment, it amounts to a criminal liability. Therefore, the dismissal of a complaint by the Trial Court by relying on the decision of the Andhra Pradesh High Court referred to above is incorrect. Whenever a complaint is presented under Section 138 of the Negotiable Instruments Act, it is the duty of the learned Magistrate to take note of the cognizance and record the sworn statement of the complainant and his witnesses and after hearing if there is any prima facie case then it is the duty of the Court to issue summons to the accused.

6. In the case of Abdul Gafoor v. Abdurahiman, 1999(4) Crimes 98 (Ker.) the Kerala High Court held that an unregistered Partnership firm can prosecute complaint under Section 138 of the Negotiable Instruments Act and the effect of non-registration of firm under Section 69 of the Partnership Act is applicable only to a case involving civil rights.

Further, the Supreme Court in the case of BSI Limited and Anr. v. Gift Holdings Private Limited and Anr., 2000 SCC (Cri.) 538) has held that:

> *"... A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the Negotiable Instruments Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability".*

Again in the case of Gurcharan Singh v. State of Uttar Pradesh and Anr., 2002(4) Crimes 165 (All) the Allahabad High Court has followed the above said judgment of the Supreme Court.

Therefore, in view of the above decisions of the Supreme Court as well as of the other High Courts, the contention of the respondent that filing of a criminal complaint by a partner of an unregistered firm is hit by Section 69(2) of the Partnership Act cannot be accepted. The said section has no application to the criminal cases. Under these circumstances it could be said that Section 69(2) of the Partnership Act is applicable only where the civil rights are invoked and not in criminal cases. Non-registration of the firm has no legal bearing on the criminal case. Hence, the finding recorded by the Trial Court is totally incorrect and illegal and the same is liable to be set aside."

23. In ***Capital Leasing and Finance Co. vs. Navrattan Jain, (2005) 4 RCR (Cri) 330,*** the learned Single Judge of Punjab and Haryana High Court, chose to follow the Division Bench of Kerala High Court and held as under:

> "25. *A bare reading of the above shows that Section 69(2) prohibits the enforcement of rights in respect of an unregistered firm by way of a suit. The same does not relate to a criminal complaint. In Kerala Arecanut Stores v. Ramkishore and Sons and another, AIR 1975 Kerala 144, a Division Bench of the Kerala High Court held that provisions of Section 69(2) of the Partnership Act, provide that the suit by a partner for recovery of money of a dishonoured cheque, interest in favour of the firm is not barred. The following observations in the said case are apposite :*

> *"It is sufficient to state here for the purpose of this case that the right of action available to an indorsee of a cheque who comes to hold the cheque in due course is based upon conferment on him by the statutory provisions the right to sue the maker of the cheque and also the endorser. If that be the case the right that is sought to be enforced does not arise from a contract. It is not a suit by the indorsee to enforce a right arising out a contract and therefore, the bar under Section 69(2) of the Partnership Act will not operate in such a case."*

26. Besides, the Supreme Court in HaldiramBhujiawala and another v. Anand Kumar Deepak Kumar and another, 2000 (1) Unreported Judgments 603, held that a suit is not barred by Section 69(2) if a statutory right or a common law right is being enforced.

27. I n the case in hand the complainant has a statutory claim in terms of Section 138 N.I Act. Even otherwise Section 69 of the Partnership Act is confined to enforcement of a right arising out a contract by instituting a suit or other proceedings by an unregistered firm. The criminal complaint that has been filed cannot be treated as a suit or other proceedings to enforce any rights arising under a contract. Therefore, there is no bar to the criminal complaint that has been filed and the non-registration of the firm would not bar the prosecution of an accused on the ground that the firm was not registered."

24. Similar issue came up before Division Bench of Karnataka High Court in***Gowri Containers vs. S.C. Shetty 2008 Cri. L.J. 498***and it was held as under:

" 9. Now coming to the contention of the respondents that in view of the provisions of Section 69(2) of the Indian Partnership Act, the amount under the transaction was not legally enforceable debt, reliance has been placed by the respondents learned advocate on a Division Bench decision of Andhra Pradesh High Court in Amit Desai and Anr. v. Shine Enterprises and Anr. 2000 Criminal Law Journal 2386 wherein in respect of an unregistered partnership firm, on the ground that the suit cannot be instituted by an unregistered firm, it was held that the debt against the accused was not a legally enforceable debt. That was the case in which, the second consignment received by the complainant could not be sold and it had been returned to the accused by dispatching through a lawyer and the accused had sent a credit note to the amount and promised to return the value of the stock returned to them. In that circumstances, the accused had issued a cheque and the complaint arose out of the dishonour of that cheque. The amount under the cheque arose out of that promise of the accused to return the value of the stock. That was a case of enforcement of a right arising out of such contract. That principle is not applicable to the fact of the present case.

10. The Supreme Court in the case of Kamal Pushpa Enterprises v. D.R. Construction Co. AIR 2000 Supreme Court 2576 has observed that the bar to enforce rights arising from contract under Section 69(2) of the Partnership Act applies only in respect of suits and not applicable to the proceedings before the Arbitrator. In a direct decision of this Court Beacon Industries, Rep. by Its Partner, Bangalore v. Anupam Ghosh the observation of this Court is that an unregistered firm is barred from filing a civil suit, but that there is no bar to initiate a private complaint for the offence punishable under Section 138 of the Negotiable Instruments Act.

11. The words,' legally enforceable debt or other liability' used in the explanations to Section 138 of the Negotiable Instruments Act refer to the enforceability in law of the debt or the liability in question and have no reference to the right of the person enforcing it. If there is no legal impediment for enforceability of a debt or other liability in general, disability of a particular individual or entity to enforce such right to recover such debt or liability does not render such debt or liability not legally enforceable debt or liability. The intention of the legislature is to make non payment of amounts of cheques despite service of notice as per the provisions of the Act an offence only when the cheque has been issued for payment of a legitimate debt or liability. Amount required to be paid as price of articles or goods is a legitimate debt or liability and therefore it is a legally enforceable debt or liability. The disability of an unregistered firm under Section 69(2) of the Indian Partnership Act to file a suit to enforce a right arising out of a contract does not make such debt or liability not a legally enforceable debt or liability."

25. In ***Dabasree Das Baishnab vs. FI Multimedia Consultants, 2011 (1) Crimes (HC) 131, a*** learned Single Judge of High Court of Gauhati, held as under:

"8.....For the purpose of resolving the controversy raised in these petitions, I feel it appropriate to refer to the provisions of Section 69(2) of the Partnership Act which reads as follows:

> *"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."*

9. From a careful reading of Section 69(2) it appears that the said section prohibits institution of suits by or on behalf of an unregistered firm against a third party for enforcing the rights and liabilities arising from a contract. This Court in the case of IndrajitGogli v. Auto Sales and Service Station, (2008) 3 GLR 440, while disposing a criminal petition filed under Section 82, Cr.P.C observed as follows:

> *"More importantly, nothing contained in Section 69, prohibits prosecution, in terms of Section 138 of the Act, by an unregistered firm, of a person, who may have issued a cheque addressed to such a firm, when such a cheque is dishonoured and, upon notice of demand for payment having been received by the drawer, the drawer fails to make payment. Considered, this, it is clear that there was no bar, on the part of the present unregistered firm, to institute criminal prosecution against the petitioner, as accused, for dishonour of the said cheque."*

10. Relying on the decision held in the case of Amit Desai v. Shine Enterprises, 2000 Crl. LJ. 2386, a Division Bench judgment of the Andhra Pradesh High Court, the learned Counsel appearing for the petitioner has submitted that an unregistered firm cannot initiate action under Section 138 of NI Act. While deciding the case aforesaid, the Division Bench (supra) differed with the view taken by the Kerala High Court in the case of Kerala Arecanut Stores v. Ramkishore and Sons, AIR 1975 Kerala 144 and held that the explanation to Section 138 of the Nl Act specifically laid down that the debt or other liability

means legally enforceable debt or other liability. It was observed by the Division Bench as under:

> *"Enforcement of legal liability has to be in the nature of civil suit because the debt or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a Suit by unregistered firm, the bar equally applies to criminal case as laid down in Explanation (2) of Section 138 of the NI Act."*

In the case of Kerala High Court (supra), it was held that a suit by a partner for recovery of money on dishonoured cheques endorsed in favour of the firm is not a bar. This was also the view taken by this Court in the case of IndrajitGogoi (supra). For the sake of convenience and proper appreciation let me quote the provision of Section 138 of the NI Act as follows:

> *"138. Dishonour of cheque for insufficiency, etc, of funds in the account— Where any cheque drawn by a person on an account maintained by him with a Banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the Bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made out with that Bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) the cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.*
>
> *(b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid; and*
>
> *(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."*

11. The above statutory provision of the NI Act provides that if the drawer fails to make the payment of the amount mentioned in the cheque to the holder of the same, within fifteen days from the date of the receipt of the notice of demand, he shall be deemed to have committed an offence and shall be liable to be convicted and punished with imprisonment as prescribed by the Section 138. Therefore, it appears that failure of the drawer to pay the cheque amount after the said statutory period, creates criminal liability against him. This failure on the part of the drawer creates aright, in favour of the holder of such dishonoured cheque; in whose favour the same is issued, for initiating criminal prosecution before a Court not inferior to that of a

Metropolitan Magistrate or a Judicial Magistrate, First Class, who shall have the power to try and punish they drawer under Section 138 of the NI Act. Therefore, the moment cheque, in lieu of cash amount, is hand over the drawer stands liable either to pay the amount within fifteen days from the date of receipt of the demand notice, if the cheque is not honoured by the Drawer's Bank or to face criminal action in the Court of law having jurisdiction to try cases under Section 138 of NI Act. The NI Act does not provide any bar for launching criminal prosecution against such erring drawer. The Sub-section (2) of Section 69 of the Partnership Act debars a suit to enforce a right arising from a contract by or on behalf of a firm against any third party if the firm is not registered under the Act. The said provision relates to instituting a suit for enforcing a right arising from a contract. This does not debar initiating a criminal prosecution for launching criminal action as prescribed by the special statute. In view of the above, with due respect, I prefer to differ with the views expressed in the case of Amit Desai (supra) and agree with the decision held in the case of IndrajitGogoi (supra) and in the case of Kerala Arecanut Stores (supra). I

12. n the light of the above discussion, I am of the considered opinion that the criminal prosecution initiated by the complainant against the present petition is not hit by Section 69 of the Partnership Act. Therefore, I find no sufficient ground to interfere with the impugned, order passed by the learned Magistrate, First Class."

26. From the discussion so far, it is abundantly clear that an unauthorised partnership firm cannot approach the Court for enforcement of any right arising from a contrat, hence civil proceedings for recovery of money would be barred by virtue of sub Section (2) of Section 69 of the Partnership Act. However, proceedings under Section 138 of the NI Act cannot be treated as civil suit for recovery of cheque amount with interest as was held by the Hon'ble Supreme Court in ***R Vijayan vs. Baby and another (2012) 1 SCC 260***wherein it was observed:

"16.....It is sometimes said that cases arising under section 138 of the Act are really civil cases masquerading as criminal cases. The avowed object of Chapter XVII of the Act is to "encourage the culture of use of cheques and enhance the credibility of the instrument". In effect, its object appears to be both punitive as also compensatory and restitutive, in regard to cheque dishonour cases. Chapter XVII of the Act is an unique exercise which blurs the dividing line between civil and criminal jurisdictions. It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realization of the cheque amount) thereby obviating the need for the creditor to move two different fora for relief. This is evident from the following provisions of Chapter XVII of the Act.

(i) The provision for levy of fine which is linked to the cheque amount and may extend to twice the amount of the cheque (section 138) thereby rendering section 357(3) virtually infructuous in so far as cheque dishonour cases are concerned.

(ii) The provision enabling a First Class Magistrate to levy fine exceeding Rs.5,000/- (Section 143) notwithstanding the ceiling to the fine, as Rs.5,000/- imposed by section 29(2) of the Code;

(iii) The provision relating to mode of service of summons (section 144) as contrasted from the mode prescribed for criminal cases in section 62 of the Code;

(iv) The provision for taking evidence of the complainant by affidavit (section 145) which is more prevalent in civil proceedings, as contrasted from the procedure for recording evidence in the Code;

(v) The provision making all offences punishable under section 138 of the Act compoundable.

17. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under section 357(1)(b) of the Code. Though a complaint under section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount, (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under section 357 (1)(b) of the Code and the provision for compounding the offences under section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary."

27. The judgments in ***Abdul Gafoor vs. Abdurahiman, 1999 (2) Ker LT 634, Gurcharan Singh case (supra) and Beacon Industries (supra)*** were followed by the learned Single Judge of the Madras High Court in ***Karthick and Company vs. Vadivel Sizing and Weaving Mills (Pvt.) Ltd. (2013) 7 RCR, (criminal) 140*** and it was held that even if the complainant remains to be unregistered firm, it is legally competent to lay complaint under Section 138 of the Act.

28. The issue in question recently came up before a learned Single Judge of Delhi High Court in ***Smt. Rani Kapoor vs. M/s Silvermount (2017) Vol. 242 DEL.363*** and after taking into consideration all the aforesaid judgments including the judgment of the Hon'ble Supreme Court in **BSI Ltd.** (supra), it was held as under:

"12. *It is thus apparent that on finding of the guilt arrived at by the criminal Court the accused is liable to a sentence of imprisonment which may extend to two years, or fine or with fine which may extend to twice the amount of cheque, or with both. Thus discretion is granted to the criminal Court to either award imprisonment or fine or both. Thus proceedings under Section 138 of the NI Act are not recovery proceedings and in a given case the criminal Court may only award sentence of imprisonment. Irrespective of a complaint proceeding under Section 138 of the NI Act, a creditor has the right to institute civil suit for*

recovery of his debt in which case the same would be recoverable only if it is a legally enforceable debt or other liability.

13. Following the decision of the Supreme Court in BSI Ltd. (supra) this Court is of the considered view that the decisions of the Kerala High Court, Karnataka High Court and Punjab & Haryana High Court as noted above lay down the correct law. Thus the issue raised by learned counsel for the petitioner that since the complainant respondent is not a registered firm it cannot maintain a complaint under Section 138 of the NI Act is rejected. Petition and application are dismissed."

29. From the aforesaid discussion, it would be noticed that save and except an isolated authority of the Division Bench of Andhra Pradesh High Court in ***Amit Desai's*** case (supra), all other High Courts in the country, have categorically held that the proceedings under Section 138 of the N.I. Act, are not recovery proceedings. Therefore, even an unregistered Partnership firm can maintain a complaint under Section 138 of the Act.

30. That apart, it would further be noticed that the view taken by the Andhra Pradesh High Court, in fact, is contrary to the ratio of the judgment laid down by the Hon'ble Supreme Court in ***R. Vijayan's*** case (supra). Therefore, in the given facts and circumstances, I am of the considered view that the criminal prosecution initiated by the complainant against the respondent is not hit by Section 69 of the Partnership Act.

31. Consequently, I find merit in this appeal and the same is allowed. The order/judgment dated 12.3.2018 passed by learned Judicial Magistrate 1st Class, Manali, District Kullu, H.P. in Criminal Case No.1630I/2015/31-III/2017 is set-aside and the matter is remitted back to the learned trial Magistrate, who shall afford an opportunity to the appellant to lead evidence with regard to the factum of partnership as also due authorisation, if any, in favour of Sh. Aakash Ahuja. Needless to say that the respondent shall have corresponding right of not only cross-examining the appellant witnesses, but shall also have a right to lead evidence.

32. The parties through their counsel(s) to appear before the learned trial Magistrate on **24.9.2018.**

33. The appeal is disposed of in the aforesaid terms, so also the pending applications, if any.

****

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

National Insurance Company Limited ....Appellant

Versus

Mani Ram and others ....Respondents

FAO(MVA) No. 40 of 2018
Decided on: September 11, 2018.

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Pleadings generally – Held, Strict rules of pleadings cannot be made applicable to claim proceedings filed under Act. (Para-13)

Motor Vehicles Act, 1988- Section 166- Motor accident – Claim application- Compensation – Housewife – Assessment – On facts, monthly income of deceased at time of accident (2011) taken at Rs.4500/- p.m. (Para-21)

Motor Vehicles Act, 1988- Sections 10, 149 and 166- Motor Accident- Claim application – Defences – Validity of driving licence (DL) - DL of 'Light Motor Category"- Held, Section 10 of Act requires driver to hold driving licence with respect to 'Class' of vehicle and not with respect of 'Type' of vehicle –Driver holding LMV driving licence authorized to drive light transport vehicle. (Para-11)

Cases referred:

Krishan Gopal and another vs. Lala and others (2014) 1 SCC 244
Lata Wadhwa &Ors vs State of Bihar &Ors, AIR 2001 SC 3218
Jitendra Khimshankar Trivedi v. KasamDaudKumbhar (2015) 4 SCC 237
National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157
Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639

For the Appellant	:	Mr. Jagdish Thakur, Advocate.
For the Respondents	:	Mr. Raj Negi, Advocate, for respondents No.1 and 2. Mr. Nitin Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal filed under Section 173 of the Motor Vehicles Act is directed against the Award dated 3.12.2016 passed by the learned Motor Accident Claims Tribunal Kinnaur at Rampur Bushahr, District Shimla, Himachal Pradesh, in M.A.C. Petition No. 0000075 of 2014, whereby learned Tribunal below held respondents No.1 and 2-claimants (hereinafter, 'claimants') entitled to compensation to the tune of Rs.6,53,000/- (Rs.5,28,000/- on account of loss of income, Rs. 25,000/- on account of funeral expenses and Rs.1,00,000/- as loss of consortium) alongwith interest at the rate of 7.5 percent per annum from the date of filing of the petition till its realisation. Vide aforesaid Award, learned Tribunal below also held that appellant-Insurance Company being insurer of the ill-fated vehicle is liable to pay the compensation on behalf of respondent No.3 (owner of the vehicle) and held that in case, subsequently the appellant-Insurance Company succeeds in proving that the deceased was traveling in the vehicle as a gratuitous passenger, then in that eventuality, it would be at liberty to recover the aforesaid amount alongwith interest from respondent No.3.

2. For having bird's eye view, facts as emerge from the record are that the claimants being legal heirs of deceased Smt. Gulbasi, approached the Motor Accident Claims Tribunal below by way of petition filed under Section 166 of the Motor Vehicles Act, 1988, claiming therein compensation to the tune of Rs.11,00,000/- alongwith interest at the rate of 18% per annum from the date of institution of the petition till payment of the entire compensation amount. Claimants averred that on 16.11.2011, deceased Gulbasi was traveling in a vehicle bearing registration No. HP-26A-0905 owned by respondent No.3, Sunil Kumar. Claimants further claimed that the vehicle in question was being driven rashly and negligently by the driver and as such, he lost control over the vehicle and it went down the road and rolled into river Sutlej, resulting into death of Gulbasi. Claimants averred that the deceased was a housewife and was the only bread earner of the family. It is further averred that the deceased was earning Rs.8,000/- per month and due to her death, claimants have been deprived of their bread earner.

3. Respondent No.3-Sunil Kumar, owner of the vehicle, while acknowledging the factum with regard to accident, denied that the accident in question occurred due to rash and negligent driving on the part of the driver. Aforesaid respondent also raised plea that the deceased was traveling in the vehicle alongwith ration articles and specifically denied that she was bread earner of the family and was earning Rs.8,000/- per month from agriculture/horticulture. Respondent No.3 also claimed before the learned Tribunal below that since vehicle stands insured with the appellant-Insurance Company, it is liable to indemnify him, in case the learned Tribunal below comes to the conclusion that claimants are entitled to compensation on account of death of the deceased.

4. Appellant-Insurance Company opposed the claim of the claimants on the ground that the vehicle was being plied by respondent No.3 in violation of terms and conditions of the policy and at the relevant time and the driver of the vehicle did not have a valid and effective driving licence to drive the vehicle in question. Appellant-Insurance Company further denied that at the time of accident, deceased was 51 years of age and was deriving income from agriculture/horticulture and claimed that the deceased was traveling as an unauthorized /gratuitous passenger, as such, it (appellant-Insurance Company) can not be held liable to indemnify respondent No.3, for the compensation, if any, to be paid to the claimants.

5. Learned Tribunal below, on the basis of pleadings of the parties, framed following issues on 1.3.2016:

"1. Whether Smt. Gulbasi had died in motor accident on account of rash and negligent driving of Bolero Camper No. HP-26A-0905, as alleged? OPP

2. Whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP

3. Whether the claim petition is not maintainable in the present form, as alleged? OPR-2

4. Whether the insured had violated the terms and conditions of the insurance policy and the provisions of the Motor Vehicles Act, as alleged?

OPR-2.

5. Whether the offending vehicle at the relevant time was being plied without fitness certificate and valid registration certificate, as alleged? OPR-2.

6. Whether the driver of the offending vehicle at the relevant time was not holding valid and effective driving licence, as alleged? OPR-2.

7. Whether the deceased at the relevant time was traveling in the offending vehicle as an unauthorized/gratuitous passenger, as alleged?

OPR-2."

6. Subsequently, the learned Tribunal below allowed the claim petition vide Award dated 3.12.2016 and held claimants entitled to the compensation to the tune of Rs.6,53,000/- alongwith interest at the rate of 7.5% per annum, from the date of institution of petition till the payment of entire compensation amount. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the impugned Award being contrary to the provisions of law as well as law laid down by Hon'ble Apex Court.

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

8. Having heard the learned counsel representing the parties and perused the material available on record, this court is not persuaded to agree with the contention of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that the Award passed by learned Tribunal below is not based upon proper appreciation of the evidence adduced on record, rather this Court is convinced and satisfied that the learned Tribunal below has dealt with each and every aspect of the matter meticulously and has passed the Award on the basis of proper appreciation of evidence. Onus to prove that the vehicle in question was being plied at the time of accident in violation of the terms and conditions of the insurance policy as well as provisions of Motor Vehicles Act, was upon the appellant-Insurance Company and if the evidence led on record by the respective parties is perused carefully, it clearly suggests that appellant-Insurance Company failed to discharge the said onus and as such, learned Tribunal below rightly decided aforesaid issue against the appellant-Insurance Company. Similarly, this Court finds that the appellant-Insurance Company was unable to prove on record that at the time of accident, driver of the vehicle was not having a valid and effective driving licence to drive the vehicle in question.

9. True it is that the appellant-Insurance Company, took a stand that at the time of accident, driver of the vehicle was having two licences issued by different licensing authorities, but if the evidence led on record by the appellant-Insurance Company in this regard is perused/examined carefully, there is considerable force in the argument of Mr. Raj Negi, learned counsel representing the claimants that there is no evidence except bald statement of RW-1, Ramesh Chander that the driver was not possessing a valid driving licence. RW-1 Ramesh Chander tendered in evidence, Ext. RW-1/D, copy of letter dated 13.12.2012 issued by Registering and Licensing Authority, Pangi at Killar, District Chamba and Ext. RW-1/E, copy of letter dated 6.12.2012 sent by Investigator of appellant-Insurance Company to the District Transport Officer, Imphal, Manipur and reply in the form of endorsement made thereon by the Transport Authority. Perusal of Ext. RW-1/D suggests that the Registering and Licensing Authority had certified that the licence issued in favour of Anil Kumar son of Kehar Singh was in respect of Light Motor Vehicle and it was valid with effect from 11.5.2005 to 10.5.2010. As per Ext. RW-1/E, driving licence issued in favour of the above named deceased was valid from 27.4.2011 to 26.4.2014 and deceased was authorized to drive Light Motor Vehicle. Ext. RW-1/E shows that driving licence was issued on 27.4.2011 i.e. after six years from the date of issuance of earlier driving licence issued by Registering and Licensing Authority, Pangi at Killar.

10. Leaving everything aside, appellant-Insurance Company, with a view to prove the contents of letter Ext. RW-1/E dated 6.12.2012 sent by the investigator of the appellant-Insurance Company, to the District Transport Authority, Imphal, Manipur, neither examined any official of Registering and Licensing Authority Pangi at Killar nor any official from the office of District Transport Authority, Impahl, Manipur and as such, argument having been advanced by Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that since two driving licences are shown to have been issued by different authorities, it is to be presumed that there was no valid and effective driving licence, deserves outright rejection because, admittedly, there is no dispute that during the period when the alleged accident occurred, vehicle in question was insured with the appellant-Insurance Company and driver of the vehicle in question was holding a valid and effective driving licence to drive the vehicle.

11. Question, whether driver having licence to drive a Light Motor Vehicle is competent to drive a Light Transport Vehicle, has been settled by Hon'ble Apex Court in case

titled **Mukund Dewangan** Vs. **Oriental Insurance Company Limited**, wherein, it has been specifically held that Section 10 of the Act requires a driver to hold driving licence with respect to 'class' of vehicle and not with respect to the 'type' of vehicle. Aforesaid judgment has also been taken note by this Court in FAO No. 153 of 2014 titled **Kamal Devi** vs. **Tulsi Ramand others**, decided on 12.9.2017, as such, argument of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company, that the driver of the vehicle was not competent to drive the vehicle in question, is not tenable.

12. Careful perusal of the evidence available on record vis-à-vis impugned award passed by learned Tribunal below, nowhere suggests that the appellant-Insurance Company was able to prove that the deceased was travelling in the offending vehicle at the time of accident as a gratuitous/unauthorized passenger, rather, evidence clearly suggests that the deceased was traveling in the ill-fated vehicle alongwith goods.

13. True it is that the claimants have not pleaded specifically in the petition that the deceased was carrying some ration in the vehicle but if the reply having been filed by the owner of the vehicle (respondent No.3) is seen, it clearly suggests that the deceased was travelling in the vehicle alongwith her ration articles. PW-1, while deposing before the learned Tribunal below stated that the deceased was also transporting some ration articles and wool and for that purpose he had hired the vehicle. In his cross-examination, he specifically denied the suggestion put to him that the aforesaid story is concocted one. No doubt, there is no specific averment in the claim petition filed by the claimants to the effect that at the time of accident, deceased was carrying ration articles/wool but is quite apparent from the reply having been filed by respondent No.3 as well as statement given by PW-1 that deceased had hired vehicle in question for transporting some ration articles and wool and as such, learned Tribunal below rightly arrived at a conclusion that strict rule of pleadings can not be made applicable to the proceedings of present nature.

14. Though, in the case at hand, appellant-Insurance Company, with a view to prove its contention that the deceased was travelling as a gratuitous passenger also placed reliance upon Ext. RW-1/C, copy of form of motor claim preferred by respondent No.3 with regard to damage caused to his vehicle, wherein answer has been mentioned as "No" to the query with regard to weight of goods carried in the vehicle, but, if the cross-examination conducted upon RW-1, is perused, he specifically denied the suggestion put to him that no ration articles were being transported at the time of accident. Though this witness denied that ration articles and wool were not found by the police on the spot and the police in its report had mentioned that deceased had taken lift in this vehicle but it is not in dispute that all the occupants of the vehicle had expired and as such, there was none left to throw light on the aforesaid aspect of the matter. It is also not in dispute that PW-1 was not traveling in the vehicle at the relevant time.

15. Otherwise also, there is no evidence led on record by the appellant-Insurance Company that the ill-fated vehicle was not hired by the deceased, rather RW-1, while deposing before the learned Tribunal below made an attempt to prove the contents of RW-1/C by stating that investigating agency had also come to the conclusion that the deceased had taken lift in the vehicle in question but there is no evidence led on record by the appellant-Insurance Company to prove aforesaid aspect of the matter, neither record, if any, from the concerned investigating agency is led on record to prove the factum with regard to deceased having taken lift in the vehicle, has been produced nor steps, if any, were taken by the appellant-Insurance Company to examine Investigating Officer with respect to aforesaid aspect of the matter and as such, learned Tribunal below rightly rejected the contention raised on behalf of the appellant-Insurance Company that the deceased was traveling in the ill-fated vehicle as a gratuitous passenger.

16. Otherwise also, as has been taken note above, the learned Tribunal below while passing impugned award, has categorically held that in case appellant-Insurance Company is able to prove, in the appropriate proceedings, that the deceased was traveling in the ill-fated vehicle as a gratuitous passenger, it can recover necessary compensation from respondent No.3 i.e. owner of the vehicle.

17. It is not in dispute that deceased was aged 51 years at the time of alleged accident, as is evident from Ext. PW-1/C, wherein date of birth of the deceased has been mentioned as 9.3.1960. Learned Tribunal below, taking note of the fact that the deceased was a housewife, took her monthly income as Rs.6,000/- per month in light of judgment rendered by Hon'ble Apex Court in **Krishan Gopal and another** vs. **Lala and others** (2014) 1 SCC 244, wherein Hon'ble Apex Court has held that due to devaluation in rupee, double of notional income of a non-earning person as given in the Schedule annexed to the Motor Vehicles Act as Rs.15,000/- could be considered as Rs.30,000/- per annum. Learned Tribunal below while taking monthly income of the deceased at Rs.6,000/- also took into consideration law laid down by Hon'ble Apex Court in **Lata Wadhwa &Ors**vs **State of Bihar &Ors**, AIR 2001 SC 3218, wherein income of the deceased housewife was treated at minimum of Rs.3,000/- per month. Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company contended that the learned Tribunal below has erred, while taking monthly income of the deceased at the rate of Rs.6,000/- because monthly income of deceased could not be taken more than Rs.3,000/- per month. Mr. Thakur further contended that judgment passed by Hon'ble Apex Court in **Krishan Gopal** (supra) is not applicable in the present case because in that case, Hon'ble Court was dealing with a case of a minor. Mr. Thakur also placed reliance upon judgment rendered by Hon'ble Apex Court in **Jitendra Khimshankar Trivedi** v. **KasamDaudKumbhar** (2015) 4 SCC 237, to suggest that considering the nature of work and evidence of claimants' witnesses, learned Tribunal below could not have taken monthly income of deceased more than Rs.3,000/- per month.

18. Having carefully perused the reasoning rendered on record by the learned Tribunal below, while taking monthly income of deceased at the rate of Rs.6,000/- this Court is persuaded to agree with the contention of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that the learned Tribunal below ought not have taken the monthly income of the deceased at Rs.6,000/-, especially when there is no evidence led on record by the claimants suggestive of the fact that the deceased was earning some money per month from agricultural or horticultural pursuits. Learned Tribunal below having perused evidence led on record by the claimants has categorically held that there is no corroborative evidence led on record to enable it to agree with the contention that the deceased was carrying agricultural or horticultural pursuits and that she was earning income, as pleaded by the claimants. In **Lata Wadhwa** (supra), Hon'ble Apex Court considering the fact that the deceased was a housewife, took her monthly income per month at Rs.3,000/- but learned Tribunal below applying the analogy that since 15 years have gone/passed after passing of the judgment in **Lata Wadhwa**, deceased can be said to be earning Rs.6,000/- per month, which finding returned by learned Tribunal below does not appear to be plausible.

19. Hon'ble Apex Court in **Jitendra Khimshankar Trivedi** (supra) has held that it is hard to monetize the domestic work done by a house-mother. Services of mother/wife are available twenty four hours. Her duties are never fixed. Contribution made by a wife to the house is invaluable and same can not be computed in terms of money. Court has further held that a house-wife/home-maker does not work by the clock and she is in constant attendance of the family throughout and such service rendered by the home maker has to be necessarily kept in view while calculating the loss of dependency and thus Hon'ble Apex

Court proceeded to fix the income of deceased at Rs.3,000/- per month. In **Jitendra Khimshankar Trivedi**, Hon'ble Apex Court has held as under:

> "9. As noticed earlier, tribunal has taken the income of the deceased at Rs.1,500/- whereas the High Court has assessed the income of the deceased at Rs.1,350/- per month. As observed by the tribunal, embroidery work, stitching work and local traditional embroidery work was doing well in the district of Kachchh and there was good earning. Considering the nature of the work and the evidence of claimants' witnesses- father-in-law and mother-in-law of the deceased, had the deceased Jayvantiben been alive she would have earned not less than Rs.3,000/- per month.
>
> 10. Even assuming Jayvantiben Jitendra Trivedi was not self- employed doing embroidery and tailoring work, the fact remains that she was a housewife and a home maker. It is hard to monetize the domestic work done by a house-mother. The services of the mother/wife is available 24 hours and her duties are never fixed. Courts have recognized the contribution made by the wife to the house is invaluable and that it cannot be computed in terms of money. A house-wife/home-maker does not work by the clock and she is in constant attendance of the family throughout and such services rendered by the home maker has to be necessarily kept in view while calculating the loss of dependency. Thus even otherwise, taking deceased Jayvantiben Jitendra Trivedi as the home maker, it is reasonable to fix her income at Rs.3,000/- per month.
>
> 11. Recognizing the services of the home maker and that domestic services have to be recognized in terms of money, in Arun Kumar Agrawal &Anr. vs. National Insurance Company Ltd. &Ors.[2], this Court has held as under:-
>
> > "The alternative to imputing money values is to measure the time taken to produce these services and compare these with the time that is taken to produce goods and services which are commercially viable. One has to admit that in the long run, the services rendered by women in the household sustain a supply of labour to the economy and keep human societies going by weaving the social fabric and keeping it in good repair. If we take these services for granted and do not attach any value to this, this may escalate the unforeseen costs in terms of deterioration of both human capabilities and social fabric.
> >
> > Household work performed by women throughout India is more than US $612.8 billion per year (Evangelical Social Action Forum and Health Bridge, p.17). We often forget that the time spent by women in doing household work as homemakers is the time which they can devote to paid work or to their education. This lack of sensitiveness and recognition of their work mainly contributes to women's high rate of poverty and their consequential oppression in society, as well as various physical, social and psychological problems. The courts and tribunals should do well to factor these considerations in assessing compensation for housewives who are victims of road accidents and quantifying the amount in the name of fixing "just compensation"."

20. If the reasoning assigned by the Hon'ble Court in the aforesaid case is applied in the facts and circumstances of the case at hand, reasoning adopted by the learned Tribunal below while considering income of the deceased at Rs.6,000/- per month does not hold good because learned Tribunal below has held that since in **Lata Wadhwa**, Hon'ble Apex Court had ordered that in case of housewife, her contribution to household must be treated at a minimum of Rs.3,000/- per month, accordingly, income of household wife after fifteen years of passing of aforesaid judgment can be considered at Rs.6,000/- per month, which reasoning does not appear to be plausible, especially in view of the judgment rendered by Hon'ble Apex Court in **Jitendra Khimshankar Trivedi**.

21. Without going into aforesaid controversy, in the facts and circumstances of the case, where the claimants have claimed that deceased was earning money from horticulture and agriculture, deceased can be said to be a skilled worker and as such, this Court deems it fit to take into consideration minimum wages prevalent in the year 2011, when alleged accident took place. It is not in dispute that in the year 2011, minimum wage of skilled labour was Rs.151/- per day as such, this Court holds that the contribution of deceased towards household was Rs.4,500/- per month.

22. This court finds that no addition has been made to future loss of dependency/income by the learned Tribunal below while placing reliance upon judgment rendered in **Sarla Verma'**s case but Hon'ble Apex Court in **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, has held that where deceased was 50-60 years of age, an addition of 10% of the established income should be made. 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."

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."

23. It is not in dispute that at the time of accident, deceased was 51 years and having a family consisting of two members as such, learned Tribunal below rightly applied factor of 11 to assess compensation payable to the petitioners and correctly deducted 1/3rd out of monthly income of deceased towards personal living expenses while calculating compensation payable to the claimants on account of death of the deceased. Besides this, in view of law laid down **Pranay Sethi**¸ an addition to 10% to the established income of the deceased is also required to be made and thus, the total loss of dependency can be calculated as follows:

Income of the deceased	= Rs.4500/-
Addition of 10%	= Rs.4500 x 10% = Rs.450/-
Total income	=Rs.4950/-
1/3rd Deduction	= Rs.4950/- x 1/3rd = Rs.1650/-
Net Income	=Rs.3300/- per month (Rs.39600/- per annum)
After applying multiplier of 11	= Rs.435600

24. So far grant of consortium to respondent No.1 on account of death of his wife is concerned, learned Tribunal below has awarded an amount of Rs.1,00,000/- under the aforesaid head which in view of the law laid down by the Hon'ble Apex Court in **Pranay Sethi**, ought to have been Rs.40,000/- and as such, this Court deems it fit to modify the amount awarded under the head of loss of consortium to Rs.40,000/- and as such, award under challenge is further modified to the extent of grant of loss of consortium. Under the head of funeral charges also, this court is of the view that amount has been awarded on higher side, which deserves to be modified and as such, same deserves to be modified to Rs.15,000/- instead of Rs.25,000/-.

25. Learned counsel for the claimants have raised another issue i.e. no amount has been granted under the head of loss of estate and as such this Court also deems it fit to grant an amount of Rs.15,000/- under the head of 'loss of estate'.

26. Otherwise also, the Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, has held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. 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."

27. Consequently, in view of aforesaid modification made herein above, respondents No. 1 and 2 are held entitled to following amounts under various heads:

1.	Loss of dependency	**Rs.4,35,600/-**
2.	Loss of consortium	**Rs.40,000/-**
3.	Loss of estate	**Rs.15,000/-**
4.	Funeral charges	**Rs.15,000/-**
	Total	**Rs.5,05,600/-**

28. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld.

29. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award dated 3.12.2016 passed by the learned Motor Accident Claims Tribunal Kinnaur at Rampur Bushahr, District Shimla, Himachal Pradesh, in M.A.C. Petition No. 0000075 of 2014, is modified to the above extent only.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

State of Himachal Pradesh .....Appellant.

Versus

Jagmohan .....Respondent.

Cr. A No. 287 of 2007.
Reserved on: 2.7.2018.
Decided on: 11.9.2018.

Indian Penal Code, 1860- Sections 380 and 454 – House breaking and theft – Proof– Complainant alleging theft of trunk containing currency when he was away from home – Case based on disclosure statement of accused and recoveries of trunk and receipt etc. from jungle- Recovery of currency made during personal search of Accused – Trial Court convicting accused but Sessions Court acquitting him in appeal – Appeal by State – On facts, (i) statement of witness 'B' having seen accused wandering around house of complainant on day of theft, found doubtful, (ii) 'P', 'M' and 'S' stating on oath of having

caught accused and then bringing him to police post belying prosecution case of police having spotted accused per chance while on patrol and making recovery of currency during his personal search, (iii) accused, complainant and 'P' having business dealings and complainant party claiming Rs.10,000/- as due from accused (iv) making of disclosure statement and recovery of trunk from jungle extremely doubtful – Held, on evidence, prosecution miserably failed to connect accused with commission of offences – Appeal dismissed – Judgment of Sessions Court upheld. (Paras-11 to 17)

For the appellant: Mr. Narinder Guleria, Addl. AG with Mr. Vikas Rathore, Addl. AG.
For the respondent: Mr. Chandernarayan Singh, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

This appeal has been directed against the judgment dated 14.5.2007 passed by learned Sessions Judge, Shimla in Cr. Appeal No. 15-S/10 of 2006, whereby on reversal of the judgment passed by learned JMIC Chopal, District Shimla in Cr. Case No. 105-1 of 2003/65-II of 2003, he has allowed the appeal and acquitted the respondent (hereinafter referred to as the accused) from the charge under Sections 454 & 380 IPC.

2. It is, Naresh Kumar (PW-4) who has set the machinery in motion by way of lodging report Ext. PW-1/A in Police Post Nerwa, Tehsil Chopal, District Shimla registered as rapat No. 14 on 2.8.2003 at 8:30 PM. The contents of Ext. PW-1/A reveal that Naresh Kumar (PW-4), the complainant was running meat shop at Nerwa Tehsil Chopal, District Shimla. On 2.8.2003, as usual in the morning he came to the shop after locking his quarter. His other partner had gone to graze the goats. In the evening, around 6-6:30 PM, when he returned to the quarter, found the lock he had put on the door broken. When he entered inside the room, noticed that the lock of Almirah was opened. When he opened the same, the trunk in which he used to keep his money was found stolen by someone. In the trunk, he had kept Rs.25,000/-, his matriculation certificate and receipts. He suspected someone having broken the lock during day time and stolen the trunk and also the currency notes lying therein. He made every possible effort to find out as to who had committed the theft but of no avail.

3. On the basis of the rapat Ext. PW-1/A, FIR Ext. PW-7/A came to be registered in PS Chopal, Distt. Shimla, under Sections 454 and 380 IPC on the next day i.e. 3.8.2003. The police started investigation in the matter. The broken lock Ext. P-1 was taken into possession. The spot map Ext. PW-8/A was also prepared. As per further case of the prosecution, on 8.8.2003, the I.O. along with other police officials had gone for patrolling towards Rana Kyar side. The accused was spotted there who on noticing the presence of the police got perplexed and tried to run away. On suspicion, he was overpowered and on enquiry, he disclosed his name as Jagmohan and other antecedents. His personal search was conducted in the presence of PW-2 Panne Lal and PW-3 Maghu Ram. It is in their presence, a sum of Rs. 10,000/- was recovered from the accused and taken into possession vide recovery memo Ext. PW-2/A. During the course of further interrogation of the accused, he disclosed that on 2.8.2003 during day time by breaking open the lock of the quarter of Naresh Kumar (PW-4), he entered inside and removed the trunk therefrom. The accused was arrested on 9.8.2003. During his custodial interrogation, he made disclosure statement Ext. PW-2/B on 10.8.2003 in the presence of PW-2 Panne Lal and PW-3 Maghu Ram. Subsequently, he led the police party accompanied by PW-2 Panne Lal and PW-3 Maghu

Ram to forest where he had identified the place of recovery of trunk Ext. PX wrapped with cover of quilt Ext. PY beneath a tree. On opening the same, the matriculation certificate of Naresh Kumar (PW-4) and receipts Ext. P-1 to P-3 were recovered threfrom. The same were taken into possession vide recovery memo Ext. PW-2/C. The trunk Ext. PX was also taken into possession vide the same memo in the presence of witnesses.

4. During his custodial interrogation, he further revealed that in the stolen trunk, a sum of Rs. 16,000/- was found kept out of which a sum of Rs. 6,000/- was already spent by him for his personal needs. He, however, denied that there were Rs.25,000/- lying in the trunk.

5. On completion of the investigation, report under Section 173(3) Cr.P.C. was filed by the Investigating Agency in the trial Court. Learned trial Magistrate, on prima-facie finding a case under Sections 454 and 380 IPC having been made out against the accused, framed charge against him accordingly. He, however, pleaded not guilty and claimed trial. Consequently, the prosecution in order to sustain the charge against him examined the complainant Naresh Kumar who has stepped in the witness-box as PW-4. PW-1 Thebu Ram is a witness to the recovery of the broken lock Ext. P-1 of Nelson-3 make, vide recovery memo Ext. PW-1/A from the spot i.e. quarter of the complainant. PW-2 Panne Lal again a meat seller and running his shop at Chirgaon market as well as PW-3 Maghu Ram were allegedly associated at the time of recovery of Rs. 10,000/- immediately after the arrest of the accused on 8.8.2003 at Rana Kyar who have stated that the currency notes Ext. P-2 worth Rs. 10,000/- were recovered from the accused and taken into possession vide recovery memo Ext. PW-1/A. They both further revealed that on 10.8.2003 in their presence, the accused had made disclosure statement Ext. PW-2/B and pursuant to that got recovered the trunk allegedly stolen by him in the jungle. The same was found wrapped in a quilt cover and hidden nearby a tree. The lock of the trunk was found broken. Inside the trunk, besides matriculation certificate, receipts were found kept. The trunk was taken into possession vide recovery memo Ext. PW-2/C. PW-5 Bhero Singh is neighbour of Naresh Kumar (PW-4) the complainant being residing adjacent to his quarter. He was associated to show that one boy (accused) was seen wandering at the site of the quarter of Naresh Kumar (PW-4) during day time. Also that in the evening, the said witness told him about the lock of his quarter broken by someone and a sum of Rs. 25,000/- stolen therefrom.

6. The remaining witnesses are official, hence, formal because PW-6 Const. Shishu Pal has proved rapatrojnamcha Ext. PW-1/A. PW-7 Asha Ram has registered the FIR Ext. PW-7/A on the receipt of rukka and prepared the challan on the receipt of the case file from PW-9 ASI Ramesh Chand, the I.O. which lateron was presented in the Court. PW-8 HC Virender Kumar had partly investigated the case as the spot map Ext. PW-8/A was prepared by him. The photographs Ext. PA to PC of the spot were also stated to be taken by him. PW-9 is the investigating officer. He has deposed about the manner the investigation progressed in the case and the accused nabbed on 8.8.2003 at Rana Kyar. He has also supported the prosecution case qua recovery of Rs. 10,000/- vide memo Ext. PW-2/A in the presence of PW-2 Panne Lal and PW-3 Maghu Ram from the accused. The statements of witnesses, according to him were recorded as per their version. According to him, the disclosure statement Ext. PW-2/B was made by the accused while in custody and on the basis thereof got recovered the trunk Ext. PX, Quilt Ext. PY, receipts Ext. P-1 to P-3. He has also identified the broken lock Ext. PZ. The same, according to him were taken into possession vide recovery memo Ext. PW-2/B.

7. The accused in his statement recorded under Section 313 Cr.P.C. has denied the entire prosecution case either being incorrect or for want of knowledge and in his defence stated that he had business dealings with the complainant and certain disputes had

cropped up amongst them about the payment of money to him by the complainant. He, as such, was falsely implicated in this case.

8. Learned trial Judge, on hearing learned Assistant Public Prosecutor and also learned defence counsel has arrived at a conclusion that the charge under Sections 380 and 454 IPC against the accused stands proved beyond all reasonable doubt with the help of cogent and reliable evidence produced by the prosecution. He, as such, was convicted and sentenced to undergo rigorous imprisonment for three years and imposed the penalty of Rs. 5,000/- and in default ordered to undergo rigorous imprisonment for a further period of six months. In appeal, as noticed at the outset, learned lower appellate Court has reversed the judgment passed by learned trial Court and acquitted the accused of the charge framed against him.

9. It is the legality and validity of the judgment passed by learned lower Appellate Court, under challenge in the present appeal on the grounds, inter alia, that learned lower Appellate Court has not appreciated the evidence available on record in its right perspective and passed the impugned judgment on hypothesis, conjectures and surmises. The prosecution evidence comprising the testimony of the complainant Naresh Kumar (PW-4) corroborated by PW-2 Panne Lal and PW-3 Maghu Ram fully substantiate the prosecution case, however, stated to be erroneously ignored. The recovery of the trunk Ext. PX at the instance of the accused is duly established on record, however, the evidence qua the disclosure statement Ext. PW-2/B made by the accused while in custody and the recovery of trunk in the presence of witnesses at his instance is erroneously brushed aside. Ample evidence qua arrest of the accused on 8.8.2003 at Rana Kyar and recovery of the part of the stolen money i.e. Rs. 10,000/- from him in the presence of the witnesses also connect the accused with the commission of the offence. The prosecution evidence has, therefore, been ignored without assigning any reason. The impugned judgment is stated to be legally and factually unsustainable. The same has been sought to be quashed.

10. On hearing Mr. Narinder Guleria, learned Addl. Advocate General on behalf of the appellant State and Mr. Chandernarayan Singh, Advocate, learned defence counsel as well as going through the evidence available on record, the only question which arises for determination is that though the prosecution has proved its case against the accused beyond all reasonable doubt, however, the learned lower Appellate Court has illegally reversed the judgment passed by learned trial Court and acquitted the accused of the charge framed against him.

11. The close scrutiny of the prosecution case and the evidence available on record reveals that the prosecution story right from the very beginning till completion of the investigation inspires no confidence for the reason that PW-5 Bhero Singh, the immediate neighbour of the complainant (PW-4) no doubt in his examination-in-chief has come forward with the version that on the day of occurrence i.e. 2.8.2003 during day time he had noticed the accused wandering in the vicinity where the building in which they have taken accommodation on rent is situated. He, therefore, had expressed his suspicion on the accused to have broken open door of the quarter of the complainant and stolen the money lying in the trunk inside the room. However, when as per his version, he is also running a shop at Nerwa as is stated in his cross-examination and when he as per his own statement was in his shop up to 7:00 PM, how he could have noticed the accused wandering in the vicinity on that day. Even, if it is believed that he came to his quarter to have lunch at 1-1:30 PM and it is at that time, he noticed the accused wandering there why had not disclosed this fact to the complainant particularly when as per his version the accused had been coming to the complainant off and on. Therefore, it was expected from this witness that he should have apprized the complainant when he came to know about the theft that

the accused who had been visiting him was wandering in the vicinity on that day. PW-5 Bhairo Singh, therefore, is a liar and deposed falsely for some extraneous consideration as has come in the cross-examination of PW-1 Thebu Ram. Interestingly enough, as per his statement, in other houses adjoining to the building in which they were residing 30-35 other tenants are also residing. It is not understandable as to how anyone or the accused could break open the lock of the quarter of the complainant and entered inside and also removed the trunk therefrom and that too during broad day light because PW-4 the complainant when returned to the quarter in the evening at 6-6:30 PM, noticed that theft was committed there by someone. In the month of August, 6/6:30 PM is a time when it is not even sunset also, meaning thereby that the so called theft was committed during day time, which in our considered opinion, was not possible in the locality which is inhibited by other people also that too during day time.

12. The statement of PW-3 Maghu Ram can also be pressed in service qua this aspect of the matter. No doubt, as per his statement in examination-in-chief, broken lock mark Nelson-3 Ext. P-1 was taken into possession in his presence vide recovery memo Ext. PW-1/A, however, during his cross-examination, he has denied the recovery of lock by the police in his presence though he has admitted his signatures on Ext. PW-1/A. The signatures of another witness on this memo, namely, Mohan Lal were also obtained. PW-2 Panne Lal and the complainant are known to him. He was invited by the complainant to come to his quarter and when he went there, the complainant, PW-2 Panne Lal and PW-5 Bhairo Singh had been consuming liquor and also eating meat. It is they who asked him to make a statement so that the accused is convicted in this case. Therefore, the story qua theft committed in the quarter of the complainant is not at all established.

13. The rapat Ext. PW-1/A was entered in the rojnamcha of Police Post Nerwa on 2.8.2003 at 8:30 PM. The FIR Ext. PW-7/A was also registered on the basis thereof in PS Chopal on 3.8.2003 at 9:00 AM. What efforts were made by the police after registration of FIR to trace out the culprit till 8.8.2003, nothing material in this behalf has come on record. Interestingly enough, as per the testimony of PW-2 Panne Lal he was informed by the complainant on 3.8.2003 about the theft committed in his house. While at Aarakot at 3:30 PM, on that very day, the accused met him there at the bridge. PW-3 Maghu Ram, Sohan Lal and Sajhi Ram were also with him. In their presence, he asked the accused at Aarakot bridge that he had committed theft in their quarter. After that on 8.8.2003, they all caught hold of the accused and he was taken to police Chowki at Nerwa. It is in this way, the accused was taken into custody by the police. The investigation conducted in this case, however, discloses all together a different story qua arrest of the accused by the police as the police party when on patrol duty at Rana Kyar noticed the accused there who on seeing the police became nervous. He, therefore, was nabbed during the course of his search conducted in the presence of PW-2 Panne Lal and PW-3 Maghu Ram, who allegedly came in a car there. Currency notes in parcel Ext. P-2 worth Rs. 10,000/- were recovered from him. Such contradictory evidence, that too qua material aspects of the prosecution case, demolishes its entire case and the possibility of the accused having been implicated in this case falsely cannot be ruled out.

14. Now, if coming to the alleged recovery of Rs.10,000/- during the personal search of the accused in the manner as claimed by the prosecution, the same again inspires no confidence for the reason that when the story qua arrest of the accused in the manner as claimed by the prosecution is false, the recovery as alleged by the prosecution is also doubtful. Above all, as per the prosecution case, the complainant had kept Rs.25,000/- in the trunk. The investigation conducted at the most reveals that the accused had admitted the currency notes worth Rs.16,000/- having stolen by him from the trunk and that out of the same, Rs.6,000/- were spent by him to meet with his personal needs. Nothing tangible

which can be termed as cogent and clinching evidence qua this aspect of the matter has, however, come on record. A sum of Rs. 10,000/- even if believed to be recovered from the accused is not a big amount nor any such recovery can be taken to believe that this amount was the part of the alleged stolen money by the accused. Admittedly, the accused, the complainant and PW-2 Panne Lal had business dealings with each other as they all were running meat shops. According to the accused, he had cleared the accounts, however, irrespective of it they (the complainant and PW-2 Panne Lal) had been claiming the balance amount of Rs. 10,000/- payable by him to them. He has stated so while answering question No. 12 in his statement recorded under Section 313 Cr.P.C. In view of there being business dealing with them, the possibility of the accused having been implicated by the complainant PW-4 and PW-2 Panne Lal**,** cannot be ruled out, as Panne Lal isnone else but in relations as brother-in-law being the husband of the sister of the complainant. As such, the possibility of conspiracy having been hatched by both of them to implicate the accused in a false case cannot be ruled out.

15. Now, if coming to the so called disclosure statement Ext. PW-2/B made by the accused on 10.8.2003, while in custody in the presence of PW-2 Panne Lal and PW-3 Maghu Ram, the same is again not proved on record for the reason that PW-2 Panne Lal in his cross-examination has expressed his ignorance as to at what time, they had gone with the police in the search of trunk. He also expressed his ignorance as to at what place the trunk was lying. He is illiterate and does not know to read and write and the contents of the documents got signed from him were not read over and explained to him. Now, if the statement of PW-3 Maghu Ram qua this aspect of the matter is seen, he had signed one paper on 8.8.2003 whereas the another on 8.10.2003 in Police Post Nerwa. The place of recovery of the trunk according to him was identified by the accused to the police on 8.10.2003 meaning thereby that he has not supported the prosecution case qua the disclosure statement made on 10.8.2003 and the trunk was recovered on that very day. The disclosure statement rather, as per his version was recovered on **8.10.2003.** Initially, he denied the suggestion that he is not aware of the place of recovery of the trunk, however, in the same breath has expressed his ignorance qua the place of recovery of the trunk and also its size. Therefore, with this type of evidence available on record, neither it is proved that the accused had made the disclosure statement Ext. PW-2/B in the presence of PW-2 Panne Lal and PW-3 Maghu Ram while in custody nor that it is he who had identified the place of recovery of the trunk. The documents Ext. PW-2/B and the recovery memo Ext. PW-9/B as well as site plan Ext. PW-8/A have been prepared falsely by the Investigating Agency.

16. In view of the contradictory statements made by PW-1 Thebu Ram, PW-2 Panne Lal, PW-3 Maghu Ram and PW-5 Bhairo Singh as discussed hereinabove, the evidence as has come on record by way of testimony of the complainant Naresh Kumar (PW-4), qua the manner in which he found the theft having been committed in his quarter and the alleged recovery of currency notes worth Rs. 10,000/- from the accused cannot also be believed to be true. The remaining prosecution witnesses being police officials are formal as discussed hereinabove. The evidence as has come on record by way of their testimony need not to be elaborated because the present is a case of circumstantial evidence and in view of the evidence discussed hereinabove, the prosecution has miserably failed to connect the accused with the commission of the offence.

17. In view of what has been said hereinabove, learned lower Appellate Court has not committed any illegality or irregularity while allowing the appeal and acquitting the accused of the charge framed against him under Sections 380 & 454 IPC. The impugned judgment, as such, cannot be said to be legally and factually unsustainable. The same rather is upheld. Consequently, the appeal fails and the same is accordingly dismissed.

The personal bonds furnished by the accused shall stand cancelled and the surety discharged.

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

Vinod Kumar ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

CrMP(M) No. 1116 of 2018
Decided on September 11, 2018.

Code of Criminal Procedure, 1973- Section 439- Protection of Children from Sexual Offences Act, 2012- Section 6- Bail- Entitlement – On facts, prosecutrix though minor found having acquaintances with accused for the last about year and a half, she voluntarily joining his company and developing physical relations with him – No complaint ever made by her to anyone – Matter revealed by prosecutrix to mother when mobile was recovered from her bed by her mother – Victim not appearing before trial court despite notice for recording her statement – Co-accused already on bail – Held, on account of delay in prosecution, accused cannot be allowed to incarcerate in jail for indefinite period – Accused ordered to be released on bail subject to conditions. (Paras-7 to 9 and 15).

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
ManoranjanaSinh alias Gupta versus CBI, (2017) 5 SCC 218,
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Mohan Singh, Advocate.
For the respondent : Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.
ASI Madan Mohan, IO, Police Station Kasauli, District Solan, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely, Vinod Kumar, who is behind the bars since 3.12.2017, has approached this Court in the instant proceedings filed under Section 439 CrPC, praying therein for grant of regular bail in case FIR No. 69 of 2017, dated 2.12.2017, under Sections 376, 506 and 34 IPC and Section 6 of Protection of Children from Sexual Offences Act, registered at Police Station, Kasauli, District Solan, Himachal Pradesh.

2. Sequel to order dated 28.8.2018, ASI Madan Mohan, Police Station Kasauli, District Solan, Himachal Pradesh 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. Careful perusal of record/status report suggests that FIR detailed herein above came to be lodged at the behest of complainant namely Paramjeet Kaur, who alleged that her minor daughter i.e. prosecutrix studies in Government Senior Secondary School Chamia, District Solan, Himachal Pradesh in plus one standard. She further stated that her daughter goes to school in a private bus i.e. Kaushal private bus, allegedly on 28.11.2017, complainant recovered one mobile phone from the bed of the prosecutrix, while she had gone to the school. Having noticed details with regard to calls having been made by prosecutrix, complainant made a call on mobile No. 78073-01800 and found that her daughter was with a person namely Banti i.e. present bail petitioner. Subsequently on 2.12.2017, prosecutrix disclosed to the complainant that she knows the bail petitioner for the last one and a half years and he had provided her mobile phone one month ago. Allegedly, prosecutrix disclosed to her mother (complainant) that on 29.7.2016, bail petitioner had taken her to Hotel Anchal, Kasauli to celebrate his birthday, where taking undue advantage of her innocence, he sexually assaulted her against her wishes. Prosecutrix also disclosed to her mother that on 29.7.2017, when bail petitioner had gone out of room, to get some food, co-accused Tara Chand came into the room and sexually assaulted her against her wishes. It is further alleged that on 28.11.2017 also, bail petitioner had sexually assaulted the prosecutrix. On the basis of aforesaid statement having been made by the complainant under Section 154 CrPC, FIR as taken note herein above, came to be lodged against the bail petitioner and co-accused Tara Chand.

4. Mr. Mohan Singh, learned counsel representing the bail petitioner, while inviting attention of this Court to record/ status report strenuously argued that there is no evidence available on record suggestive of the fact that bail petitioner sexually assaulted the prosecutrix against her wishes rather, there is ample material on record suggestive of the fact that prosecutrix of her own volition and without there being any external pressure joined the company of bail petitioner. Learned counsel for petitioner further contended that even if statement of complainant is perused, it clearly reveals that prosecutrix and bail petitioner had prior acquaintance and they had been meeting each other for almost one and a half years prior to alleged incident and no such incident/complaint was ever reported either to complainant or to the police. Learned counsel further contended that as per her own statement under Section 164 CrPC, prosecutrix of her own volition had gone with the bail petitioner to Hotel Anchal, Kasauli, and at no point of time, she raised alarm, if any, while she was being sexually assaulted by the bail petitioner and co-accused Tara Chand, against her wishes. Learned counsel for the bail petitioner further contended that alleged incident happened on 29.7.2016, 29.7.2017 and then on 28.11.2017 but FIR had been registered only on 2.12.2017 and there is no explanation rendered on record, for the delay in lodging FIR. It is only at the instance of mother of prosecutrix (complainant) that FIR later was lodged on 2.12.2017 that too after delay of more than one and a half years of alleged offence. Learned counsel for the petitioner further contended that bail petitioner is behind the bars for the last nine months and despite there being specific notice issued to the prosecutrix, she is not coming forward to get her statement recorded and as such, bail petitioner is incarcerating in jail for no fault on his part. Mr. Mohan Singh further stated that since *Challan* stands presented in the competent Court of law, there is no likelihood of tampering with the evidence by bail petitioner and as such, he deserves to be enlarged on bail. Mr. Mohan Singh, Advocate further contended that this Court has already enlarged co-accused Tara Chand on bail, vide order dated 6.4.2018 passed in CrMP(M) No. 494 of 2018.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly acknowledging the factum with regard to presentation of *Challan* in the competent Court of law, contended that keeping in view the gravity of offence allegedly committed by bail petitioner, he does not deserve to be enlarged on bail, rather needs to be dealt with severely.

Mr. Thakur contended that though record may reveal that prosecutrix had prior acquaintance with the bail petitioner but taking note of the fact that the prosecutrix was 16 years of age, consent, if any, of the prosecutrix can not be a ground to enlarge bail petitioner on bail. Mr. Thakur further contended that there is ample evidence available on record suggestive of the fact that bail petitioner taking undue advantage of innocence of prosecutrix, who was minor at that time, repeatedly sexually assaulted her against her wishes. Mr. Thakur, on the instructions of the Investigating Officer, who is present in the court, fairly admitted that despite there being specific notice to the prosecutrix, she failed to appear before the court on 1.8.2018 and now fresh notice for her presence has been issued for 22.10.2018.

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

7. Record clearly reveals that prosecutrix had prior acquaintance with the bail petitioner, who at the time of alleged incident, was working as conductor in Kaushal Bus owned by co-accused Tara Chand. Apart from above, if statements made by prosecutrix under Section 164 CrPC and that of complainant under Section 154 CrPC are read in their entirety, same clearly suggest that the prosecutrix had been meeting bail petitioner for the last one and a half years and during this period, she had developed physical relations with him. Prior to 2.12.2017, when FIR came to be lodged against the bail petitioner, prosecutrix never lodged complaint, if any, either with her parents or to the police with regard to aforesaid illegal acts of the accused. It has specifically come in the statement of prosecutrix recorded under Section 164 CrPC that alleged incident had happened on 29.7.2016, 29.7.2017 and 28.11.2017 and on all these occasions, prosecutrix remained silent and never informed her parents or the police. First incident allegedly took place on 29.7.2016 but despite that prosecutrix kept on meting bail petitioner for almost one year, whereafter allegedly on 29.7.2017 and 28.11.2017, prosecutrix was sexually assaulted against her wishes but matter came to be reported to the police only on 2.12.2017, when complainant after having discovered mobile phone from the bed of prosecutrix, lodged the complaint.

8. No doubt, material available on record suggests that at the relevant time, prosecutrix was 16 years of age but having taken note of the aforesaid conduct of prosecutrix, this Court is persuaded to agree with the contention of Mr. Mohan Singh, Advocate, that the prosecutrix of her own volition and without there being any pressure, joined the company of bail petitioner and developed physical relations.

9. Though aforesaid aspects of the matter are to be considered and decided by the learned trial Court on the basis of evidence adduced on record by the prosecution but taking note of the fact that bail petitioner is behind bars since 3.12.2017 i.e. for more than nine months, and co-accused having been enlarged on bail, this Court sees no reason to keep the bail petitioner behind the bars, especially when *Challan* stands presented in the competent Court of law. It is also not in dispute that despite there being a specific direction by the learned trial Court to the prosecutrix to appear before it, she failed to turn up to get her statement recorded and as such, on account of delay in prosecution, bail petitioner can not be allowed to incarcerate in jail, for indefinite period. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner being enlarged on bail, he may tamper with prosecution evidence or flee from justice can be met with by imposing stringent conditions upon the bail petitioner. Needless to say, it is well settled by now that till such time, guilt of a person is not proved, he is deemed to be innocent. In the case at hand, guilt of bail petitioner is yet to be proved in accordance with law.

10. 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."

11. 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."

12. In**ManoranjanaSinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while

dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

13. 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.

14. 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.

15. 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.

16. 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.

17. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of instant petition alone.

The petition stand accordingly disposed of.

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

Mukesh Kumar. .....Petitioner.

Versus

State of Himachal Pradesh. .....Respondent.

Cr.MMO No. 296 of 2018
Date of decision: September 12, 2018.

Code of Criminal Procedure, 1973- Sections 374, 381 and 386- Appeal against conviction- Whether can be dismissed in default?- Held- No - Addl. Sessions Judge dismissing appeal of accused in default for non-appearance of accused or his counsel on day it was fixed for hearing – Petition against – Held, criminal appeal cannot be dismissed in default –It is to be decided on merit even if accused or counsel representing him not present – Petition allowed – Order set aside – Matter remanded to Appellate Court for disposal in accordance with law. (Para-3)

For the petitioner Mr. Hemant Kumar Thakur, Advocate.

For the respondent Mr. R.P. Singh and Mr. Kunal Thakur, Dy. Advocate Generals.

The following judgment of the Court was delivered:

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

In this petition, order dated 25.6.2016 passed by learned Additional Sessions Judge-III, Kangra at Dharamshala, circuit Court at Baijnath has been sought to be quashed and set aside.

2. It is seen that against his conviction and sentence under Section 323 324 IPC vide judgment dated 23.12.2011 passed by learned Judicial Magistrate Ist Class, Baijnath in Criminal case No. 13-II/11, the convict-petitioner had preferred an appeal registered as Criminal Appeal No. 14-B/X/2015. The appeal when taken up on 25.6.2016 by learned Additional Sessions Judge-III, Kangra at Dharamshala in Circuit Court at Baijnath, neither the petitioner-convict nor learned Counsel representing him could appear. Learned lower Appellate Court on having called the appeal thrice has passed the following order at 2:45 P.M.:

> "Case called thrice. It is 2:45 p.m. but appellant not present nor an Advocate made appearance on behalf of the appellant. As such, the case is dismissed in default for want of prosecution on behalf of the appellant. Record of ld. Trial court be returned forthwith. Case file after due completion be consigned to the Record Room."

3. As a matter of fact, a criminal appeal cannot be dismissed in default and rather to be decided on merit even if the appellant-convict or learned counsel representing him are not present. The impugned order, as such, is patently illegal. The same is accordingly quashed and set aside. Consequently, the appeal is restored to its original number and file and the case remanded to learned Appellate Court for disposal in accordance with law.

4. The parties through learned Counsel representing them are directed to appear in the learned Appellate Court in its circuit Court at Baijnath on *25.10.2018.*

5. The petition is accordingly disposed of, so also the pending application(s), if any.

6. An authenticated copy of this judgment be sent to learned Appellate Court for compliance.

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

State of H.P. .....Appellant
Versus
Hari Chand .....Respondent.

Cr. Appeal No. 147 of 2007
Decided on : 12.9.2018.

Indian Penal Code, 1860- Sections 279, 337 and 304-A- Rash and negligent driving and death – Proof – Accused allegedly by his rash driving of bus hitting boy crossing road and causing his death – Trial Court acquitting accused – State in appeal and contending gross misappreciation of evidence by trial Court –Site of occurrence visible from both sides – Skid marks resulting on account of application of brakes existing upto 10-15 feet on road – Accused in position to see sudden arrival of boy on road – No cross-examination on Investigating Officer and photographer qua site plan and photographs showing skid marks on road – Held, Evidence on record clearly showing negligent driving on part of accused – Findings of trial Court perverse – Appeal allowed – Acquittal set aside – Accused convicted of offences under Sections 279, 304-A and 337 of Code. (Paras-9 to 13).

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. Vinay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant appeal stands directed, against, the verdict, recorded, on, 17.2.2006, by the learned Chief Judicial Magistrate, Kinnaur District, Camp at Rampur Bushahr, H.P., upon, Criminal Case No. 44-2 of 2003, whereby the learned trial Court, hence, acquitted the respondent (for short "accused"), for, the offences charged.

2. Brief facts of the case are that complainant is a resident of village Seri, P.O. Sungri. She is studying in 10+1 and residing with her maternal uncle Sh. Pawan Thakur at Jagat Khana. Her nephew aged five years is studying in Kamla Memorial School, Shish Mehal. At about 9 A.M. she was going to leave her nephew to school. Two other children from the neighbour were also with her. When she was trying to cross the road near old post office alongwith the children a Bus No. HP-06-2839 being driven by the accused came from the side of Bus-stand Rampur in a very high speed and hit a boy named Sahil and dragged him upto a distance of about 10-15 feet causing injuries to him. Thereafter the injured was brought to hospital by some one and she herself went towards Jagat-Khana to inform the accident in question to her natural uncle. Thereafter, she reported the matter to the police through FIR Ext. PW-1/A. Thereafter the injured was referred to IGMC Shimla where he succumbed to his injuries. After investigation, the accused was sent upto trial before the learned trial Court for the offences punishable under Sections 279, 337 and under Section 304-A of IPC.

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 304-A of the Indian Penal Code, whereto, he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 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 examined two witnesses in support of his 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. PW-1, in her testification, borne in her examination-in-chief, has therein, made disclosures, bearing concurrence, with, her previous statement, recorded in writing, and, during the course of her cross-examination, by the learned defence counsel, she denied suggestions, (i) qua the offending vehicle being driven by the accused, at, a slow speed, (b) qua the minor deceased child, after, freeing himself from the clutches of his aunt, his, abruptly arriving at the middle of the road, (c) qua the driver, of, the offending vehicle being disabled, to sight, the abrupt arrival of the deceased minor child, at, the site of occurrence. Consequently, with the afore referred ocular witness to the occurrence, rather giving credence, vis-a-vis, her testifications borne, in, her examination-in-chief, thereupon, implicit reliance, is, enjoined to be meted thereto.

10. Even, though, another ocular witness PW-2, reneged, from his previous statement, recorded in writing, yet, after, an, apt opportunity, being granted to the learned APP concerned, for subjecting PW-2 to cross-examination, (i) the learned APP concerned, during, the course of his holding him to cross-examination, succeded in eliciting from him, acquiescences qua the site of occurrence rather being visible from his shop, (b) the road whereat the occurrence took place or the site of occurrence hence being visible from both sides, (c) qua skid marks, upto, a distance of 10-15 feet, being available at the site of occurrence, (d) qua existence of skid marks, upto, a distance of 10-15 feet, being a sequel of the respondent/accused, suddenly applying, the, brakes hence upon the offending vehicle. The effect of the aforesaid acquiescences meted by PW-2, during, the course of his being held, to, cross-examination, by the learned APP concerned, after, his being declared hostile is qua, the, respondent/accused, acquiescing qua (i) his driving the offending vehicle, at, a brazen speed (ii) and despite his holding, the, capacity, to, sight the sudden arrival, of, the minor deceased child, at the site of occurrence, his, apparent negligence, arising, from his driving the offending vehicle, at, a brazen speed, rather begetting, the, sequel of, the, minor child, being pulverized under the tyres, of, the offending bus. An immense impetus, vis-a-vis, the afore inference, qua his, apt capacity, to, sight the minor child, is, mobilized, from, the factum of existence, of, apt skid marks, upto a distance of 10-15 feet, rather standing concurrently testified, by PW-1, and, by PW-2 (a) AND, from, the site plan borne in Ext. PW-7/B, and, from the photographs borne, in, Ext. PW5/1, to, Ext. PW-5/6. The effect of the afore reared inferences is bolstered, (b) by the learned defence counsel, while, his holding, the, apt cross-examinations', of, the Investigating Officer, and, of the photographer concerned, his thereat omitting to put apt suggestions, vis-a-vis, both (i) devolving , upon, no reliance being visited, upon the afore exhibits, (ii) given, theirs being fictitiously drawn, importantly, qua time of drawing(s) thereof, hence occurring at a stage, when the position of the offending vehicle stood disturbed or the vehicle rather being not available at the site of occurrence.

11. The learned counsel appearing, for the accused has depended, upon, occurrence, in, the cross-examination, of, PW-2, apt, acquiescences, (i) qua, the minor deceased child, suddenly freeing himself, from, the clutches of his aunt, and, also, from, acquiescing , qua, the deceased minor child hence suddenly arriving at the site of occurrence, and, (b) hence he proceeds to contend, that, the respondent/ accused rather held no capacity to sight, the, sudden arrival of the minor deceased child, at the site of occurrence. However, the aforesaid submission is not founded, upon, a, wholesome reading, of, the evidence, existing on record, and, it is also addressed by the learned counsel, for, the respondent/ accused, his being unmindful, (c) qua the hereinabove inference, drawn, from the uneroded testification, of, PW-1, and, of, PW-2, (d) besides his being grossly unmindful, of, the fact qua, the, learned defence counsel, while, cross-examining, the, photographer, and, the investigating officer concerned, his omitting to put apt suggestions to both, qua, preparation of the site plan, and, clicking of photographs, not enjoying, the, apt vigor, (e)

given theirs' being fictitiously drawn, given, the position of the offending vehicle being disturbed. Contrarily, hence, with, the accused/respondent rather accepting,the, veracity, of, apt depictions', borne in, the site plan, and, in the photographs, respectively, borne in Ext. PW7/B, and, in Ext. PW5/1, to, Ext. PW5/6, and, wherein, the, apt existence, of, skid marks, are, rather disclosed to occur at the relevant site, (f) thereupon, this court is constrained to conclude qua the existence of skid marks, being a sequel, of, unsuccessful application of brakes, by, the respondent/accused, (g) given his driving the offending vehicle, in a negligent manner, and, also, of, his despite sighting, the, abrupt arrival of the minor deceased child, at, the site of occurrence, his, yet negligently and brazenly hence driving the offending vehicle.

12. The fatal injuries sustained by the minor deceased child upon his body, in sequel to his being pulverized, under, the tyre(s) of the offending bus, stand, disclosed in the apt post-mortem report, borne in Ext. PC, to, rather bear, the, apt concurrence, vis-a-vis the testifications of PW-1, and, of, PW-2 and, of, the Investigating Officer concerned, thereupon it is proven qua his committing, an, offence punishable under Section 304 of the Indian Penal Code.

13. The appreciation of the evidence as done by the learned trial Court, suffers, from, a, gross infirmity, as well as, a gross 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 304-A, of, the Indian Penal Code. Let the accused/convict be produced on **31.10.2018,** 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.

Anil Sood ...Petitioner/Plaintiff.
Versus
Pawan Sahani and others ...Respondents/defendants.

Civil Revision No. 105 of 2017.
Reserved on : 5th September, 2017.
Date of Decision: 13th September, 2018.

Specific Relief Act, 1963- Section 6 – Suit for possession on strength of previous possession – Proof- Plaintiff filing suit for possession of premises allegedly given by him to his erstwhile employee 'S' (D4) for running workshop – Plaintiff claiming to have been dispossessed from suit premises by defendants illegally without recourse to law – Defendants denying previous possession of plaintiff and claiming its possession initially with 'S', and thereafter delivery of same to defendants 1to3 on purchase- Trial Court dismissing suit – Revision against – On facts, no evidence showing payment of any remuneration to 'S' by plaintiff- 'S' found to be in exclusive possession of suit premises in his individual capacity – Rent receipts not revealing that payment aforesaid included rent of suit premises also – 'S' not proved to be servant or caretaker of plaintiff – Held, Previous possession and illegal dispossession of plaintiff not proved – Suit rightly dismissed by Trial Court – Revision dismissed. (Paras- 8 to 10)

Specific Relief Act, 1963- Section 6- Suit for possession on strength of previous possession– Dismissal of suit – Remedies – Held, Remedy of aggrieved plaintiff is neither review nor appeal – His remedy comprised in instituting regular suit for establishing his title qua suit property – However an exceptional remedy of revision available to aggrieved plaintiff exercisable within parameters of Section 115 of Code of Civil Procedure. (Para-8).

Cases referred:

ITC limited vs. Adarsh Cooperative Housing Society Limited, (2013)10 SCC 169

MaggaridaSequeiraFernades and others vs. Erasmo Jack De Sequeira (dead) through Lrs. (2012)5 SCC 370

For the Petitioner:	Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For Respondent No.1:	Mr. Rajneesh K. Lal, Advocate
For other Respondents:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit, cast under the provisions of Section 6, and, Section 38 of the Specific Relief Act, 1963, for possession of the suit premises, stood, dismissed by the learned trial Court, and, the plaintiff being aggrieved therefrom, has hence motioned this Court.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for possession of portion of the suit premises described, as, AEGHJLMCA, in, the rough site plan, appended with the plaint, existing over land as detailed in the plaint, situated in mauza Dehun, Tehsil and District Solan, H.P. It is pleaded that the plaintiff is running a auto mobile parts shops, at Deonghat, since, the year 1970, in the suit premsies along with rented out premises described in the rough sketch plan attached with the plaint. In fact the predecessor of the plaintiff late Sh. Girdhari Lal was in possession of suit premises as he had taken the same on rent in the year 1970 from one late Sh. Lala Lekh Ram. The suit premises consisted of two shops, where he started the business of tyre retreading along with plaintiff and also installed a telephone number SOL 2537 and had also installed the electricity connected. In this shop tyre retreading machine was installed and adjoining of the premises denoted by FBKDMLJF was used as a store for keeping raw material and finished product. In the year 1980, Sh. Girdhari Lal, with a view to accommodate his another son Sh. Rajinder Kumar Sood, carved out a small shop from the shop AEFJLMC denoted by EFJHG with the consent of the then landlords where the business of spare parts under the name and style of M/s R.K. Auto was commenced. The shop was connected to the parent shop through a passage denoted by JH in the rough plan. In the year 1989, Sh. Rajinder Kumar Sood died and then Sh. Girdhari Lal and plaintiff started looking after the business of M/s R.K. Auto. In the year 1993, the health of Girdhari Lal Started deteriorating and as a result of the same, he was not able to attend the business property. Thus, he distributed the entire assets amongst his sons and business of M/s Unique Tyre and M/s R.K. Auto were allotted to the plaintiff, and, as such since, 1993, the plaintiff is owner of the said two businesses. After the death of late Sh. Girdhari Lal, in the year 1996, the plaintiff found it difficult to handle both the businesses and thereafter the business of M/s Unique Tyres was closed. The business of M/s R.K. Auto was being conducted in the entire premises, which was originally taken on rent by Sh. Girdhari Lal. The premises, in which the machinery was installed was now used as workshop as store of M/s R.K. Auto

and adjoining shop was converted into the shop. As such, the business of M/s R.K. Auto used to be done in the portion shown as EFBKDMLJHGE as shown in the rough sketch. It is averred that late Sh. Girdhari Lal had employed one Sh. Sobha Singh, i.e. defendant No.4 to work in the M/s Unique Tryes, since the incpetion of the business, i.e. from 1970. After closure of business of M/s Unique Tyres Sh. Sobha Singh was rendered jobless. However, for consideration of the fact that Sobha Singh was his employee and worked for him, then the plaintiff and Sobha Singh entered into an oral agreement to the effect that the plaintiff shall allow Sh. Sobha Singh, i.e. defendant NO.4 to work as Mistri in the workshop in M/s R.K. Auto. This understanding was made that in the vent of repair works of M/s R.K. Auto, Sh. Sobha Singh received the entire labour charges and the payment of spare parts used in the job were to be taken by the plaintiff. It is averred that Sh. Sobha Singh was neither employee of Sh. R.K. Auto nor the plaintiff had handed over any part of premises to him and this arrangement was made only to co-operate and help and old employee. The defendants in August, 2007, had purchased the suit premises along with other property. After this purchase, defendant No.1 came to the shop of plaintiff and asked him to vacate the premises. However, defendant No.1 was informed by the plaintiff that he has only this business and he cannot vacate the premises immediately. The plaintiff has also offered that in case defendant No.1 was to increase the rent, then he has right for the same,but defendant No.1 became furious and threatened the plaintiff that he knows how to get the premises vacated. It is averred that defendant No.1 to 3 immediately contacted Sh. Sobha Ram, defendant NO.4 and hatched a conspiracy to illegally take possession of the suit premises. Pursuant to their illegal plan, on the intervening night of 16/17/10/2007, defendant No.1, Sobha Ram accompanied with few persons came to Deonghat, in the night and broke open the locks of the suit premises and removed the scrap and other material stored therein and put their locks and took illegal possession of the suit premises. The plaintiff came to know about this fact, when he came in the morning to his shop. Defendant No.1 then came around 11.30 a.m. and informed that the suit premises was handed over to me by defendant No.4, after receiving the premium (pagri). Thus, it is alleged that defendant No.1 illegally took possession of the suit premises, then the plaintiff reported the matter to the police of P.S. Solan, in this regard rapat No.10 of 17.10.2017 was entered. The police also visited the spot in the evening alongwith defendant No.1, but they failed to take any action. It is averred that prior to the dispossession of the plaintiff, it was possessed by him in the capacity of tenant. It is alleged that the defendants have illegally dispossessed the plaintiff from his lawful possession of the suit premises. It is averred that the plaintiff legally entitled to recover possession of the suit premises. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken the preliminary objections, qua, non joinder of necessary parties. It is averred that the alleged sketch plan is not as per position of the spot. It is denied that the shop was in possession of Sh. Sobha Singh and Sh. Sobha Singh had no connection with the plaintiff or his predecessor Sh. Girdhari Lal or with Sh. R.K. Sood, in any manner. It is categorically stated that the shop which was under the possession of Sh. Sobha Ram is separate and distinct identity having no relation with the plaintiff or his predecessor or with Sh. R.K. Sood. Sh. Sobha Singh was separate tenant and had been independently occupying the shop as tenant under the original landlord from whom, the defendant have purchased the property. It is averred that the plaintiff by drawing a false rough plan is trying to intermingle the facts, so as to claim the possession of the shop, which was under the possession of defendant No.4 and now in possession of defendants. It is denied that at any point of time the alleged small shop denoted by letter EFJHG was carved out by the plaintiff or his predecessor with or without the permission of original landlords. It is averred that the location of the walls, doors, type of construction, nature of premises as is existing today is the original shape from the very beginning and alteration whatsoever has been done on the

spot by the plaintiff. It is averred that to run particular business under particular name and style may be as M/s Unique Tyres or M/s R.K. Auto has nothing to do with the shop, which is now in the possession of the defendants. The distributing of business by Sh. Girdhari Lal was his own affair, but has no right to distribute the tenancy right more particularly to have claim with regard to the shop, which was never under his possession. It is denied that Sh. Sobha Singh was an employee of Sh. Girdahri Lal. It is denied that there was any oral agreement between the plaintiff and Sh. Sobha Singh. It is reiterated that Sh. Sobha Singh was independent and was in possession of the shop as separate and distinct identity as lawful tenant of original owners. The keys of the suit premises always remains with Sh. Sobha Singh and he used to open the same without any interference from any person including the plaintiff. It is admitted that the defendants No.1 to 3 have purchased the property. It is denied that at any point of time any conversation with regard to vacation of the premises took place with the plaintiff. Since, no conversation ever took place with regard to the vacation of premises, therefore, the question of any threat does not arise. Defendants No.1 to 3 had filed the eviction petition against defendant No.4 Sh. Sobha Singh and a suit for injunction was also filed, wherein, Sh. Sobha Singh was also a party. When Sh. Sobha Singh came to know about this litigation, then he approached the defendant and requested for settlement. As per amicable settlement Sh. Sobha Singh delivered the vacant possession of the suit premises to defendants No.1 to 3. The keys of the shop were with Sh. Sobha Singh, who took out his goods, tools etc., and vacated the same and handed over the keys to defendants No.1 to 3 on the spot. It is denied that defendant No.1 and defendant No.4 accompanied with few persons and came to Deonghat broken open the locks of the suit premises as alleged. It is averred that since the plaintiff was never in possession of the disputed shop, hence, there is no question of dispossession of the plaintiff. It is averred that the possession of defendants No.1 to 3 is lawful and valid and based upon the title.

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

1. Whether the plaintiff is tenant under the defendants over the suit land, asalleged?OPP
2. Whether the plaintiff is entitled to possession of the tenanted premises, as prayed for?OPP.
3. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for?OPP
4. Whether the plaintiff is entitled for damages, as prayed for?OPP
5. Whether the suit is bad for non joinder of necessary parties?OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the latter Court dismissed, the, suit of the plaintiff/petitioner herein. Now, the, plaintiff/petitioner herein, has hence instituted the instant Civil Revision, before this Court, wherein he assail the findings recorded, in its impugned judgment and decree, by the learned trial Court.

8. The verdict and decree, of, dismissal of the plaintiff's suit, as, cast under the provisions of Section 6 and 38, of, the Specific Relief Act, 1963, is not appealable, rather, in, a verdict rendered by the Hon'ble Apex Court, in, a case titled, as, ***ITC limited vs. Adarsh Cooperative Housing Society Limited***, reported in ***(2013)10 SCC 169***, the, relevant paragraphs No. 10, 11 and 12 whereof, stand extracted hereinafter:-

"10. In fact, para 4 of this Court's judgment passed in Sanjay Kumar Pandey (supra) may be a useful reiteration of the law in this regard. The same is, therefore, extracted hereinbelow:-

> "4. "A suit under Section 6 of the Act is often called a summary suit inasmuch as the enquiry in the suit under Section 6 is confined to finding out the possession and dispossession within a period of six months from the date of the institution of the suit ignoring the question of title. Sub-Section (3) of Section 6 provides that no appeal shall lie from any order or decree passed in any suit instituted under this section. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to file a regular suit establishing his title to the suit property and in the event of his succeeding he will be entitled to recover possession of the property notwithstanding the adverse decision under Section 6 of the Act. Thus, as against a decision under Section 6 of the Act, the remedy of unsuccessful party is to file a suit based on title. The remedy of filing a revision is available but that is only by way of an exception; for the High Court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well-settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code."

11. It is indeed sad, if not unfortunate, that what was intended by the legislature to be a summary proceeding to enable a person illegally dispossessed to effect quick recovery of possession of the immovable property has, in the present case, erupted into an over two decades old litigation. The sheer number of pending lis permitted the learned Trial Court to return its findings, after almost a decade, that it is, indeed, the plaintiff who was in possession of the disputed property on the relevant date and was dispossessed therefrom in an illegal manner by the defendant.

12.Though Section 6 (3) of the Act of 1963 bars the remedy of appeal and review, a small window, by way of a revision, was kept open by the legislature possibly to enable the High Court to have a second look in the matter in an exceptional situation. However, section 115 of the CPC was amended in its application to the State of Uttar Pradesh and the forum for exercise of the revisional jurisdiction came to be recognized as the next Superior Court and not necessarily by the High Court. That is how the unsuccessful defendant moved the learned District Judge."

(p.175)

(a) A trite expostulation of law, stands, hence borne therein qua the remedy, of, the aggrieved plaintiff, arising, from his suit, cast under Section 6 of the Specific Relief Act, hence standing dismissed, is, neither a review nor an appeal, (b) rather, the, apt remedy available to the aggrieved plaintiff, is, comprised, in, his instituting a regular suit, for, his therein rather, establishing his title qua the suit property. However, it is also expostulated therein, that, (c) the alternative thereto remedy of revision, vis-a-vis, the aggrieved plaintiff, being, an exception to the afore propounded expostulations, borne therein, (d) besides it also stands expostulated therein, that, the remedy of revision, as, available to the aggrieved plaintiff, being exercisable, only, within the parameters, of, revisional jurisdiction, as set forth, in, Section 115 of the CPC.

9. Bearing in mind the aforestated expostulation, of, law, this Court would hence, within, the ambit of Section 115 of the CPC, proceed to, mete an adjudication, (i) qua

whether the learned trial court in rendering a verdict, rather dismissing the plaintiff's suit, hence, has acted with gross illegality and impropriety (ii) or has exercised jurisdiction not vested in it under law or has with evident gross illegality or impropriety hence proceeded to exercise jurisdiction, (iii) and, also for making the aforesaid discernments, an obvious latitude, is bestowed upon this Court, to, from the evidence, as existing on record, rather test the validity of the reasonings, assigned by the learned trial Court, (iv) on anvil, of, its discarding, the, apt relevant and germane evidence, vis-a-vis, the apposite issues, (v) AND, on anvil qua rather its mis-appraising, the, apt relevant and germane evidence. The decree for possession, as, claimed by the plaintiff, stands anvilled, upon, his inheriting the, apt, tenancy right, vis-a-vis, the suit premises, from, his father, one Girdahri Lal, and, who stood inducted, as, a tenant by the hitherto landlord one Lala Lekh Ram, (vi) whereas, the defendants purchasing the suit property in August, 2007, (vii) AND yet, the plaintiff contends that, unless, he stood evicted, by, apt adherence(s) to the apt processes of law, the defendants hence being disabled, to, assume possession, of, the suit premises. Uncontrovertedly, as borne, in, the testification of the plaintiff, one Sobha Singh held possession of the suit premises, and, the capacity of holding, of, possession, by the aforesaid Sobha Singh, impleaded as defendant No.4, vis-a-vis, the suit premises, is, testified by the plaintiff, to be rested, upon, the aforesaid being his employee, (vii) yet the aforesaid testification, is, not amenable for meteing of any credence, as, he thereafter admits, of, his not liquidating any remunerations, to, the aforesaid Sobha Singh, rather he makes, a, deposition qua his helping him, in, the business. He has also testified qua Sobha Singh, keeping, his tools inside the suit premises. He has admitted, in his testification qua the last attornment, of, rent qua the suit premises, rather occurring in August, 2007, and, he has also acquiesced qua there being no mention therein, qua rent as, liquidated therein also appertaining, vis-a-vis, the suit premises. Likewise, the afore rendered testification, of, the plaintiff, does enable, rearing of the hereinafter inference (i) the list borne in Ex.P-33, depicting, the, apt articles, lying in the suit premises, not holding any aura of authenticity, more so, when it does not carry thereon, any date of its scribing, nor it being accompanied by any stock register, in purported consonance, wherewith, it stood prepared, (ii) and qua Sobha Singh holding possession of the suit premises, in his, individual capacity, and, concomitantly also his holding keys thereof.

10. Be that as it may, the plaintiff has contended that the aforesaid Sobha Singh, was, his employee or was manning the suit premises, on his behalf, and, that he was hence holding, vis-a-vis, him constructive possession, of, the suit premises, (i) and, that hence he did not hold any further empowerment or any legal capacity, to except, the plaintiff, hence, handover possession, of, the suit premises, (ii) and, his handing over the keys, of, the suit premises, vis-a-vis, the defendants, being contrary to the limited authority, he held, vis-a-vis, the suit premises. In making the aforesaid submission, the learned counsel appearing, for the plaintiff/petitioner herein, has, relied upon a verdict of the Hon'ble Apex Court, rendered in a case titled as Maria ***MaggaridaSequeiraFernades and others vs. Erasmo Jack De Sequeira (dead) through Lrs***. reported in (2012)5 SCC 370, the relevant paragraph No.97 whereof, stands reproduced hereinafter:-

> "97. Principles of law which emerge in this case are crystallized as under:-
>
> (1). No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
>
> (2). Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

(3). The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

(4). The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

(5). The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession." (p.396-397)

The hereinabove extracted relevant para, of, the aforesaid judgment, does bear out, the contention of the learned counsel for the plaintiff/petitioner. However, for the learned counsel, for the plaintiff/petitioner herein, to, rather secure, the, fullest support therefrom, he is also, from the evidence existing on record, (i) rather enjoined to establish qua defendant No.4, Sobha Singh, being, his employee or his standing engaged by him, as, a caretaker or, a, servant, vis-a-vis, the suit premises. However, as aforestated, the afore rendered testification, of, the plaintiff, and, with its holding candid bespeakings (ii) qua his not liquidating any remuneration, to, Sobha Singh, hence negatives his espousal qua the latter being his employee or hence his holding apt possession, given, his standing engaged, as, a caretaker, or, a watchman or a servant by the plaintiff. Contrarily, with the plaintiff also making acquiescences, in his testification, qua his making, the, last attornment in August, 2007, and, the apt rent receipt issued to him, not making clear reflections qua, its, issuance also appertaining to or holding any nexus with the suit premises, (iii) thereupon, it is to be inevitably concluded qua the aforesaid Sobha Singh, as contrarily contended, by the defendant, rather holding possession of the suit premises, in a capacity, not holding any linkage, with, any purported tenancy thereon, of, the plaintiff, rather his holding possession, of, the suit premises, in his individual capacity, (iv) thereupon, in his proceeding to handover the keys, of, the suit premises, to the defendants, the plaintiff cannot contend, that, Sobha Singh held no authorization, to, hence handover possession, of, the suit premises to the defendant, (v) importantly when the vigour, and, bedrock of the his aforesaid contention, rested, upon Sobha Singh, hence, standing engaged, as, a caretaker or a watchman, by him, stands, for reasons aforestated, to, both stagger, and,founder.

11. The upshot of the above discussion, is that the learned trial Court has neither mis-appreciated nor discarded the apt relevant, and, germane evidence appertaining to the relevant issues, thereupon, this Court, while, exercising the revisional jurisdiction, within, the ambit of Section 115 of the CPC, is, constrained to hold that the learned trial Court, has not committed any gross illegality, in, its exercising jurisdiction nor it has acted with an material illegality or irregularity, nor it can be concluded, that, any jurisdictional misdemeanor, stands, hence committed, by the learned trial Court.

12. For the foregoing reasons, there is no merit in the extant petition and it is dismissed accordingly. In sequel the judgment and decree impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

Dhani Ram .....Applicant/Appellant.

Versus

Prabhu Ram and others .....Respondents

Cr.MP(M) No. 1174 of 2018
in Cr. Appeal No. of 2018
Decided on: 13.09.2018.

Code of Criminal Procedure, 1973- Section 372- Proviso- Forum of appeal- Held, against judgment of acquittal of trial Court remedy available to victim would be to file appeal in Sessions Court. (Para-1)

Code of Criminal Procedure, 1973- Section 372- Proviso- Right of Appeal – Held, Victim of occurrence has right to file appeal against order of acquittal or conviction for lesser offence or inadequate compensation of trial Court. (Para-1)

For the applicant: Mr. Ajay Kumar Dhiman, Advocate.
For the respondents: Mr. R.P. Singh and Mr. Kunal Thakur, Dy. A.Gs for respondent No.3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The proviso to Section 372 of the Code of Criminal Procedure makes it crystal clear that a victim of an occurrence has the right to prefer an appeal against an order of acquittal or conviction for a lesser offence or imposition of inadequate compensation by the trial Court, in a Court where the appeal ordinarily lies against the order of conviction of such Court. Had there been conviction, however, sentence for a lesser offence or imposing inadequate compensation, the remedy available to the victim would have to file an appeal in the Sessions Court. Therefore, against the judgment of acquittal also, the appeal as per proviso to Section 372 of the Code of Criminal Procedure has to be filed in the Court of Sessions. Being so, learned counsel representing the applicant seeks permission to withdraw the appeal with liberty reserved to file the same in the Court of Sessions. Leave and liberty as sought is granted. The appeal is accordingly dismissed as withdrawn. The certified copies of trial Court judgment be returned to learned counsel for the applicant, however, photocopies thereof be retained for records. The time spent in prosecuting the present appeal in this Court shall, however, to be excluded while counting limitation.

2. The appeal is accordingly disposed of, so also the pending application(s), if any.

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

Smt. Gauri .....Plaintiff/Non-applicant.
Versus
Sh. Karma K. Namgyal .....Defendant/ Applicant.

OMP No. 492 of 2016 in
Civil Suit No. 75 of 2015.
Reserved on : 23.08.2018.
Date of Decision: 13th September, 2018.

Code of Civil Procedure, 1908- Order VI Rule 17– Order VIII Rules 6A and 9- Counter claim – filing of - Stage - Defendant seeking to amend written statement and simultaneously intending to file counter claim - Plaintiff contending that counter-claim can only be laid when written statement is initially filed by defendant and it cannot be filed subsequently alongwith amended written statement – Held, Order VIII Rule 9 of Code vests discretion in Court to permit defendant to lay counter-claim at later stage even if it was not raised it in pre-instituted written statement –Leave can be granted to defendant provided no prejudice going to be caused to plaintiff by filing of counter-claim. (Para-4)

Cases referred:

Vijay Prakash Jarath v. Tej Prakash Jarath, (2016)11 SCC 800

Ramesh Chand Ardawatiya vs. Anil Panjwani, (2003)7 SCC 350

For the Plaintiff/Non-applicant: Mr. Naveen K. Dass, Advocate.

For the defendant/Applicant: Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff has instituted a suit, for, rendition of a decree for recovery of Rs.52 lacs along with interest w.e.f., from, 22.12.2013 till realization. The plaintiff's suit, is, anvilled, upon, the factum qua the defendant, in, breach of, the, apt agreement, rather, hence, failing to pay to the plaintiff, his proportionate entitlement(s), vis-a-vis, the statutorily determined compensation amount. The defendant resisted the plaintiff's claim, by raising a contention, vis-a-vis, hers rather being solitarily entitled qua, the, apt compensation amount, as, determined by the statutory authorities concerned. The afore written statement was instituted, on 8.8.2016. However, subsequent thereto, on 15.12.2016, the applicant/ defendant rather instituted an application, cast under the provisions of Order 6, Rule 17 of the CPC, wherein, he sought leave of the court, to, incorporate in the prior thereto instituted written statement, the, hereinafter extracted averments:-

> "6. That admittedly, by Sale Deed dated 27.05.2005, land measuring 1-9-0 bigha was sold by the plaintiff and purchased by the defendant, out of a land measuring 1-19-0 bigha. Consequently, upon such sale only an area of 0-10-0 bigha of land was left in possession of the plaintiff herein.
>
> 7. That upon such sale, the defendant became the exclusive owner in possession of the aforesaid land. The plaintiff did not/could not possess any right whatsoever pursuant to such sale.
>
> 8. That the sale deed amongst others, contained the following explicit promises of the plaintiff-
>
> a) that the plaintiff was unaware/not any notice/notification for acquisition fo land in question has been issued or know of the plaintiff;
>
> b) that the plaintiff was unaware/nor in the know of any "statutory demand, claim, attachment... or order made or passed by any Authority and attachment... of any Curt of law affecting the aforesaid land..."; and
>
> c) that the subject land was/is "free from all encumbrances.
>
> 9. That the Award No.2/09 dated 24.07.2009 passed by Land Acquisition Collector, HPPWD (CZ), Mandi, Himachal Pradesh explicitly records that the Himachal Pradesh Government for public purposes had issued Notification

No.PBW(B) (A) (7)(I)-89/2004 on 26.02.2005 invoking Section 4 of the Land Acquisition Act, 1894.

10.That on the face of the aforesaid notification issued by the Himachal Pradesh Government, it is apparent and emphatically established that the plaintiff had wrongly and incorrectly stated in the Sale Deed that no proceedings for acquisition were initiated/or pending.

11.That quite contrarily, on the date of the execution of the sale dated dated 27.05.2005, the Notification under Section 4 of the Land Acquisition Act was already in existence-having been issued on 26.02.2005.

12.That quite contrarily, despite explicitly knowledge and awareness, the plaintiff had incorrectly and wrongly represented before the defendant, for the sale and categorical motive of selling the land in question at the then existing market price, again aware that once the public secured such knowledge, they would refrain from purchasing the land and in turn paying the existing market rate/value.

13.That the plaintiff executed the sale deed dated 27.05.2005 with ulterior, extraneous and dubious motive to unlawfully and illegally profit and simultaneously cause loss/damage to the defendant herein.

14.That in the aforesaid backdrop, realizing that since the land had already been acquired, payment for compensation would soon arise/become due, the plaintiff directed the defendant to sign another agreement the very next day/28.05.2005.

15.That after having received the entire sale consideration and having sold all right, title or interest over the land in question, the plaintiff in an attempt to ensure that any amount of compensation that may otherwise be due to the plaintiff may not be paid to the defendant for the remaining/unsold 0-10-0 bigha, by an abundant precaution, executed the Agreement dated 28.05.2005.

16.That the defendant likewise in an honest and bonafide belief of the Plaintiff's representation/promise, without hesitation executed the said agreement,agreeing that he shall not claim any compensation for the remaining/unsold land of 0-10-0 bigha that belonged to the plaintiff.

17.That based on the aforesaid categorical and explicit understanding, both the plaintiff and the defendant have received compensation under the land Acquisition Act, from the Himachal Pradesh Government in proceedings numbered/registered as Award No.2/09 dated 24.07.2009 passed by the Land Acquisition Collector, HPPWD (CZ) Mandi, Himachal Pradesh; Reference Petition No.150/2012, dated 8.10.2012 passed by the Court of Shri Baldev Singh, District Judge, Kullu, Himachal Pradesh; and Regular First Appeal No(s). 162/2014 and others dated 1.10.2014 passed by the learned Single Judge, of the Hon'ble High Court of Himachal Pradesh at Shimla.

18.That a perusal of land acquisition proceedings adjudicated by/before the Land Acquisition Collector, the Reference Court and the High Court emphatically establishes that the plaintiff actively participated in those proceedings and received his due compensation.

19.That a perusal of the aforesaid record, further establishes that the defendant was equally a part in those proceedings, who received their due compensation. In those proceedings, the plaintiff never contended or represented that the

defendant was not entitled to such compensation, since the land did not belong to the defendant.

20.That likewise, the plaintiff never contended or represented that the plaintiff was entitled to the compensation that the defendant was claiming/seeking or receiving.

21.That for all purposes, the land acquisition proceedings have been adjudicated and have become final. Both the relevant parties have received their due compensation. Admittedly, the plaintiff never contended or remotely claimed before the Competent authorities that any amount was wrongfully refused to the plaintiff or wrongfully provided to the defendant.

22. That after such proceedings have settled and become final over a period of 11-years, the plaintiff has now filed the present suit with illegal, unlawful and extraneous motive to secure unlawful and unjust gains by misrepresenting facts, records and law. The suit in question is a manifestation of the plaintiff's greed, mischief and unbecoming conduct to obtain unjust enrichment. It is liable to be dismissed with costs throughout.

23.That it is equally liable to be dismissed on grounds of constructive res-judicata and limitation- being hopelessly barred by time. While the Award was passed in 2009, the suit has now been filed in 2015. Since, the claim pertains tot he compensation amount, admittedly compensation was determined by way of the aforesaid Award in 2009. Thus, the claim of the plaintiff is hopelessly time barred."

Apart therefrom, the defendant, also, reared therein, an, apt counter claim.

2 The application was resisted by the plaintiff/non-applicant, by hers instituting a reply thereto, wherein, it stands contended, that, the leave as asked for, be declined to the defendant/applicant, as, the proposed amendments would substantially change, the, nature, and, complexion of the pleadings, as initially set forth, in the prior hereto instituted, written statement, by the defendant/applicant.

3. Apparently, OMP aforesaid, espouses twin reliefs (i) for securing the leave of the Court, to, incorporate, in, the pre-instituted written statement, the afore extracted averments, and, for leave to take on record, the, enclosed therewith counterclaim. This Court would accord the espoused relief(s) to the defendant/applicant, even if, some delay has occurred in the institution, of the apt application, (i) upon the apt averments, in, respect whereof, the apt leave stands espoused, upon, being rather hence permitted to be incorporated, in, the pre-instituted written statement, (ii) thereupon, the, entire factual scenario appertaining, to, the lis engaging the parties at contest, though, extantly remaining impermissibly, hence, hidden or camouflaged, yet, upon the according, of, the apt leave, its making, its emergence, whereupon, rather the according of the apt leave, being both essential, and, also just, for, thereafter enabling the striking, of, apt therewith issues, (iii) besides for thereafter facilitating the adduction, of, apt evidence thereon, (iv) whereafter this Court, would ultimately render clinching findings, whereunder, the entire gamut of the entire controversial factual matrix, would stand, rather firmly rested. In making determination(s) qua the aforesaid facet(s), (v) when the averments in respect whereof leave, is, sought by the defendant/applicant, hence, make disclosures, in repudiation, of, the claim of the plaintiff, (vi) and, when, the, disclosures qua, the dis-entitlement of the plaintiff, arise from, in contemporaneity of the apt notification, a registered deed of conveyance hence standing executed inter se the litigating parties, (vii) more particularly, with, paragraph No.8 thereof, making clear recitals, qua, the unawareness of the plaintiff, vis-a-vis, initiation, of, processes, for, bringing under acquisition, the, suit property, (viii) besides, the suit property

being recited therein, to be free from all encumbrances, (ix) hence, the defendant/applicant contends, that, encumbrances, if any, entailed upon the suit property, arising from, entitlement, if any, of the plaintiff to receive compensation amount, rather obviously hence foundering. Consequently, the aforesaid propagation in denial, of, the title, of, the plaintiff, (x) does embody, an apt factual matrix, besides also encompasses the apt entire gamut of the controversy, whereon, in consonance therewith, contentious issues are enjoined to be struck, besides evidence, is, enjoined to be adduced, and, thereafter apt clinching findings, vis-a-vis, entitlement or dis-entitlement of the plaintiff, qua, the compensation assessed, vis-a-vis, the suit property, would stand rendered. As a corollary, the, leave as sought, for, hence incorporating in the written statements, the, afore averments, is granted, its, being just, and, essential, for, clinchingly making, the, completest adjudication, upon, all the relevant facts, appertaining tot he suit property, and, for avoiding rather obviable multifariousness, of, litigation.

4. Be that as it may, the amended written statement also encloses, an, apt counterclaim therewith. The learned counsel appearing, for, the plaintiff/non-applicant, canvases that the counterclaim, as, enclosed with the amended written statement, being not permitted, to be taken on record, (i) given it standing imperatively enjoined, upon, the defendant, to, rather rear, a, counter claim, in, contemporaneity, with, his pre-instituted written statement, (ii) whereas, the defendant/applicant not rearing thereat a counterclaim, rather hence, upon the apt leave being accorded, the apt ingredients borne, in Order 8, Rule 6A, of, the CPC, provisions whereof stand extracted hereinafter, would obviously stand infringed.

> **"Rule 6A**. **Counter- claim by Defendant-** (1) A Defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause action according to the defendant against the plaintiff either before or after the filing of the suit, but before the defendant against the plaintiff either before or after the filing of the suit, but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter- claim is in the nature of a claim for damage or not:
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court.
>
> (2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.
>
> (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

However, the aforesaid submission, cannot be accepted, as, the learned counsel, appearing for the plaintiff/non-applicant, has hence not borne in mind, the provisions of Order 8, Rule 9, of, the CPC, provisions whereof stand extracted hereinafter:-

> "9. Subsequent pleadings.- No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counterclaim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same."

(i) wherewithin, an exception, to, the afore extracted provisions, of, the CPC stand encapsulated, and, wherein, a discretion is foisted, in, the Court, to, permit the defendant, to, even when in the pre-instituted written statement, he fails to espouse a counterclaim, to, rather rear it hence subsequent thereto. The manner, of, exercise of the discretion, foisted in the Civil Courts, under, the aforestated Rule 9 of Order 8, is encapsulated, in, a judgment of the Hon'ble Apex Court, rendered in a case titled as ***Vijay Prakash Jarath v. Tej Prakash Jarath,*** reported in ***(2016)11 SCC 800***, the relevant paragraph No.10 whereof stand extracted hereinafter:-

> "9. It is quite apparent from the factual position noticed hereinabove, that after the issues were framed on 18.10.1993, the counter claim was filed by the appellants before this Court (i.e. by defendant Nos.3 and 4 before the trial court) almost two and a half years after the framing of the issues. Having given our thoughtful consideration to the provisions relating to the filing of counter claim, we are satisfied, that there was no justification whatsoever for the High Court to have declined, the appellant before this Court from filing his counter claim on 17.06.1996, specially because, it is not a matter of dispute, that the cause of action, on the basis of which the counter claim was filed by defendant Nos.3 and 4, accrued before their written statement was filed on 11.11.1992. In the present case, the respondent-plaintiff's evidence was still being recorded by the trial court, when the counter-claim was filed. It has also not been shown to us, that any prejudice would be caused to the respondent-plaintiff before the trial court, if the counter-claim was to be adjudicated upon, along with the main suit. We are of the view, that no serious injustice or irreparable loss {as expressed in paragraph 15 of BollepandaP.Pooncha's case, (2008) 13 SCC 179)}, would be suffered by the respondent-plaintiff in this case."
>
> (p.806)

(a) wherein it stands pointedly expostulated, that, unless prejudice, is, demonstrably caused to the plaintiff/applicant/non-counter-claimant, by Courts, hence, according, the apt permission, to, the, defendant, to, subsequent to the pre-instituted written statement, rather rear , a, counterclaim, thereupon, the apt leave rather being grantable, to, the defendant/applicant. Furthermore, in a judgment rendered by the Hon'ble Apex Court, in, a case titled as ***Ramesh Chand Ardawatiya vs. Anil Panjwani,*** reported in ***(2003)7 SCC 350,*** the relevant paragraph No.28 and 29 whereof, stand extracted hereinafter:-

> "28. Looking to the scheme of Order VIII as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order VI Rule 17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order VIII Rule 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all

disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter-claim being raised by way of 'subsequent pleading' as there is no 'previous pleading' on record. In the present case, the defendant having felled to file any written statement and also having forfeited his right to filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.

29. The purpose of the defendant which was sought to be achieved by moving the application dated 2.5.1995 under Order VIII Rule 6A of the CPC was clearly mala fide and an attempt to reopen the proceedings, including that part too as had stood concluded against him consequent upon rejection of his application under Order IX Rule 7 of the CPC. Fortunately, the Trial Court did not fall into the defendant's trap. If only the Trial Court would have fallen into the error of entertaining the counter-claim the defendant would have succeeded in indirectly achieving the reopening of the trial in which effort, when made directly, he had already failed. There being no written statement of the defendant available on record and the right of the defendant to file the written statement having been closed, finally and conclusively, he could not have filed a counter-claim." (p.367-368)

wherewithin, more, pointed expostulations, are, borne qua (a) a counterclaim being permissible to be filed, by way of subsequent pleadings, under, Rule 9, Order 8 of the CPC, and, the statutory discretion foisted thereunder, upon, courts of law, being hence exercisable at a stage, (b) when the suit has not progressed, upto, the stage of issues being struck nor evidence stands adduced, upon, the relevant issues, (c) more so when hence it would carry forward, the, mandate of Order 8, Rule 9 of the CPC, and, would also beget apt curtailment, and, obviate multiplicity, of, litigation, inter se the parties at contest. Bearing in mind, the aforesaid expostulation(s) of law, and, when in tandem therewith, the extant suit, has not progressed, upto, the stage of striking of issues, and, nor when evidence stands adduced thereon, and, when the counterclaim, rather foists causes of action, evidently occurring in contemporaneity, with, the institution of the suit, (i) thereupon, for facilitating, the, defendant/counter-claimant to join all causes of action, incorporated therein, and, for

also facilitating this Court, to, pronounce a decree, upon, the plaintiff's suit, and, also a decree upon the counter claim, wherein, the, relief of mandatory, and, permanent prohibitory injunction are claimed, with respect to the suit property, (ii) thereupon, this Court is constrained, to, also order that the counter claim be taken on record, preeminently when hence multifariousness, of, litigations would stand obviated, and, also when no demonstrable prejudice would befall, upon, the plaintiff.

5. For the foregoing reasons, the instant application bearing OMP No. 492 of 2016 is allowed. Consequently, the amended written statement along with counterclaim, be taken on record. The plaintiff is directed to within four weeks from today, file replication to the amended written statement, and, he is also directed to, within, the aforesaid period, institute, a written statement to the defendant's counter claim. List thereafter.

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

Himalya International Limited .....Plaintiff.

Versus

Himachal Pradesh State Electricity Board Limited and others.....Defendants.

Civil Suit No. 92 of 2008.
Reserved on : 28.08.2018.
Date of Decision: 13th September, 2018.

Limitation Act, 1963- Section 14- Exclusion of time - Civil proceedings- Court – Meaning and requisites – Held, Benefit of Section 14 of Act would be available only when prior proceeding was (i) of civil nature, (ii) those being prosecuted in good faith in Court of first instance or appeal or revision (iii) said Court not holding jurisdictional competence to entertain or conclude it – 'Court' means Court construable as part of judicial branch of State and not quasi judicial authority – Cause of action accrued to plaintiff in 2002 and continued till 2004, whereas suit for damages filed in 2008 – Suit on face of it barred by limitation – Time spent by plaintiff in pursuing remedies before Statutory Authorities created under the Electricity Act, not being before Court, cannot be excluded from computation. (Paras-7 & 8)

For the Plaintiff: Mr. Rahul Mahajan, Advocate.
For the Defendants: Mr. S.S. Mittal, Senior Advocate with Mr. Surender P. Sharma, Advocate, for the defendants.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff company stands incorporated under the Companies Act, 1956, and, has its works at ShubhKhera, Paonta Sahib, Himachal Pradesh 173025. It is a 100% export oriented, and, food processing unit. It grow mushrooms in control climatic conditions, and, process other vegetable and fruits and IQF Individual Quick Feez). The plaintiff company, IQUF mushroom, vegetables, fruits etc., and then store them in cold

storage at temperature below 0 deg F (-18 deg C). The plaintiff company has averred that it had applied to the HPSEB for a load of 992.13 KW with the contract demand of 1100 KVA vide AA form 8552 of 18.05.1995, and, the said load/contract demand was sanctioned by HPSEB vide letter No. HC-II/CS-0-1-575-95-006 of 26.8.1995, hence, it has a connected load of 990 KWA and a contract demand of 1100 KVA. The plaint continues to make averments, vis-a-vis, the plaintiff company, being asked vide letter No. PED/DB-5/95-268 of 13.9.1995 by the defendants to deposit cost of Rs.6,29,640/- for independent feeder so that power connection could be granted. The plaintiff company deposited the entire expenses on this account before the release of power connection in 1996. The plaint further continues to make disclosures qua the plaintiff company's plant being totally based on climatic controlled atmosphere for mushroom growing, refrigeration, and, for processing the mushrooms, vegetables as IQF frozen mushrooms/vegetables, and, thus maintaining the temperature below 0 deg F (-18 deg C) and having proper air conditioning/cooling during the summer months and also throughout the year is the most crucial for the production and storage for finished products (mushrooms/vegetables). Mushrooms are averred to be not growable beyond the temperature of above 18 degree C and IQF frozen mushrooms and vegetables start getting deteriorating below -0 deg, F (-18 deg C) and get totally spoiled if the temperature goes warmer than -10 deg C. (10 deg. F), hence, in view of the sensitivity, climate controlled atmosphere is required for the plaintiff company's plant, and, electricity on the load sanctioned is required continuously and throughout 24 hours and throughout the year without any interruption. The plaintiff company has averred to have made consistent remainders upon the defendants, vis-a-vis, its being beset with power tripping, and, it asked the defendants to resolve the crisis of power tripping and steps be taken so that the plaintiff company does not face any power difficulty. However, despite letter of 21.03.2012 being written to defendant No.5 Sub Divisional Officer, HPSEB, Badripur, Paonta Sahib, requesting him to take corrective measures so that the plaintiff company does not suffer power tripping, nothing substantial/effective was done and the plaintiff company immediately in the month of May-June, 2002 suffered the brunt of power tripping and loss of power, power cuts, as a result of which the IQUF mushrooms and vegetables were spoiled and mushroom crop also failed due to rise in temperature on account of power tripping, low voltage and power cuts. The monopolistic careless and callous attitude of the respondent(HPSEB) is depicted by the fact that while the plaintiff company requested on 19th April, 2002, for the permission of running of DG set, inspection was done on 14th June, 2002, after two months and worst of all the permission was granted on 17.09.2002, after three months of the inspection, when the plaintiff company had already sustained huge losses. The plaint also makes disclosures under letter of 20.6.2002, the plaintiff company making communication to the defendants to not divert the power from the plaintiff company's independent feeder to may other consumers i.e. industrial and domestic, given the cots of the independent feeder being borne by the plaintiff company, and the aforesaid request was repeated under letter of 29.06.2002, wherein, the details of power tripping from 20.06.2002 to 29.06.2002 were also detailed, and, the request was made therein to permit the uninterrupted power supply to the plaintiff's plant. Communication made under the aforesaid letter were repeated under the letters of 7th July, 2002. However, it is averred to be of no avail. It is also averred that the plaintiff company had under the aforesaid letter also requested the defendants to take corrective measures in order to improve the power tripping and also to assure that the independent feeder which has been installed at the cost of the plaintiff company be exclusively used for providing electricity to the plaintiff company only and not to other domestic and industrial consumers. All the aforesaid letters are appended with the plaint. However, it is averred that the grievance of the plaintiff ventilated therein remaining unredressed by the defendants. The plaintiff avers that it had even asked the defendants especially defendant No.4 vide letter of 8.7.2002, 17.7.2002, 10.8.2002 to

provide it, the copy of log sheets of plaintiff's independent feeder along with copy of MRI (half hourly reading of current received any company's end), however, the aforesaid information has remained unpurveyed to the plaintiff company. It is averred that the defendant vide letter No. 808-09, 31/12/2002, from CE(Commercial), communicated that as on 31st December, 2002 the independent feeder was supplying power only to plaintiff company and it is hence averred that it constituted an admission that prior thereto the dedicated feeder of the plaintiff's company plaint was supplying electricity to the other domestic and commercial establishments. In the tables extracted hereinafter, appertaining to the years 2002 and 2003, details of losses, as, suffered by the plaintiff company, losses whereof arising from the tripping of power supply, vis-a-vis the plaintiff finds complete elucidation therein.

Year 2002

Sr. No.	Items amount	Qty (kg)	Rate	(Kg)
A 1.	IQF Green Peas	45000	30.00	13,50,000.00
2.	IQF GREEN BEANS	12,000	25.00	3,00,000.00
3	IQF OKRA	06686	25.00	1,67,150.00
4.	IQF CAULIFLOWER	06500	25.00	1,62,520.00
5.	IQF CARROT	01100	25.00	27,500.00
6.	IQF PALAK	02150	25.00	53,750.00
7.	IQF APRICOTS PULP	10600	25.00	2,65,000.00
8.	IQF MANGO SLICE	01414	30.00	42,420.00
9.	IQF MANGO PULP	02034	30.00	61,020.00
10.	POTATO	3000	25.00	75,000.00
11.	IQF WHOLE MUSHROOMS	16218	60.00	9,73,080.00
12.	IQF MUSHROOMS SLICE	45250	60.00	27, 15,000.00
13.	CANNED MUSHROOMS	06000	75.00	4,50,000.00
		TOTAL(A)		66,42,420
	"B"			
1.	FRESH MUSHROOMS DESTROYEDIN GROWING ROOMS	200000	40.00	80,00,000.00
			Total (A) & (B)	**Rs. 146,42,420.00**

Year 2003;-

Sr. NO.	Items amount	Qty (kg)	Rate	(kg)
1.	IQF PEAS	145400	30.00	4362000
2.	IQF BEANS	8091	25.00	202275
3.	IQF DRUMSTICK	1059	25.00	26475
4.	IQF BABY ONION	9724	25.00	243100
5.	IQF BOTTLE GUARD	617	25.00	15425
6.	IQF TINDA	2366	25.00	59150
7.	IQF PARWAL	738	25.00	18450
8.	IQF CAULIFLOWER	10930	21.00	229530
9.	IQF APRICOT PULP	781	25.00	19525
10.	IQF PEACH PULP	210	28.00	5880
11.	IQF CHHIKI PULP	950	30.00	28500
			Total	Rs.5210310/-

The plaintiff company has averred to have made complaint to the Chairman, Board Level Dispute Settlement Committee, HPSEB Vidyut Bhavan, Shimla on 13th September, 2004, detailing therein the losses entailed upon, it, owing to power tripping, failure, cut and diversion of power from independent feeder of plaintiff company. However, no decision was meted thereon, upto, 26.10.2006, hence, whereat, a communication was made to it by the Chairman qua the inability of the Board Level Dispute Settlement Committee to decide the complaint on account of territorial and pecuniary jurisdiction , arising from the Electricity Act, 2003, HPSERC (Conduct of Business) Regulation 2006 and amendments made thereto and also in view of the HPERC Distribution Licensee Standard of Performance Regulation, 2005. Consequently, the plaintiff company approached the Himachal Pradesh Electricity Regulatory Commissioner and the aforesaid Commissioner proceeded to refer the matter for Arbitration. However, reference for arbitration was challenged by the plaintiff company by motioning the Appellate Tribunal under the Electricity Act, 2003 and the Appellate Tribunal allowed the appeal and remanded the complaint No.242 of 2006 to the Himachal Pradesh Electricity Regulatory Commission. However, the Himachal Pradesh Electricity Regulatory Commission, under orders of 24.05.2008, allowed the plaintiff company to withdraw the aforesaid complaint with liberty to approach the appropriate forum under law, hence the instant suit. Causes of actions are averred to have arisen on 21.03.2002, 19.04.2002, 20.06.2002, 29.06.2002, 3.7.2002, 6.7.2002, 7.7.2002, 8.7.2002, 11.7.2002, 12.7.2002, 22.7.2002, 7.8.2002, 17.8.2002, 20.8.2002, 18.01.2003, 20.1.2003, 29.03.2003, 16.04.2003, 29.4.2003, 30.04.2003, 11.6.2003, 20.06.2003, 25.06.2003, 26.6.2003, 4.7.2003, 26.7.2003, 29.7.2003, 2.8.2003, 16.2.2004, 27.5.2004, 5.6.2004, 14.6.2004, 15.06.2004, 1.7.2004, 7.7.2004, 17.7.2004 and on 13.9.2004 etc. Consequently, relief for rendition of a decree for compensation comprised in a sum of Rs.one crores ninety eight lakhs along with interest @ 18 % from the date of filing of suit till payment is espoused in the plaint.

2. The defendants contested the suit, and, filed written statement, wherein they have taken preliminary objections, inter alia, limitation, maintainability, estoppel, bad for non joinder of necessary parties, etc. On merits, The defendants admitted qua theirs receiving commutation mentioned in the plaint from the plaintiff company. However, it is pleaded in the written statement furnished by the defendants that the plaintiff had expressly agreed that the defendants will not be responsible for any breakdown or loss to the company on account of break down or tripping supply. It is also contended in the written statement that in peak period of May, June and July, 2002, the plaintiff company was provided power to the extent of 98%, 96% and 96% respectively. Against the working hours of 744 during the month of May, the uninterrupted power supply was made available to the plaintiff for 732 working hours by the defendant. Similarly in the month of June against 720 working hours uninterrupted supply was made available for 691 hours, i.e. 96% and in the month of July against 744 working hours the uninterrupted supply for 716 hours was made available by the defendants. It is further averred that as and when the power supply was not available also include the shut down of power, breakdown due to storm and rain or due to gird failure etc. It is contended that the Chief Electrical Inspector to the Govt. of H.P., accorded permission to run 780 KVA, 415 Volts DG sets, vide his office letter of 17.9.2002 after inspection being held on 14.6.2002. It is also averred that the Chief Electrical Inspector to the Govt. of H.P. is the necessary party, for the latter denying the averments that there was any intentional delay on his part to sanction the applied for DG sets by the plaintiff company at its plant. The contents of paras 7 and 8 of the plaint are denied rather it is contended that requisite information as asked for by the plaintiff company with respect to the log sheets etc., was supplied to it. It is also denied that the plaintiff at any point of time was provided with independent or dedicated feeder, as alleged. It is contended that the defendants have always taken steps to provide sufficient and adequate power supply to the plaintiff and similar situated industrial concerns, the feeder in question providing supply to Bhungarni was also detached from the feeder in question and power to Bhungarni has been supplied independently by providing a separate feeder. In paragraph No.10 of the written statement, it is contended during the period 12th January to 19 th January, 2003, the power supply to the plaintiff company was more than 99 % of standard of reliability, hence, it is contended that the false allegations of short supply or power tripping were levelled against the defendants. It is contended that short fall of power generation during winter season as the power generation in Himachal is hydro generation. The shortage of upstream water resource adversely hamper the power generation. The short fall in power supply during the moth of January, 2003 was owing to short fall in power general in Himachal and in order to regulate power supply, the power restriction and power cuts were imposed. Consequently, it is contended that benefit of Section 14 of the Limitation Act, is not applicable, vis-a-vis, the plaintiff company's suit, since the plaintiff company was not pursuing prior thereto remedy before the the statutory authorities rendering them to be construction to be civil proceedings instituted before a civil court of first instant, whereas, only in respect whereof benefit of provisions of Section 14 of Limitation Act is applicable.

3. The plaintiff company filed replication to the written statement of the defendants, wherein, it denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

4. On the contentious pleadings of the parties, this Court on 7.9.2009 struck the following issues inter-se the parties at contest:-

1. Whether the suit filed by the plaintiff is within limitation?OPP
2. Whether the suit is not maintainable in view of the load sanctionorder dated 26.8.1995?OPD.

3. Whether the suit is not maintainable in view of the provisions of Indian Electricity Act, 2003?OPD.

4. Whether the plaintiff is estopped from filing the suit on account of its act, conduct, deed and acquiescence?OPD.

5. Whether the suit is bad for non joinder of necessary parties?OPD.

6. Whether the plaintiff is entitled to damages, if so, then to what extent?OPP

7. Relief.

5. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1..... No.

Issue No.2..... Yes.

Issue No.3..... Yes

Issue No.4..... Yes

Issue No.5..... Yes.

Issue No.6..... No.

7. Relief..... Suit of plaintiff is dismissed as per the operative portion of the judgment.

Reasons for findings.

Issues No.1 and 3.

6. Both the aforesaid issues are taken up together for discussion, as they are common in nature besides common evidence thereon rather stands hence adduced, by the parties.

7. Uncontestedly, the plaintiff company, vis-a-vis, the grievance ventilated in the instant suit, rather availed, the purportedly statutorily contemplated mechanism, enshrined in the Electricity Act, 2003, comprised, in its accessing the Chairman, Board Level Dispute Settlement Committee. However, the aforesaid recoursings by the plaintiff company, proved abortive, (a) given the aforesaid dispute redressal mechanism, not, making any effective orders, upto, 26.10.2006, (b) whereat, the plaintiff was hence constrained to approach, the, Himachal Pradesh Electricity Regulatory Commission, (c) yet the latter made, qua the apt dispute, a, reference, vis-a-vis, arbitration, and, the apt reference, to, arbitration was rather challenged by the plaintiff company, by its preferring an appeal before the Appellate Tribunal, and, the latter accepted the apt appeal, hence, remanded, complaint No. 242 of 2006, to, the Himachal Pradesh Electricity Regulatory Commission, and, the latter on 24.5.2008, hence, permitted the plaintiff, to withdraw the complaint, with, liberty to approach the appropriate court or forum, under law. The date of initial accrual, of, cause of action, vis-a-vis, the plaintiff company, is 21.03.2002, and, it continuously accrued uptil 2004, and, the instant suit came to be filed, in, the year 2008, hence, beyond the statutorily prescribed period, of, limitation, vis-a-vis, its institution/preferment before this Court. However, the learned counsel appearing, for, the plaintiff contends with much vigour, while, drawing the attention of this Court, to, the provisions of Section 14, of, the Limitation Act, provisions whereof stand extracted hereinafter:-

"14 Exclusion of time of proceeding bona fide in court without jurisdiction. —

> (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation.— For the purposes of this section,—
>
> (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
>
> (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
>
> (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

(a) that with the Himachal Pradesh Electricity Regulatory Commission, under, orders rendered on 24.5.2008, rather permitting the plaintiff company, to, withdraw its apt complaint, and, its also according liberty, vis-a-vis, it to approach the appropriate court or forum under law, (b) thereupon, in consonance, with, the statutory mandate, as, borne in Section 14 of the Limitation Act, the, apt time or the apt period spent by the plaintiff company, in, prosecuting its remedy, before the statutory mechanism(s), rather being excludable, (a) given, its being therebefore hence prosecuted in good faith, (b) and, in Court, statutory forum whereof, hence, for, the apt defect of jurisdiction, was, rather disabled to entertain it. For testing the vigour of the aforesaid submission, this court, is, enjoined to, upon, an incisive surgical reading, of, the apt coinage "with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded", as, borne in Section 14 of the Limitation Act, hence, therefrom make apt unearthings, qua rather evident proof, in consonance therewith, rather making upsurgings, conspicuously qua, the, prior proceedings being (a) civil proceeding(s); (b) it/they being prosecuted, in, good faith in a court of first instance or appeal or revision; (c) whereas, the aforesaid evidently not holding the apt jurisdictional competence, to entertain it or to conclude it; (d) thereupon alone, the, benefit of Section 14 of the Limitation Act, being accruable or visitable upon the plaintiff. Ex facie the parlance, gained, by the afore underlined apt statutory portion, borne in Section 14 of the Limitation Act, (e) is, none other, than, qua the prior proceedings, being enjoined, to, be instituted in a court of law, and, the connotation ascribable, vis-a-vis, "the civil proceedings pending before the court of first instance", (f) is qua, its also singularly and pointedly appertaining, to courts, as understood in, the, strict sense, of, the judicial branch of the State, and, connotation thereof not appertaining, vis-a-vis, any quasi judicial body. Consequently, bearing in mind, the,

afore connotation, ascribable to the afore apt under lined phrase, as, borne in Section 14 of the Limitation Act, (g) thereupon, the, prior hereto statutory remedies, availed by the plaintiff company, even if they were not properly constituted remedies, (h) yet when they were neither prosecuted, as civil proceedings, in the court of first instance, rather when they were prosecuted, before, a quasi judicial body, or, before, the, purportedly apt contemplated statutory redressal mechanism, (i) whereas, the latters' not being construable to be *strictosensu* courts nor being construable, as, a part of the judicial branch of the State, (j) thereupon, with the plaintiff evidently since accrual of causes of action, in, the year 2004, rather omitting, to, within the apt computable therefrom hence period, of, limitation, hence, institute the instant suit before this Court, (k) and, also when the time spent by the plaintiff, in its, prior hereto, rather prosecuting no apt unbeneficial civil proceedings, before the apt court of first instance, is, concomitantly hence not construable, to be, rather hence, its, bonafidely prosecuting, apt, civil proceedings, in a court rather devoid, of, jurisdiction, (k) thereupon, the time spent by the plaintiff company in its prior hereto, rather availing inapt remedies, hence, before purportedly statutorily contemplated authorities, is not, excludable, rather the plaintiff's suit hence falls outside the period of limitation.

8. Since, the decision rendered by the State Electricity Regulatory Commission, hence, permitting the plaintiff, to withdraw the apt complaint, with liberty to approach, the appropriate court or forum under law, is not contested by the defendants, to be ridden with any inherent fallacy, (i) thereupon, the plaintiff's suit is tentatively prima facie maintainable before this Court, (ii) yet for reasons pronounced by this Court, while, rendering disaffirmative findings, upon, the issue appertaining to the plaintiff's suit being within limitation, this Court, would yet not proceed, to, in conflict therewith, render, findings on the issue appertaining to the suit, being not maintainable, in, view of the provisions of Indian Electricity Act, 2003. Consequently, issues No.1, and, 3 are answered in favour of the defendants and against the plaintiff.

Issues No. 2, 4, 5 and 6.

9. Despite this Court pronouncing the aforesaid findings, upon, issues No.1 and 3, this Court, in the interest of justice, deems it fit to test, the, validity of the plaintiff's claim, as set forth in the plaint. In proof of the averments, reared in the plaint, the plaintiff company, lead into the witness box PW-1, (a) who during the course of his deposition, borne in his examination-in-chief, tendered into evidence, copy of resolution Ex.PW1/A, memorandum of articles, borne in Ex.PW1/B, (b) copies of representations/complaints, made by the plaintiff company, to, the defendants, borne in Ex.PW1/C-1 o Ex.PW1/C-21, (c) copies of the complaints made during the year 2002 to 2004, borne in Ex.PW1/D-1 to E.PW1/D-35, (d) copies, of, the replies of the defendants, borne in Ex.PW1/E-1 to Ex.PW1/E-4 etc. PW-1 was subjected, to, an ordeal, of, an exacting cross-examination, during course whereof, he, has acquiesced, to a suggestion qua the aforesaid power supply, being adversarially affected, in case of unprecedented rains, storms and grid failure. However, he thereafter volunteered, that, the aforesaid eventualities rather not occurring during the relevant period. Even if the defendants, do not deny, theirs receiving the aforesaid exhibits, exhibits whereof, comprise, the, communications, made to them, by the plaintiff company, elucidating therein its apt grievances, (a) arising from power tripping, sparked by the apt dedicated feeder, rather in breach, of, the apt contract, whereunder the defendants were obliged, to, exclusively, and, uninterruptedly purvey therefrom power vis-a-vis its plant, rather hence supplying therefrom, power either to domestic consumers or to commercial establishment, (b) yet the mere receipt of the aforesaid exhibits, would not, per se hence carry forth, the, plaintiff's espousal, (c) unless, evidence comprised, in the apt log book, as, appertaining to the dedicated feeder, stood, adduced into evidence. However, the plaintiff's, avers, that the aforesaid best evidence, though, was requisitioned by the plaintiff,

from, the defendants, yet it remained unpurveyed to it, whereupon, it strives to mask, its, apt omission(s). However, the aforesaid apt elicitations made upon it, is, denied by the defendant. Be that as it may, it was yet open for the plaintiff, to, elicit through an appropriate motion, being made before this Court, the apt log details, vis-a-vis, the dedicated feeder. The plaintiff yet omitted, to, make the afore apt strivings, (i) omission(s) of afore apt strivings, by the plaintiff, to, hence ensure adduction, of, best evidence in respect, of, the defendants, rather in breach, of, contract, hence, supplying, from, the apt dedicated feeder, hence, power, to, establishments other than the plaintiff, (ii) whereupon ensued, the, repercussion, of, befallment, of, power tripping, vis-a-vis, its plaint, and, in sequel whereof, the apt loss displayed, in the destruction certificate(s), stood purportedly entailed upon it, (iii) thereupon, it cannot be befittingly construed, that, the plaintiff, hence cogently, and, affirmatively proving the aforesaid *res controversia*.

10. The plaintiff relies, upon, Ex.PW1/B-4, comprising, a, letter of 31.1.2002, addressed by the defendant, to the plaintiff company, wherein recitals, are, borne qua the defendant, hence, exclusively supplying power to the plaintiff company, from, the dedicated feeder, and, no other consumers' load hence being connected therewith, rather load of the other consumers, standing removed, from, the apt dedicated feeder, (a) to canvass that hence the defendants rather acquiescing qua prior thereto, the, apt electric power, hence being supplied to other establishments, whereupon, occurred tripping, of, power supply, vis-a-vis, its plant, and, whereupon, the apt concomitant losses hence stood entailed upon the plaintiff. However, the aforesaid espousal, is not tenacious, (b) as the letter addressed by the defendant to the plaintiff, is, of 31.01.2002, and, the intial accrual of cause of action, vis-a-vis, the plaintiff, is, of, 21.3.2002, (c) and, when hence as aforestated, it, was incumbent, upon, the plaintiff to prove qua even prior to the issuance of Ex.PW1/B-4, the, defendants rather supplying power therefrom, to, other commercial and domestic establishments, (d) best proof whereof, would rather emanate, upon, its adducing into evidence, the, log details, appertaining to the apt dedicated feeder. However, given the aforesaid best evidence, in affirmative proof, of the aforesaid *res controversia,* rather remaining, unadduced, thereupon, on anvil of Ex.PW1/B-4, also, no capital can be derived by the plaintiff.

11. The plaintiff, apart from the above, for ensuring, that, even when from, the apt dedicated feeder, there is an ill occurrence, of, power tripping, engendered by certain force majeure events, its, hence, not making its apt befallments, vis-a-vis, its plant (i) nor the, apt power tripping hence visiting any ill consequence, upon, its plant, had, on 19.4.2002 applied for sanction being accorded, for, installation, at its plant, vis-a-vis, DG sets, for, augmenting, the, apt power supply thereto, (ii) and, with the relevant inspection being done, on, 15.06.2002, hence after two months therefrom, (iii) and, with the permission being granted, on, 17.9.2002, hence after three months elapsing, from the date of inspection, thereupon, the aforesaid delay, is, ascribed to the defendant. However, the aforesaid delay, as ascribed to the defendant, is rather not ascribable, to the defendants, as it stands testified by DW-1, in the latter's deposition, borne, in, his apt examination-in-chief -examination, that, the apt delay, rather arising, on account, of, negligence of, the, Chief Electrical Inspector, who, is, rather authorized to accord sanction, for, installing the DG sets, (ii) thereupon, it was imperative for the plaintiff, to add in the array of defendants, the, Chief Electoral Inspector, and, to make averments against him, qua his intentionally, delaying the according of sanction, vis-a-vis, the installation of DG sets, in the plaintiff's plant, (iii) and, only when hence the Chief Electoral Inspector, to the State of H.P., had meted, his, apt reply thereto, would hence,apt issues stand struck, and, upon, appraisal, of, evidence adduced thereon, it could be befittingly concluded qua the Chief Electoral Inspector, in, his delaying, the, purveying, of, the apt permission, his hence being guided by ulterior motive(s). Contrarily, the aforesaid omission, rather constrains this Court,to

repel, the, contention of the plaintiff, that, the apt delay, is, a sequel of any negligence or fault, on, the part, of, the defendants. Even otherwise, with hence DG sets, rather evidently existing in the plant, of, the plaintiff company, on 17.9.2002, and, thereupon, with, the, power supply, vis-a-vis, its plant hence being augmented, and, also its, obviating the ill effects, if any, of power tripping, arising, from the apt various force majeure events, hence, befalling the transmission, of, power by the defendants, vis-a-vis, the plaintiff's plant, (iv) thereupon, when the plaintiff, had, secured alternative means, for overcoming the deficit, if any, on account of any reason, even if unproven, in the transmission, of, power by the defendants, vis-a-vis, its plant, (v) thereupon, the availability thereof, cannot, ably equip the plaintiff, to, contend qua the loss, if, any, entailed upon its plant, being decreed, to, be monetarily re-compensable, from, the defendants. Accordingly, issues No.2, 4, 5 and 6 are decided in favour of the defendants, and, against the plaintiff.

Relief.

12. In sequel to findings on issues aforesaid, the suit of plaintiffs is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of.

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

Sh. Jiwan Ram (since deceased) through his legal heirs.....Appellant(s)/Plaintiff(s).

Versus

Sh. Madho Ram (since deceased) through his legal heirs

.....Respondent(s)/defendant(s).

RSA No. 429 of 2008.
Reserved on: 6th September, 2018.
Date of Decision : 13th September, 2018.

Specific Relief Act, 1963- Sections 8 and 39- Suit for possession and mandatory injunction – On basis of report of local commissioner, trial court decreeing suit for possession by demolition of construction of defendant – District Judge finding said demarcation not in accordance with law and allowing appeal – Setting aside decree of trial court and dismissing suit – RSA– Held, Report of Local Commissioner though was rightly ignored but District Judge himself ought to have appointed fresh Local Commissioner or remitted matter to trial court for fresh report and fresh decision – District Judge allowed dispute to simmer – Appeal allowed – Decree of District Judge set aside – Matter remanded with direction to appoint Local Commissioner and decide appeal afresh in view of his report after calling objections of parties to it. (Paras- 8 to 10)

Case referred:

Bali Ram vs. Mela Ram and another, AIR 2003 HP 87

For the Appellants: Mr. Romesh Verma, Advocate.
For the Respondents: Ms. Seema Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition of a decree, for mandatory injunction, stood, decreed, by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the aggrieved defendant, 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 deceased plaintiff Jiwan Ram has filed the civil suit against the deceased defendant Madho Ram, for rendition of a decree for mandatory injunction with consequential relief of permanent prohibitory injunction with the averments that he is owner in possession over the suit land comprised in Khata No.73, Khatauni No.77, Khasra No.3, measuring 0-13-20 Hectares situated in MohalKhabyal, Mauza Lanz, Sub Tehsil Harchakian, Tehsil and District Kangra, H.P. The plaintiff has further pleaded that the defendant has no right, title and interest over the suit land, and, has threatened to enter upon the suit land and thereby to dispossess the plaintiff without right, title and interest. The plaintiff has further pleaded that the defendant has cut down the valuable bushes and levelled the boundary in order to change the nature of the suit land by raising construction as the defendant has collected the material over the suit land and threatened to raise construction. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken the preliminary objections, qua cause of action, jurisdiction, estoppal and maintainability. On merits, the defendant has admitted that the suit land as per the revenue entries to be correct and claimed that the suit land was government land and he is in possession over the suit land and has challenged the revenue entries to be wrong and illegal as per the factual position of the suit land. The defendant has denied any interference being caused by him over the suit land as pleaded in the plaint. It is claimed that his house is already situated over the suit land for the last 15 years with the knowledge of the plaintiff.

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 owner in possession of the suit land, as alleged?OPP.

2. Whether the defendant is interfering over the suit land, as alleged?OPP.

3. If issue No.2 is proved, whether the plaintiff is entitled for relief of injunction, as prayed for?OPP.

3A. Whether the plaintiff is entitled to the relief of mandatory injunction by way of demolition of structure raised by the defendant, if any over the suit land, during the pendency of the suit? OPP

4. Whether the plaintiff has got no cause of action to file the present suit?OPD.

5. Whether the suit land was earlierowned by the State of H.P. and the defendant is in its possession: If so what is its effect?OPD.

6. Whether the suit is not maintainable in the present form?OPD.

7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the latter Court decreed the suit of the plaintiff(s)/appellant(s)herein. In an appeal, preferred

therefrom, by the defendant(s)/respondent(s) 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 plaintiff(s)/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 28.08.2008, this Court, admitted the appeal instituted, by the plaintiff(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 learned Appellate Court has ignored, mis-appreciated the EX.PW5/A as prepared by Shri Nek Ram Thakur, whereby there is a specific mention of encroachment made by the defendant over the suit land?

b) Whether in view of the judgment as passed by this Court and reported in AIR 2003 HP, page 73, the court below has wrongly allowed the appeal filed by the respondent?

Substantial questions of Law No.1 and 2:

8. Upon, well founded and valid reasons, as borne in paragraph No.16, of, the judgement and decree, as, impugned before this Court, (i) the learned First Appellate Court, has aptly discarded the report, of, the local commissioner concerned, as, borne in Ex.PW5/A, wherewith stood appended, a, tatima, borne in Ex.PW5/B. A reading of the afore para, borne in the verdict pronounced by the learned First Appellate Court, does withstand, the evidence rendered in consonance therewith, (ii) thereupon, this Court, is, of an utmost candid, and, formidable view qua, the, report, of, the demarcating officer concerned, borne in Ex.PW5/A, and, the recitals borne, in the apt tatima, as, embodied in Ex.PW5/B, not comprising the apt best evidence, for, hence pronouncing, any efficacious decree, of, mandatory injunction, vis-a-vis, the suit property rather it being both infirm and frail evidence.

9. Be that as it may, despite, any, frailty or lack of any probative vigour, vis-a-vis, afore exhibits, (I) the learned First Appellate Court, rather was enjoined to *suo moto*, even without, any application, cast under the provisions of Order 26, Rule 9, of, the CPC, hence proceed to appoint a Local Commissioner, for enabling the latter, rather conducting, a, fresh demarcation, in accordance with law, vis-a-vis, the contentious suit property, (i) and, thereafter, upon, the aggrieved therefrom apt litigating party, upon, rearing objections thereagainst before it, the learned First Appellate Court, was enjoined to relegate the lis to the learned trial Court, for, the latter proceeding to make, a, fresh decision, vis-a-vis, the validity, of the apt demarcation report, and, also, for, making a fresh decision, upon, the apt civil suit. However, the learned First Appellate Court, despite, in paragraph No.16 of the impugned verdict, noticing, a, gross pervasive infirmity being borne in EX.PW5/A, and, in the tatima appended therewith, borne in Ex.PW5/B, omitted to embark, upon, the aforesaid apt legal recoursings, hence, has facilitated, the, dispute inter se, the parties, to yet simmer, whereas, it was enjoined to put, it, to rest.

10. Consequently, the omission aforesaid, of, the learned First Appellate Court, hence constrains this Court, to, in consonance, with, the verdict of this Court, rendered, in, a case titled as ***Bali Ram vs. Mela Ram and another***, reported in ***AIR 2003 HP 87***, to, after quashing the impugned verdict, remand the matter to the learned First Appellate Court, (i) to, enable it, to, after appointing a Local Commissioner, for the latter hence demarcating in accordance, with law, the contentious suit property, rather, to obviously elicit from him an apt report, (ii) and, thereafter, upon, the Local Commissioner purveying therebefore its report, it shall permit the apt aggrieved litigant, to, rear objections

therebefore, and, shall also pronounce a fresh decision, in accordance with law, upon, Civil Appeal No. 131-K/2002. The learned First Appellate Court is directed to complete the aforesaid exercise within six months from today. Consequently, both the substantial questions of law, are, answered accordingly.

11. In view of above discussion, the instant appeal is disposed of, in aforesaid manner, and, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 131-K/2002, is, quashed and set aside. The parties are directed to appear before the learned First Appellate Court, on, 28th September, 2018. All pending applications also stand disposed of. No order as to costs.

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

Karam Singh & others ....Appellants/Defendants.
Versus
Smt. Bauhanu alias Baleshru and others ....Respondents/Plaintiffs.

RSA No. 58 of 2011.
Reserved on : 31st August, 2018.
Decided on : 13th September, 2018.

Indian Succession Act, 1925- Section 63- Will- Proof – Trial Court upholding Will through which deceased alienated land and excluded his wife and children – And dismissing their suit challenging aforesaid Will - First Appellate Court allowing appeal and decreeing suit – Regular Second Appeal – Plaintiffs arguing that execution of Will was surrounded by suspicious circumstances – Held, due execution of Will stood proved from statements of scribe and marginal witnesses – Exclusion of natural heirs, participation of one of beneficiary in execution of Will or registration of Will at place other than native place of executant or association of persons of other village as marginal witnesses, per se not suspicious circumstances - RSA allowed –Decree of First Appellate Court set aside and that of trial court restored. (Paras-8 to 13)

For the Appellants: Mr. G.R. Palsra, Advocate.
For Respondent No.1: Mr. Rajneesh K. Lal, Advocate.
For Respondents No.2 &3: Mr. SumitHimalvi, vice counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition, of, a declaratory decree, for, quashing of Will of 3.7.2002, besides for quashing, of, mutation No.311 of 24.9.2002, attested in sequel thereto, stood, dismissed by the learned trial Court, and, in an appeal carried therefrom, by the aggrieved plaintiffs, before the learned First Appellate Court, the latter Court allowed the plaintiffs' appeal, whereagainst, the aggrieved defendants, now, prefers the instant regular second appeal, before this Court.

2. Briefly stated the facts of the case are that the plaintiffs have filed a suit for declaration, consequential relief of confirmation of possession and in the alternative for possession. The plaintiffs alleged that the landed property situated in muzaThunag/698, detailed in para Nos. 1 and 2 of the plaint, entered in the jamabandi for the year 1999-2000 was owned and possessed by Sh. Shahru Ram, who was husband of plaintiff No.1, and, father of plaintiffs No.2 and 3. The said Shahru Ram died on 19.8.2002. The plaintiffs claimed to have become the owner in possession of the suit land after the death of Shri Shahru Ram, being his first class legal heirs. The plaintiffs further alleged that after the death of Shahru Ram, the defendants had come up with a registered Will dated 3.7.2002, registered at serial No.195 with Sub-Registrar, Tehsil Sadar, District Mandi, H.P. allegedly executed in their favour by said Shahru Ram. According to the plaintiffs, the Will of 3.7.2002 was result of fraud, concoction, collusion and illegal on the grounds that (a) the Sub Registrar Mandi had no territorial jurisdiction to register the Will as the subject matter of the Will was within the jurisdiction of Sub Registrar Thunag; (b) Shahru Ram was an old man more than 70- years in age in July, 2002. He was seriously ill and on the pretext of treatment he was taken to Mandi by defendants No.1 an 2 where they dominated the Will of the deceased. According to the plaintiffs, Shahru Ram neither ever executed any Will nor he could execute any Will as he was in semiconscious state of mind due to illness on the alleged date of execution of Will. The plaintiffs further alleged that cause of action arose to file the present suit on 5.10.2002, when they came to know about the Will of 3.7.2002.

3. The defendants contested the suit and filed joint written statement, wherein, they have taken preliminary objections inter alia estoppel, cause of action, maintainability, etc. On merits, it was admitted that Shahru Ram was husband of plaintiff No.1 and father of plaintiffs No.2 and 3. It was also admitted that Shahru Ram was owner of the suit land and he died on 19.8.2002. The defendants alleged that Shahru Ram freely and voluntarily executed a Will of 3.7.2002 in respect of his property in their favour. According to the defendants the Will executed by the deceased in their favour was legal and valid. It was also alleged that the defendants rendered services to the deceased and the plaintiffs and they were managing and looking after the suit land even during thew life time of the deceased. Hence prayed for dismissal of the suit.

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

1. Whether the Will No.195 dated 3.7.2002 is a fraud, concocted, collusive and illegal, null and void, as alleged?OPP.
2. Whether the mutation No.311, dated 24.9.2002 is wrong, null and void? OPP.
3. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction, as prayed?OPP.
4. Whether the plaintiffs are entitled for a decree for possession of the suit land as prayed?OPP.
5. Whether the suit is not legally instituted and constituted?OPD.
6. Whether the plaintiffs have no cause of action and right to sue?OPD.
7. Whether the plaintiffs are estopped to file the present suit by their acts, conducts and deeds?OPD.
8. Whether the suit of the plaintiffs is time barred?OPD.
9. Whether plaintiffs have not complied the order dated 4.1.2005 qua payment of costs of Rs.500/- for filing the afresh suit?OPD.

10. Whether deceased Shahru Ram had freely and voluntarily executed the Will No. 195 dated 3.7.2002 qua the suit property and the Will is perfectly legal and valid one?OPD.

11. Relief.

5. 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.

6. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 07.03.,2011 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 learned First Appellate Court below has mis read, misinterpreted and misconstrued oral as well as the documentary evidence of the parties, especially the statement of DW-1 Karam Singh, DW-2 Jyoti Ram, DW-3 Yog Raj Sharma, DW-4, Sobha Ram, besides documents EX.DW1/A Will, mutation Ex.DW1/B, and copy of jamabandi Ex.DW1/C, which has materially prejudiced the case of the appellants?

b) Whether exclusion of the legal heirs from the property by the executant is a suspicious circumstance of the Will?

c) Whether taking of part by one of the beneficiary of the Will is also a suspicious circumstance of the Will in question?

d) Whether giving of movable property by the executant to the beneficiaries of the Will is a suspicious circumstance of the Will?

e) Whether registration of the Will in another Tehsil other then where the property is situated is also a suspicious circumstance of the Will in question?

Substantial questions of Law No.1 to5:

7. The deceased testator, one Shahru, under a registered testamentary disposition, borne in Ex.DW1/A, hence bequeathed his estate, vis-a-vis, the defendants. The learned trial Court, on, an appreciation, of, the testifications, rendered by the propounder, and, by the scribe thereof, besides by the identifier, of, the deceased testator, and, by the marginal witness thereto, (a) all whereof made open voicings, qua, the recitals borne, in, Ex.DW1/A, being scribed, at the instance of the deceased testator, and, after contents thereof being readover, and, explained to him, his appending, his thumb impressions thereon, in the presence, of, the apt marginal witnesses thereto, (b) and, in the presence, of, his identifier, (c) and, thereafter in the presence, of, the deceased testator, the apt marginal witness thereof, and, the identifier of the deceased testator also appending their respective signatures thereon, (d) hence, thereafter, proceeded to rather conclude qua thereupon, the, peremptory statutory parameters, borne in Section 63 of the Indian Succession Act, being meted, the, fullest compliance, and, also proceeded to impute sanctity, vis-a-vis, valid execution, of, Ex.DW1/A, besides also rendered unflinching findings qua Ex.DW1/A being proven, to be, validly, and, duly executed, by the deceased testator.

8. The aforesaid inferences, drawn by the learned trial Court, do warrant meteings, of, validations thereof, (a) imperatively with the photograph, of, the deceased testator, stand borne upon EX.DW1/A, (b)and, after its proven complete execution, it,

thereafter being taken, to, the, Sub Registrar concerned, wherebefore, too, the marginal witness(es) thereto, one, Sobha Ram, and, the identifier of the deceased testator, in the presence, of, the Sub Registrar Concerned, hence proceeded to append their respective signatures thereon, (c) besides the Registering Officer concerned, visibly, as embodied therein, made thereon an apt endorsement, hence displaying qua his reading over, and, explaining the contents thereof, to the deceased testator, and, whereunderneath, the, authentic thumb impressions, of, the deceased testator also occur. The validity of the apt endorsement, is not, concerted to be belittled by the plaintiffs, by theirs making apt strivings, to lead into, the, witness box the Sub Registrar concerned, (d) rather when the identifier, of, the deceased testator, and, the marginal witnesses, vis-a-vis, Ex.DW1/A, also at the stage contemporaneous, to its presentation, for registration before the Sub Registrar concerned, evidently hence appended their respective signatures thereon, (e) AND with no apt suggestion being meted to each, qua the apt endorsement, rather suffering from any aura of falsity, (f) thereupon, utmost vigour, is, to be imputed qua the factum, of, Ex.DW1/A being cogently proven to be validly and duly executed. In addition, it is to be concluded qua it being volitionally executed, by the deceased testator, and, with his at the relevant time, rather also holding, the, apt *compos mentis*, and, also qua the witnesses thereto lending proof, vis-a-vis, their apt *animus attestendi*.

9. However, the learned First Appellate Court, rather irrevered the sanctity, of, the apt findings recorded, by the learned trial Court, on, anvil of want, of, explications, being rendered by the propounder, vis-a-vis, the purported suspicious circumstances, hence, surrounding the execution of the Will, (a) comprised in the deceased testator hence excluding his natural heirs, (b) his proceeding to ensure the registration of Ex.DW1/A, at, the Sub Registrar's Office, located at Mandi, whereas, the Sub Registrar Office also existed at Thunag, and, the latter was located in the closest proximity, vis-a-vis, the homestead, of, the deceased testator. (c) One, of, the apt propounder(s) evidently playing an active part in the execution, and, registration of the Will, (d) and, the deceased testator rather choosing, the, attesting witness(es), from, a village, other than, whereto he belonged, and, hence, concluded qua the execution of Ex.DW1/A, being not proven to be validly and duly executed.

10. The afore conclusions, drawn by the learned First Appellate Court, hence, for reversing the decree, rather dismissing the plaintiffs' suit, are grossly infirm, (a) given the learned First Appellate Court inaptly benumbing and underwhelming, the, preponderant paramount evidence, concurrently testified by the afore referred defendants' witnesses, wherefrom, unflinching proof rather emerges, vis-a-vis, the valid and due execution, of, Ex.DW1/A. by its executant. The learned First Appellate Court in concluding, that, the defendant, being, a jus*alinee* or a stranger, to, the family of the deceased testator, and, it further concluding, hence, a pervasive stain, rather ingraining Ex.DW1/B, has, visibly committed an apparent gross fallacy, (b) given, the plaintiffs rather rearing pleading(s) qua the defendants not being *jusalinee(s),* pleadings whereof operates, as, estoppel, against, the plaintiffs, rather to, claim that the defendants are either *jus alienee(s)* or strangers to the family of the deceased testator, (c) nor, it was tenable, for, the learned First Appellate Court, on the aforesaid purported anvil, to rather conclude that Ex. DW1/A, is henceridden with a deep aura of suspicion, (d) ensuing sequel whereof, is, qua when the very purpose, of, execution, of, a testamentary disposition, is to disinherit, hence, certain natural heirs, or to exclude them from inheritance, (e) thereupon, the mere factum, of, the natural heirs of the deceased testator standing excluded by him, and, his making a bequest, vis-a-vis, the defendants, cannot be either, a, valid or a genuine, reason, for concluding qua it either constituting any suspicious circumstance, nor, hence any explication thereto was enjoined to be meted, by the defendants.

11. The factum, of, the participation, of, one of the propounders, in, the execution of Ex.DW1/A, also cannot be construed to be a suspicious circumstance, as, the testifications, of, the defendants' witnesses, and, the proven apt afore endorsements, made on Ex.DW1/A, by the registering officer, whereunderneath, the deceased testator, has, appended his thumb impression, (a) contrarily begets, an inference qua it being volitionally executed, by the deceased testator, and, with his at the relevant time, rather holding the apt *compos mentis, (b)* besides when the plaintiff No.1 has admitted qua her husband, on returning from Mandi, his intimating her qua his executing a testamentary disposition, (i) thereupon, it has to be concluded with vigour, qua the further purported vitiatory effects, appertaining to Ex.DW1/A, being purportedly not proven to be validly and duly executed, and, as sparked, from, the deceased testator, proceeding to Mandi, than, to Thunag, for it getting registered, especially when at the latter place, the Sub Registrar's office, is, available, rather also concomitantly getting subsumed, (ii) more so, when evidence has emerged, qua, in the deceased testator hence proceeding to Mandi, his intending to also get himself medically treated, (iii) besides, comprised in the factum of the deceased testator, rather choosing apt marginal witnesses, from, a village other than whereto he belonged, also, concomitantly rather stand hence effaced.

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

13. In view of the above discussion, the instant Regular Second Appeal is allowed. In sequel, the judgement and decree rendered by the learned First Appellate Court, upon, Civil Appeal No. 33/2009 is set aside, whereas, the judgment and decree rendered by the learned Civil Judge (Jr. Division) Chachoit at Gohar, upon, Civil Suit No. 51/2005 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 Sudeep Trading Company .....Appellant.

Versus

Deepak Aukta and others .....Respondents.

Cr. Appeal No. 261 of 2010.
Reserved on: 24th August, 2018.
Date of Decision: 13thSeptember, 2018.

Negotiable Instruments Act, 1881- Sections 138 and 139- Dishonour of cheque – Complaint –Presumption of consideration- Trial Court acquitting accused solely on ground that business concern with whom complainant had dealings was owned by someone else and not by accused – Appeal against – Complainant specifically stating of having delivered electrical goods to accused – Complainant also deposing in having made necessary entries in his register and of accused signing and handing over cheques to him– Statement of complainant not disputed in cross-examination – Cheques pertain to account of accused – Accused also not denying his signatures on said cheques – Held, Cheques in question given

by accused for consideration – Reasons given by trial Court for acquittal fallacious – Appeal allowed – Accused convicted of offence under Section 138 of Act. (Paras- 8 to 13)

For the Appellant: Mr. V.S. Chauhan, Advocate.
For Respondents No. 1 & 2: Mr. Arun K. Verma, Advocate.
For Respondent No.3: 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, stands aggrieved, by the pronouncement, of, an order, of acquittal by the learned trial Court, vis-a-vis the accused, upon, Cr. Complaint No. 40-3 of 2007.

2. The facts relevant to decide the instant case, are that M/s Sudeep Trading Company through its proprietor Suddep Bansal has filed a criminal complaint against accused, namely, Deepak Aukta Proprietor of M/s Deepak Electrical Store and M/s Deepak Electrical Store through its proprietor. In the complaint, it is alleged that the complaint deals in sales/trading of electrical, Hardware items, paints etc. at Parwanoo. The accused has business relations with the complainant and he is in full control over the administrative and financial affairs of concern, M/s Deepak Electrical Store. It is further alleged that the accused used to regularly place orders on telephone to the complainant for purchasing electrical goods and as per orders the complainant sold the items to the accused. It is also alleged that in order to discharge part of the liability being the price of items purchased, accused had issued two cheques, one bearing No.957286 of 10.1.2006 for a sum of Rs.15,000/- and the other bearing No.957287 of 29.11.2006 for a sum of Rs.20,000/-, in favour of the complainant drawn on State Bank of India, Jubbal. It is alleged that the accused had assured the complainant that the cheques would be encahsed as and when presented. Further, it is alleged that the complainant, had presented the cheques through its banker i.e. The Parwanoo Urban Co-operative Bank, Sector-1, Parwanoo but the same were returned as unpaid on the ground "Exceeds Arrangement". It is alleged that the complainant was intimated by its banker at Parwanoo through the returning memo dated 17.5.2007 alongwith the dishonoured cheques and another returning memo from the banker of the accused with remarks "Exceeds Arrangement". On receipt of this information regarding dishonour of cheques, legal notice of 4.6.2007, calling upon them to make the payment for the aforesaid dishonoured cheques, but despite the service of the said notice(s) the accused have not made any payment to the complainant and thereby have committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

3. A notice of accusation, was, put to the accused by the learned trial Court, for his, committing an offence punishable under Section 138 of the Negotiable Instruments Act. In proof of his case, the complainant examined 3 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 he examined two witnesses in his 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 solitary reason assigned by the learned trial Court, hence, for recording an order of acquittal, upon, the accused, is, anvilled upon, the proprietary concern, nomencaltured as M/s Deepak Electrical Store, not being owned by the accused, rather, it, as depicted by Ex.DW2/A, and, by Ex.DW2/B, being owned by one Deepika Aukta. The aforesaid reason, for the reasons to be ascribed hereinafter, is grossly fallacious; (a) the complainant, in his testification, comprised, in his examination-in-chief, rendering clear echoings, vis-a-vis, accused No.1, visiting his commercial establishment, located at Parwanoo, and, his thereat supplying electrical items, to him; (b) his making an apposite entry in his apt register(s); (c) the dishonoured negotiable instruments, respectively, borne in Ex.CW1/A, and, in Ex.CW1/B, being signatured, in his presence by the accused. The afore rendered echoings, borne in his examination-in-chief, are meted apt corroboration(s) by CW-3. The afore stated echoings, testified, in, concurrence by CW-1, and, by CW-3, enjoy immense credibility, (d) given each, during, the course of their respective cross-examinations, not being meted any apposite suggestions, for hence belying their respective echoings, occurring in their afore respective examinations-in-chief, qua, Ex.CW1/A and Ex. CW1/B being sigantured by the accused in their presence. The absence of meteing, of, afore suggestions, to both, by the learned defence counsel, while holding, each to cross-examination, hence, render their apt echoings, qua, the accused signaturing Ex.CW1/A and Ex.CW1/B, in their presence, and, thereafter his handing over, to the complainant, the afore exhibits, rather being construable to be credible, wherefrom, hence, a further inference is bolstered, especially when the accused, does not, deny his signatures borne on Ex.CW1/A, and, on Ex. CW1/B, qua the afore exhibits hence holding his authentic signatures; (e) the absence, of, the accused, to, bely the entries, testified by CW-1, to be made by him, in the relevant register, in respect of the accused standing delivered electrical items, also,enable, erection of an inference, qua, his hence making an apt acquiescence therewith; (f) whereupon, it is to be concluded, qua, the complainant rather efficaciously proving qua the amounts, borne in Ex.CW1/A, and, in Ex.CW1/B, being towards a legally recoverable debt or liability, (g) more so, when the aforesaid presumption, remains obviously unrebutted, by adduction, of, cogent evidence, besides the aforesaid firm credible evidence, qua the aforesaid legal parameter(s) rather also facilitates, the, apt drawing, of, an inference qua hence, the complainant, discharging the apt onus, vis-a-vis, the afore apposite statutory presumption.

9. The learned trial Court, merely, upon anvil, of reflections, borne, in Ex.DW2/A, and, in Ex.DW2/B, proceeded, to record, an order of acquittal upon the accused. However, the placing, of, reliance thereon, is, grossly inappropriate, given (i) qua the aforesaid not appertaining to the bank concerned, whereagainst, Ex.CW1/A, and, Ex.CW1/B, were drawn, rather theirs appertaining qua M/s Deepak Electrical Store, (ii) whereas, the apt account where against Ex.CW1/A, and, Ex.CW1/B, were drawn, is testified

by DW-1, to be owned by One Deepak Aukta. Since, the relevant account(s), whereagainst Ex.CW1/A, and, Ex. CW1/B were drawn, cheques whereof, for want of sufficient funds therein, were, refused to be honoured, uncontrovertedly and visibly, stand, in the name of Deepak Aukta, (iii) thereupon, contrary therewith reflections, if any, borne in Ex.DW2/A, and, in Ex.DW2/B, are, insignificant, nor it was appropriate for the learned trial Court, rather to discard, the, probative worth of the afore testification, of DW-1, as, occurring in his cross-examination.

10. 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.

11. Consequently, the instant appeal is allowed and the judgment impugned before this Court is quashed and set aside. In sequel, the accused/respondent herein, is, convicted for the offence punishable under Section 138 of the Negotiable Instruments Act. He be produced before this Court on 3/X/2018 for his being heard on the quantum of sentence.

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

Prakash Chand & others .....Petitioners/contemners

Versus

Hem Singh and others ...Respondents/Applicants.

Civil Revision No. 34 of 2010.
Reserved on : 5th September, 2017.
Date of Decision: 13th September, 2018.

Code of Civil Procedure, 1908- Order XXXIX Rule 2A- Disobedience of order – Proof - Trial Court holding plaintiffs guilty of contempt on finding that despite status quo order they raised construction over suit land – District Judge upholding finding and dismissing plaintiff's appeal – Revision – Held, No demarcation report indicating construction having been raised over suit land adduced by defendants – Report of Local Commissioner (Advocate) in absence of demarcation report not of much credence – Lower Courts went wrong in relying upon discardable material – Revision allowed – Contempt petition dismissed. (Paras-8 to 10)

For the Petitioners: Mr. G.R. Palsra, Advocate.
For the Respondents: Mr. Vishal Bindra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Civil Revision Petition, stands, directed against the concurrently recorded pronouncements by both the learned Courts below, upon, Contempt Petition No. 68-VI of 2005, whereunder, both the learned Courts below, hence, allowed the aforesaid

contempt petition, and, rendered a direction for the petitioners/contemners, being detained in civil prison, for 15 days each.

2. Briefly stated the facts of the case are that the contemners/respondents herein had filed a suit for permanent prohibitory injunction against the respondents herein with respect to the suit land as detailed in the application. The said suit was instituted on 12.12.2003 and in the application filed under Order 39, Rules 1 and 2 of the CPC, vide orders rendered on 16.12.2003, the learned Civil Judge (Junior Division) concerned, directed the parties to lis, to, maintain status quo qua the nature of the suit land till the next date of hearing and the said order was extended from time to time. It is averred by the respondents herein/applicants that despite the status quo order, the petitioners herein/contemners themselves started construction work over the suit land after digging the foundation w.e.f. 14.4.2004 for raising pillars and stacked the construction material and completed the construction work during the pendency of the suit. Thereafter, the Local Commissioner was appointed and it was found that there exits an old house which was in Khasra No.504 and new house constructed on Khasra No.475/1 and 505/1 and said old house was repaired and extended in other numbers. It has been submitted that contemners have taken the plea that they have only carried out the repair work and they have no disobeyed the order of he court but the report of the Local Commissioner shows that the construction work was completed by contemners during the stay order, as such, they have willfully and deliberately disobeyed the order of the court and the respondent be sent to civil imprisonment and their property be attached.

3. The contemners/petitioner herein contested the contempt petition, wherein, they have admitted of theirs filing a suit for injunction against the applicants/respondents herein, wherein, both the parties were directed to maintain status quo qua the nature of the suit land but it has been denied that they have raised construction over the suit land during the pendency of the main suit, when the said order was operative. They pleaded that construction work was old one and only repairs were done. It was pleaded that the report of the Local Commissioner is not correct, as such, the application is not maintainable.

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

1. Whether the respondents have violated the court order of the court dated 16.12.2003, as alleged? OPA

2.Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the latter Court hence allowed, the, contempt petition preferred therebefore, by the applicants/respondents herein. In an appeal preferred therefrom, by the contemners/petitioner herein, before the learned Presiding Officer, Fast Track Court, Mandi, the latter Court dismissed, the, appeal, and, affirmed the apt findings returned by the learned trial Court. Now, the, contemners/petitioner herein, hence institute the instant Civil Revision, before this Court, wherein, they assail the findings recorded, in their impugned orders, by the learned Courts below.

6. The order alleged to be violated by the petitioners herein/contemners, is, an order rendered on 16.12.2003 by the learned Civil Judge (Junior Division), Court No.3, Mandi, District Mandi, H.P., whereunder, the litigating parties were directed to maintain status quo, vis-a-vis, the nature and possession, of, the suit property. During the pendency, of the aforesaid contempt petition before the learned trial Court, the latter proceeded, to, appoint, a, Local Commissioner, (i) and the Local Commissioner was directed, to, submit his report, vis-a-vis, “whether the construction is being raised on vacant land or merely repair is

being carried out or on which khasra number the construction is going on". The Local Commissioner concerned, a legal practitioner, at, District Courts, Mandi, in his report purveyed, vis-a-vis, the learned trial Court, recorded findings therein (ii) that the old house borne in Khasra No. 504 being repaired, and, extended onto other khasra numbers, as, depicted in site plan, (iii) and, further also recorded findings therein, that, the aforesaid repairs, and, new construction work being, not, more than 4 to 5 months, from the last date of inspection i.e. on 7.7.2004, given the white washing, and, cement being not totally dried. The recitals borne in the report of Local Commissioner, embodied in Ex.AW2/B, are, prima facie supported by spot map, borne in Ex.AW2/D. Ex.AW2/D was prepared by one Murari Lal, Patwari.

7. The contemners/petitioners herein meted objections, to, the report of the Local Commissioner, and, had therein rather made strivings for invalidating the same, (i) on anvil, of, it not standing supported by any valid demarcation, standing conducted, of the apt khasra numbers, thereupon,no credence being amenable to be meted, vis-a-vis, any of the findings recorded therein. Both the learned Courts below rather accepted, the, recitals borne, in, the report of the local commissioner, embodied in Ex. AW2/B, and, also proceeded to assign sanctity, vis-a-vis, spot map appended therewith, and, as embodied in Ex.AW2/D. Obviously, hence both the learned courts below invalidated the objections reared thereto, by, the petitioners/contemners.

8. This Court would validate, the, concurrent findings, as, recorded by both the learned courts below only, upon, cogent evidence making emergences, vis-a-vis, Ex.AW2/B, and, spot map embodied, in Ex.AW2/D, being grooved, upon, a, valid demarcation being conducted, of, the apt khasra numbers, especially by an authorised revenue officer. The Local Commissioner, as, aforestated is a legal practitioner, at, District Courts, Mandi, and, though at the relevant stage, he was accompanied by AW—3, the, Patwari of the Halqua concerned, who prepared Ex.AW2/D, (i) yet both the aforesaid exhibits apparently lose their apt evidentiary vigour, (ii) given AW-3, making a clear voicing qua no valid demarcation, of, the apt kahsra numbers being held, and, his further making, a, testification qua Ex.AW2/D remaining unverified, by, the Kanungo, (iii) whereas, the Kanungo concerned, being testified by him, to be, the competent revenue officer to make, a, valid demarcation of the apt khasra numbers, and, thereater to mete his report.

9. The effect of the aforesaid underlinings, borne in the testification of AW-3, does validate, the objections projected by the contemners/petitioners herein, vis-a-vis, the report of the Local Commissioner, borne in Ex.AW2/B, and, vis-a-vis, site plan, borne in Ex.AW2/D, (i) and, obviously hence any meteing of credence thereto by both the learned Courts below, was, unmeritworthy, (ii) besides begets a sequel qua both the learned Courts below, in, imputing sanctity, to, afore evidentiary material, despite the aforesaid exhibits, not, for the reasons aforestated, being imbued with, the, utmost evidentiary vigour, (iii) rather, thereupon, hence meteing of any credence, vis-a-vis, discardable material, by both the learned courts below, bespeaks, of, theirs hence acting with material illegality, and, gross impropriety.

10. For the foregoing reasons, the instant petition is allowed, and, the concurrent orders impugned before this Court are quashed and set aside. In sequel, the contempt petition bearing No. 68-VI of 2005 is dismissed. 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. Seema Devi ....Appellant.

Versus

Dinesh Kumar ....Respondent/Petitioner.

FAO No. 394 of 2017.
Reserved on : 7th September, 2018.
Decided on : 13th September, 2018.

Hindu Marriage Act, 1955- Section 13(1) (i-a)- Divorce – Cruelty – What is? – Held, acts of wife in slapping husband in presence of respectable persons of biradari, tearing his clothes, lodging false FIR of cruelty against husband and in case arising therefrom, filing application under Section 319 of Code of Criminal Procedure for impleading her parents-in-law, undergoing surgery without intimating husband, refusing to attend guests of husband etc. caused immense trauma to him – Findings of Additional District Judge of petitioner having been met with cruelty by wife and ordering dissolution of marriage on ground of cruelty upheld. (Para-7)

Hindu Marriage Act, 1955- Section 28 Divorce decree- Appeal- Re-marriage - Despite stay – Effect – On facts, re-marriage of husband during pendency of appeal though disapproved yet not invalidated – However, husband directed to pay Rs. One Lac as compensation to his erstwhile wife – Appeal dismissed (Paras-9 to 11).

For the Appellant: Mr. Kulwant Chauhan and Mr. Vijay Singh Thakur, Advocates.

For the Respondent : Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the pronouncement recorded by the learned Addl. District Judge, Sirmaur District at Nahan, H.P., upon, H.M.A. Petition No. 3-N/3 of 2012, wherethrough, he dissolved the marital ties inter se, the, appellant herein, with, the respondent herein.

2. The brief facts of the case are that the respondent (hereinafter called as the petitioner) was married to the appellant (hereinafter called as the respondent) on 31st January, 2008, according to the Hindu rites and ceremonies. Out of this wedlock a son was born. The respondent in the first week of February, 2008, started pressurizing him to purchase a plot at Paonta Sahib and construct residential house so that she could live there. The respondent, was asked to wait for some time, but she was not satisfied and started abusing, quarreling and deserting the petitioner without any reason. She also starting misbehaving with the parents of the petitioner. On 8.2.2008, close relatives of the petitioner had come to the house and when asked to prepare teat, respondent refused and commented that she was dragged in the hell and could not live with them. On 12.2.2008, she left the house at her own and on 24.2.2008, she called the petitioner to Ranjan Hospital, Yamunanagar, where she was surprised to know that a surgery has been conducted upon the respondent. He paid a sum of Rs.3,000/-, there and the respondent could not explain as to why this surgery was got conducted without informing him and at the same time, she refused to return despite of being requested time and again. On 15.8.2008, the respondent visited the matrimonial house on the request of the sister of the petitioner, and started

raising hue and cry in the house by becoming quarrelsome and insulting the petitioner and his parents. On 3.10.2008, meeting was convened in the house of Shri Sanjay Kaushal, who acted as a mediator to settle the dispute, but the respondent slapped the petitioner in the presence of the relatives and matter was to be reported to the police. On 20.10.2008, a false FIR was lodged against the petitioner and his family members and they were harassed. On 29.12.2009, the matter was amicably settled with the intervention of the local people of biradari and a compromise deed was to be filed before the D.M. Nahan. On 20.2.2010, the respondent attended Satya Narayan Katha in the house of petitioner, but abused him and his family members on the plea that they had failed to arrange separate residence at Poanta Sahib and after misbehaving and threatening the petitioner left the house on the same day and did not return. These acts and conduct of the petitioner are stated to have mentally and physically tortured the petitioner and it amount to physical and mental cruelty. The respondent is also said to have deserted the petitioner by not returning to the house as she is serving in Health department, Haryana. It is averred that the petition has not been filed in collusion of the respondent and the cause of action accrued on 20.2.2010 and is still continued. On the basis of these averments, the petitioner has sought the divorce on the aforesaid grounds.

3. The petition for divorce instituted by the petitioner before the learned trial Court, stood contested by the respondent, by hers instituting a reply thereto, wherein, she controverted all the allegations constituted against her in the apposite petition. He has denied that her behaviour was not proper, rather the petitioner is not treating her in proper manner. The respondent claimed that at the time of their marriage sufficient dowry was given by her parents to the petitioner and his family members, but they being greedy and having lust of dowry were not satisfied with the same and started perpetuating cruelty on the pretext that the Santro car was not given in the marriage. It is further stated that when she showed her inability to arrange dowry beyond the capacity of her parents, the petitioner and his parents became furious and gave merciless beatings to her, but she kept on tolerating everything with the hope that good sense will prevail one day. On 15.7.2008, she was allegedly thrown out of the matrimonial house when she was having five months pregnancy after having given merciless beatings with a threatening note that she shall be permitted to enter the house only after Santro car is arranged. The son was born on 23.11.2008 in the hospital, but the petitioner and his family members did not come despite of being informed nor any expenses were born by them. It is further averred that all these acts and conduct of the petitioner and his family members how that they have no love and affection for the respondent and the child and they, therefore, are responsible for break down of the marriage. The respondent denied that she had pressurized the petitioner to construct a house after purchasing the plot at Paonta Sahib. According to her, she had been residing in Govt. accommodation allotted to her at PHC, Chhachrauli and had no reason to ask the respondent for residence at Paonta Sahib. The respondent denied other allegations and justified the lodging of FIR as she was compelled to do so by the petitioner and his parents. She pleaded that she was compelled to enter into a compromise after pressure was exhorted by the biradari and lateron, the petitioner did not keep his words and abide by the under taking to the effect that the respondent shall kept nicely and therebefore, the case could not be withdrawn.

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

> 1. Whether the petitioner is entitled for a decree of dissolution of marriage on account of cruelty, as prayed for?
>
> 2.Whether the petitioner is also entitled to the decree of divorce on the ground of desertion, as prayed for?OPP.

3.Whether the petition is not maintainable in the present form?OPR

4. Whether the petitioner is estopped by own act and conduct to file and maintain the petition?OPR.

5.Whether the petitioner has no cause of action to file the present petition? OPR

6.Relief.

5. On an appraisal of evidence adduced before the learned Addl. District Judge, the latter allowed the apposite petition.

6. The learned trial Court had rendered affirmative findings, (i) upon, the apposite issue appertaining to the respondent meteing besides perpetrating cruelty upon her husband, (ii) and, had also rendered affirmative findings, upon, the issue appertaining qua the appellant herein, willfully without the consent, and, against the will of her husband, hence, deserting the matrimonial company, of, her husband. The afore findings were anvilled, upon, (a) the proven incident, of, 8.2.2008, whereat, the errant spouse is concurrently testified by the petitioner, and, his father, to, hence, misbehave with her husband, comprised in hers, in the presence, of, Shakultala Devi, Preeti Devi, Surjo Devi, Ranbir Singh, Randev Singh and Fateh Singh etc., rather flatly refusing to prepare tea, for the aforesaid. An apt conclusion qua efficacious proof standing adduced qua the aforesaid incident, is tenably, drawn by the learned trial Court, given, no apt therewith suggestion being put by the learned counsel appearing for the errant spouse, either to the petitioner or to his father, while his holding them to cross-examination, nor any apt therewith denial existing in the affidavit, of, the errant spouse, tendered as Ex.RW1/A. (b) The incident of 24.2.2008, whereat, the respondent admittedly underwent surgery, and, hers prior thereto, not, apprising her husband, purportedly on the ground, of, given its emergent besetting, upon, her, hers being left with no time to intimate her husband, is also proven, (c) given no cogent evidence in respect thereto, being adduced by the errant spouse, and, also rather the efforts of her husband to thereafter retrieve her to his matrimonial company, hence failing, as, disclosed in affidavit borne, in, Ex.PW2/A, are, also aptly drawn conclusions, given the petitioner and his father, during the course of theirs being held to cross-examination, theirs, being not meted any apposite therewith suggestion, (d) the incident of 15.8.2008, whereat, though the respondent/appellant herein, rather joined the company of the petitioner, for a day, yet hers turning violent, abusive, and, quarrelsome, and, tearing the clothes, of, the petitioner besides threatening him to kill, and, leaving his house, is also aptly concluded to be a cogently proven incident, given no specific denial in respect thereto being meted, in, the reply furnished, by the respondent, even when, the aforesaid fact, stood, specifically averred, in, the apt petition. (e) More so, when the affidavit borne in Ex.PW2/B, earmarks, the aforesaid factum, with clear elucidation, and, when he during the course of his being cross-examined, rather remaining uncross-examined qua it. (f) Furthermore, an incident of 3.10.2008, occurring in the meeting convened in the house, of, one Sanjay Kaushal, for amicably settling the dispute inter se the parties, whereat, the respectable persons, of, the biradari were present, whereat, the errant spouse, in the presence, of, the respectables, of, the biradari, slapped the petitioner besides insulted him, is aptly concluded to be cogently proven, (g) given, despite it, standing specifically averred in in the apt petition, besides being narrated in EX.PW2/A, yet, no specific denial thereto emanating from the respondent, nor the counsel appearing for the respondent while holding him to cross-examination, hence, meteing in denial thereof, any, apt suggestion.

7. Be that as it may, the incident of 22.2.2010, whereat, in a religious congregation held in the house, of, the husband of the appellant herein, and, prior whereto, an, amicable settlement, occurred on 29.12.2009, the factum, of, the errant spouse abusing

her husband, and, his family members, for want of theirs making arrangements, for her separate residence, is also aptly concluded to stand cogently proven, (a) given, despite, it standing specifically averred in paragraph No.8 of the petition, yet it standing not denied in the apt reply,besides given the petitioner, despite his making averments, in consonance therewith, in Ex.PW2/A, his remaining uncross-examined, vis-a-vis, it, by the learned counsel for the errant spouse. Lastly, an FIR lodged against the petitioner/respondent herein, under Section 498-A, and, under Section 506 of the IPC, whereon a verdict of acquittal stood pronounced, vis-a-vis, the respondent herein/petitioner, and, during the pendency, of, the apt criminal case, against, the respondent herein/petitioner, the endeavour of the errant spouse, through, hers casting an application, under, Section 319 of the Cr.P.C., for, hence adding along with him, the, parents of the respondent herein/petitioner, as, accused, also yielded unsuccessful result, (b) and, effects whereof are qua hence, the, allegations constituted in the FIR being concludable to be falsely drawn against him, whereupon, obviously, he was beset with immense trauma, and, also concomitant therewith cruelty rather also stood entailed upon him. The result of the above discussion is that the findings recorded, upon, the apt issues by the learned trial Court, are, anvilled upon proper appreciation, of, the material on record.

8. During the pendency of the instant appeal before this Court, the appellant herein has cast, two applications herebefore, one bearing CMP No.11284 of 2017, constituted under Order 1, Rule 10(2) of the CPC, and, the second bearing CMP No. 11276 of 2017, constituted under Order Order 41, Rule 27 of the CPC, for, adding, in, the array, of, respondent, one Divya alias Reena, (a) given, the respondent herein, after, the impugned verdict being pronounced, and, after, this Court, upon, CMP No. 21.09.2017, on 21.09.2017, rendering orders, hence, staying the operation of the impugned verdict, (b) his rather sloemnising, a, marriage with aforesaid Divya alias Reena, on 11.11.2017, besides qua the aforesaid evident effect, leave for tendering the relevant certificate, being accorded, vis-a-vis, the appellant herein. Even if, the aforesaid marriage, is, solemnized inter se one Divya alias Reena, and, the respondent herein, and, also with, the solemnization of marriage inter se both, rather occurring, after, this Court, upon, CMP No.7939 of 2017 on 21.09.2017, rather ordering, for, staying, the, operation of the impugned verdict, rendered by the learned trial Court, (c) yet when it is not averred, nor proven qua the respondent herein/petitioner, hence, solemnizing marriage with one Divya alias Reena, despite, the copy, of, the order pronounced on 21.09.2017, upon, CMP No. 7939 of 2017, being served upon him, (d) whereas, with the aforesaid fact rather being enjoined to be cogently proven, and, with its remaining unproven, does constrain this Court, to dismiss, both, the aforesaid applications. Even otherwise, when the aforesaid effectuation, of, evident apt service of orders pronounced, upon, CMP No.7939 of 2017, on, 21.09.2017, upon, the respondent herein, was imperative, whereas, its service, upon, him rather remaining unproven, (e) whereas when hence only apt proven, service, upon, the respondent herein, would constrain this Court, to, prima facie hence make, a, tentative conclusion qua it being a nonest, void marriage, also, when hence this Court may be, constrained to, allow the addition of one Divya alias Reena as a party to the lis, (f) yet, for all the aforesaid omissions, this Court is reiteratedly inclined to decline the apt relief, upon, the aforesaid applications, vis-a-vis, the appellant herein. Consequently, both the aforesaid applications are dismissed.

9. At this stage, it is imperative, to, deal with the uncontroverted factum of the petitioner/respondent herein, one, Dinesh Kumar in the interregnum, since, the rendition of an apposite verdict, upon, the Hindu Marriage Petition AND the institution of an appeal therefrom, by Seema Devi (i) besides during the pendency thereof (ii) his contracting a marriage. For settling a firm finding upon validity thereof, a n apt allusion, to, a, verdict rendered by the Hon'ble Apex Court in a case titled as ***Suman Kapur versus Sudhir***

Kapur, AIR 2009 SC 589, the relevant paragraph(s) No.47 and 48 whereof stand extracted hereinafter, is of utmost relevance:-

> "47. Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both the courts, i.e. the trial Court as well as by the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have re-married before the expiry of period stipulated for filling Special Leave to Appeal in this Court by the wife.
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> 48. It is true that filing of appeal under Article 136 of the Constitution is not a right of the party. It is the discretion conferred on this Court to grant leave to the applicant to file appeal in appropriate cases. But, since the Constitution allows a party to approach this Court within a period of ninety days from an order passed by the High Court, we are of the view that no precipitate action could have been taken by the respondent-husband by creating the situation of fait accompli. Considering the matter in its entirety, though we are neither allowing the appeal nor setting aside the decree of divorce granted by the trial Court and confirmed by the appellate Court in favour of respondent-husband, on the facts and in the circumstances of the case, in our opinion, ends of justice would be met if we direct the respondent-husband to pay an amount of Rs. Five lakhs to the appellant-wife. The said payment will be made on or before 31st December, 2008.
>
> (pp.599-600)

wherein, it is mandated that (i) the aforesaid errant conduct of a party vis-a-vis whom, an, affirmative verdict is pronounced upon the apposite Hindu Marriage Petition, though, warrants disapprobation, also, though its presenting the Appellate Court with a *fait accompli, (ii)* yet the Hon'ble Apex Court, given its prior thereto validating the decree impugned before it, (iii) AND hence, did not pronounce, upon, the validity, of, the litigant concerned vis-a-vis whom, the, apt apposite affirmative decree stood pronounced, rather proceeding to, in the interregnum since the apposite verdict being pronounced, till an appeal being preferred therefrom also his, despite the time prescribed for filing an appeal, not expiring, his hence contracting marriage, (iv) rather for the errant conduct, of the litigant concerned, the Hon'ble Apex Court awarded compensation in a sum of Rs.5 lacs, vis-a-vis the aggrieved. (v) thereupon, when hereat there occurs hence substantial apt analogity therewith, hence, this Court is enjoined to mete deference thereto. However, since, there is a distinctivity inter se the economic status of the parties hereat vis-a-vis the litigating parties in the aforesaid verdict rendered by the Hon'ble Apex Court, thereupon this Court deems it fit, to award vis-a-vis appellant Seema Devi, compensation of Rs.1,00,000/- (Rs. One lacs only), dehors its not invalidating the petitioner's contracting a second marriage.

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

11. For the foregoing reasons, there is no merit in the instant appeal which is accordingly dismissed. The impugned judgment and decree is maintained and affirmed. However, Dinesh Kumar, respondent is directed to, within two months from today, pay a sum of Rs.1,00,000/- (Rs. One lac only) as compensation to Smt. Seema Devi. All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Smt. Meena Devi & others ....Respondents.

FAO No. 400 of 2017.
Reserved on : 30th August, 2018.
Decided on : 13th September, 2018.

Motor Vehicles Act, 1988- Section 166- Motor Accident- Claim application – Compensation – Assessment – Tribunal allowing application of legal representatives of deceased and granting Rs. One Lakh to wife towards loss of consortium, Rs. One Lakh towards loss of love and affection and Rs, 25,000/- towards funeral expenses – Appeal by insurer – Appeal partly allowed – Award modified in consonance with dictum of National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700. (Paras- 3 to 5)

Cases referred:

Shyamwati Sharma and others vs. Karam Singh and others, (2010)12 SCC 378
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For Respondent No. 1 to 6:	Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.
For Respondent No. 7:	Mr. Amit Jamwal, Advocate vice to Mr. Ajay Sharma, Advocate.
For Respondent No. 8:	Mr. Vaibhav Tanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal(II), Kangra at Dharamshala, H.P., upon, MACP No. 5-I/II/2013/2009, whereunder, compensation amount comprised, in, a sum of Rs.18,73,000/- along with costs, and, interest accrued thereon, at the rate of 8% per annum, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. Deceased Yodh Raj, as, unfolded by the apt postmortem report, borne in P-2, met his demise, in sequel, to, a road side accident. The claimants are his dependents/successors-in-interest. The learned counsel appearing for the insurer does not contest the validity, of, the apt affirmative findings, rendered by the learned tribunal, upon, the apposite issue appertaining, to, the demise of one Yodh Raj, rather being a sequel of rash and negligent manner, of, driving of the offending vehicle by its driver, nor he contests the fastening, of, the apt indemnificatory liability, upon, the insurer, of, the offending vehicle. His pointed, and, trite onslaught, vis-a-vis, the award pronounced, by, the learned tribunal, is, confined to (a) the learned tribunal concerned, computing the salary of the deceased, to stand, borne in a sum of Rs.10,000/-, despite no cogent evidence in

concurrence therewith, rather existing on record. (b) The learned tribunal inaptly, despite, the factum of the apt partnership deed, borne in Ex.PW4/A, making clear delineations therein, vis-a-vis, the remuneration(s), of, the deceased, arising, from, the factum of his being, a, partner, in, the apt nomenclatured firm, not exceeding Rs.15,000/-, thereupon, the, meteings of 30% hikes towards the apt incremental future prospects, rather being ridden, with, a fallacy, and, hence warranting interference by this Court. (c) The learned tribunal, though, enjoined, by the mandate rendered by the Hon'ble Apex Court, in, a case titled as ***Shyamwati Sharma and others vs. Karam Singh and others***, reported in ***(2010)12 SCC 378***, to make 30% tax deductions, vis-a-vis, the per mensem salary of the deceased, yet its not meteing deference thereto, hence also renders, the, computation of compensation amount, vis-a-vis, the claimants, rather to be unjust. The apt partnership deed makes disclosure, (i) qua, the deceased, being a partner, in the, relevant nomenclatured therein partnership firm, and, reading whereof also underscores the factum, (ii) qua the apt remuneration of the deceased, in any eventuality, not, exceeding Rs.15,000/- per mensem. The father of the deceased in consonance therewith, has, rendered his testification. Upon his being cross-examined by the learned counsel for the insurer, he has belied, the, apt suggestion meted qua him, vis-a-vis, the salary of his deceased being upto to Rs.6000/- per mensem. However, the effect, of, meteing(s), of, the aforesaid suggestion, by the learned counsel for the insurer, while subjecting, the, father of th deceased, to cross-examination, is qua the insurer, hence, acquiescing qua the per mensem income, of, the deceased , standing, comprised in a sum of Rs.6000/- per mensem. However, even if, the aforesaid inference, is garnered, by the afore acquiescence, yet, it was incumbent, upon, the father of the deceased, to, adduce cogent evidence, vis-a-vis, the precise, and, exact income, drawn by the deceased, from, the apt partnership concern. However, he omitted to do so. Nonetheless, his omission cannot be fatal, (a) given his at the end of his cross-examination acquiescing qua his deceased son, being an income tax payee; (b) whereupon, when the aforesaid returns filed by his deceased son, rather constituted the best evidence, for, enabling the insurer, to, prove, its, earlier therewith acquiescence, as, emanating from, its counsel, meteing, to the father of the deceased, while holding him, for, cross-examination a suggestion, qua the deceased, drawing, per mensem remuneration of Rs.6,000/-, (c) and also, comprised, the, apt best evidence, for, negativing, and, repudiating, the, testification of father of the deceased qua the latter, drawing, per mensem salary of Rs.15,000/-, (d) and, when it was rather incumbent, upon, the counsel for the insurer, to, through, making an apt motion, before, the learned Tribunal, hence seek elicitation, of, the apt records maintained, by the Income Tax department, (e) whereas, his omitting to do so, contrarily fosters an inference, qua, the vigour of computation by the learned tribunal, qua, Rs.10,000/- being, the, per mensem salary of the deceased, being neither unfair, nor unjust. (f) Besides when the aforesaid per mensem remuneration, of, the deceased, may not, render, it, rather, to, attract thereon, any tax liability, (g) thereupon, also besides, with, the apt mandate of the Hon'ble Apex Court, borne in Shyamwati Sharma's case (supra), on its incisive reading, rather not, propounding, any inflexible ratio decidendi qua, the, imperativeness, qua tax deduction, of, 30% being visited, upon, the apt annual income, rather it being propounded therein qua the apt deduction, rather depending, upon, variant factors, (h) whereupon also elicitations, of, the income tax returns, from, the income tax department by the counsel for the insurer, was, rather imperative hence for attracting, to, the, fullest, the, vigour, of the mandate rendered by the Hon'ble Apex Court, in, shyamwati Sharma's case (supra).

3. Be that as it may, the learned counsel appearing for the insurer has canvassed with much vigour before this Court, that, the meteing of hikes constituted, in, 30%, upon, a sum of Rs.10,000/-, rather being ridden, with, a gross fallacy, (i) and when he anchors, the aforesaid submission, upon, the apt mandate of the Hon'ble Apex Court, as,

borne in the judgement rendered by the Hon'ble Apex Court, in, a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700,*** given, it rather not vindicating, any meteing, of, hikes towards future incremental prospects, vis-a-vis, any self employed deceased or when he is engaged, in a non governmental organization or entity, (ii) whereas, with the deceased, being self employed or being a private entrepreneur hence reiteratedly, it being impermissible, to mete 30% hikes towards, future incremental prospects. However, the aforesaid submission, rather falters, given, the Hon'ble Apex Court in ***Pranay Sethi's case (supra)*** rather validating the meteing of hikes, vis-a-vis, future incremental prospects, even qua a self-employed deceased, as, the deceased hereat evidently, is. The relevant paragraphs whereof stand extracted hereinafter:-

> "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 apposite 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."

(p.2721-2722)

4. Since the postmortem report reflects, qua the deceased being aged 42 years, at the relevant time, hence with the afore extracted paragraph, mandating, of, accretions towards future prospects, vis-a-vis, the per mensem income of the the deceased, being pegged upto 25% thereof, consequently, after meteing 25% increase(s), vis-a-vis, the apposite per mensem income of the deceased, (i) thereupon, the relevant per mensem income of the deceased is recoknable to be Rs.12,500/-, [Rs.10,000(per mensem income of the deceased)+Rs.2500/-(25% of the per mensem income of the deceased). Significantly, the number of dependents, of, the deceased, are, six, hence, 1/4th deduction is to be visited, upon, a sum of Rs.12,500/-. Consequently, the monthly dependency, including the future

hikes towards incremental prospects, is, worked out, now at Rs.9,375/- (Rs.12,500 - Rs.3125 (1/4th of the income of the deceased). In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is, computed, at Rs. Rs.9,375x12= Rs.1,12,500/-. After applying thereon the apposite multiplier of 14, the, total compensation amount, is assessed in a sum of Rs.1,12,500=Rs.15,75,000/- (Rs.Fifteen lacs, seventy five thousand only).

5. The learned counsel appearing for the insurer has contested, the, computation of compensation made by the learned tribunal, upon, the dependents, of, the deceased, under various heads, on anvil, of its being in conflict with the verdict of the Hon'ble Apex Court rendered in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, whereupon, hence, he contends that the learned tribunal has committed, a, gross error in assessing a sum of Rs. One lacs, under, the head " Loss of love and affection", a sum of Rs.one lac, under, the head of "loss of consortium, to, petitioner No.1", and, Rs.25000/-, under, the head "Funeral Expenses" and, Rs.10,000/-, under, the head "Transportation charges". Consequently, the assessment of compensation, under, the heads "Loss of love and affection", and, under the head "transportation charges, respectively borne, in a sum of Rs. One lac and Rs. 10,000/-, vis-a-vis, the petitioners, is, set aside, whereas, quantification of compensation, under, the head "funeral expenses" in a sum of Rs.25,000/-, vis-a-vis, the petitioner, is, reduced to Rs.15,000/-, as also the quantification of compensation, under, the head "loss of consortium, to, petitioner No.1", and, borne in a sum of Rs.one lac, is, reduced to Rs.40,000/-.

6. 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.16,30,000/-, along with pending and future interest @8 %, 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 as ordered by the learned tribunal. The shares of the minor petitioners No.2 and 4 (respondents No. 2 and 4 herein), 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 SANDEEP SHARMA, J.

Atam Singh .....Appellant

Versus

State of H.P. .....Respondent

Cr. Appeal No. 445 of 2017
Date of Decision: 14.09.2018

Indian Penal Code, 1860- Sections 376, 494 and 495- Rape and Bigamy- Whether marrying and developing physical relations with lady who knew about prior subsisting marriage of accused, will amount to rape? –Held-Yes- Accused already married and having

spouse living again marrying victim – Accused developing physical relations with her – Victim filing FIR for rape against him allegedly on coming to know of his prior marriage – Trial Court convicting & sentencing accused for offence of rape - Appeal against – Evidence revealing that victim and her relatives knew about prior marriage of accused before he solemnized second marriage with victim – Accused contending that victim knew about his earlier subsisting marriage and voluntarily consented for sexual relationship and act does not amount to rape – Held, this knowledge of victim will not improve situation because he was already married and subsequent marriage, if any, had no sanctity in law - In any event, accused could not have lawfully married complainant - Accused after having solemnized marriage with complainant committed sexual intercourse with her, and it falls within provision of clause "fourthly" of Section 375 Indian Penal Code, 1860 – Accused rightly convicted of having committed rape – However in circumstances, sentence reduced to period already undergone (4 years) and payment of compensation of Rs.one lac to victim. (Paras-7, 12 to 14, 17 & 23).

Case referred:

Bhupinder Singh v. Union Territory of Chandigarh (2008) 8 SCC 531

For the appellant: Mr. Rajesh Mandhotra, Advocate.

For the respondent: Mr. S.C. Sharma and Mr. Dinesh Thakur, Additional Advocate Generals with Mr. Amit Kumar Dhumal Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Challenge in the present appeal is to the judgment dated 24.8.2016, passed by the learned Additional Sessions Judge-I, Kangra at Dharamshala, District Kangra, H.P., in Sessions Case No. 20-D/VII/2014, whereby learned court below while holding the appellant-accused guilty of having committed offence punishable under Sections 376, 494 and 495 of IPC, convicted and sentenced him to undergo imprisonment as per description given herein below:-

> *"Under Section 376 of IPC*
>
> *To undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of six months.*
>
> *Under Section 494 of IPC*
>
> *To undergo simple imprisonment for a period of three years and to pay a fine of Rs. 5,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of three months.*
>
> *Under Section 495 IPC*
>
> *The convict is also sentenced to undergo simple imprisonment for a period of three years and to pay a fine of Rs. 5,000/- and in default of payment of fine, he shall further undergo simple imprisonment for a period of three months."*

2. The prosecution version as emerges from the record is that complainant-prosecutrix filed a complaint Ext.PW2/A alleging therein that in the year, 2006, she was married to a person namely Ranjeet Singh and out of their wedlock, a daughter was born. Above named person Ranjeet Singh died about four years ago, whereafter prosecutrix started residing in the house of her parents at Paniala, Tehsil Indora, District Kangra, H.P. In the month of July, 2013, Ramesh i.e. PW-5, a relative of prosecutrix telephoned her with

regard to match for re-marriage of the prosecutrix and asked her to come to Nurpur. Prosecutrix, her brother and mother came to Nurpur and met person namely Ramesh PW5 and Kirpal Singh PW6, whereafter accused was called. Accused disclosed that his wife had died 13 years ago and he is serving in Army. The maternal aunt of the prosecutrix Rano Devi also came to the Nurpur and engagement was finalized. Allegedly, prosecutrix insisted to see the house of the accused, but accused disclosed that he is in army and is going to Ambala. On 14.8.2013, accused came to village Paniala and insisted for the marriage on the same day and as such, their marriage was solemnized at SugBhatoli. Accused stayed with the prosecutrix in her house. Prosecutrix alleged that about three months ago, accused left the house of the prosecutrix and asked the prosecutrix not to get her daughter admitted in the school as she will be admitted in the school of his village Tharu, Tehsil Shahpur. But since accused did not return, the prosecutrix got suspicious and on 8.6.2014, she went to the house of the accused at Village Tharu, where she came to know that wife of the accused is alive and he has children. Allegedly, when the accused saw the prosecutrix and her mother, present in house, he ran away and subsequently, threatened the prosecutrix over the phone with dire consequences. Accused also threatened prosecutrix that he will commit suicide in case matter is reported to the police. Complainant-prosecutrix alleged that accused had deceived her and committed rape on her, as a consequence of which, she became pregnant. On the basis of aforesaid complaint, having been filed by the prosecutrix, formal FIR Ext. PW18/A came to be registered against the accused at police station Indora. During investigation, police also got prosecutrix medically examined at Community Health Centre, Indora, District Kangra, H.P., wherein she was reported to be pregnant. Police also got statement of the prosecutrix recorded under Section 164 Cr.PC before the Magistrate. During investigation, police also found that accused had induced the prosecutrix to give him Rs. 60,000-70,000/- on the pretext of illness. After completion of investigation, police presented the challan in the competent court of law, who on being satisfied that prima-facie case exists against the accused, charged the accused for having committed offences punishable under Sections 376, 494, 495, 420 and 506 of the IPC, to which he pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as 19 witnesses, whereas accused in his statement recorded under Section 313 Cr.PC denied the case of the prosecution in toto and claimed himself to be innocent, however, he did not lead any evidence in his defence despite opportunity afforded to him.

4. Learned Additional Sessions Judge on the basis of material adduced on record by the prosecution held the accused guilty of having committed offence punishable under Sections 376, 494 and 495 of IPC, and accordingly, vide judgment dated 24.8.2016, convicted and sentenced him as per description given herein above, however fact remains that learned court below acquitted the accused of the offences punishable under Sections 420 and 506 IPC. In the aforesaid background, appellant-accused has approached this Court in the instant proceedings, praying therein for his acquittal after setting aside judgment of conviction recorded by the court below.

5. I have heard learned counsel for the parties as well carefully gone through the record.

6. Having heard learned counsel for the parties and perused the record, this Court is in agreement with the submission made by Mr. Dinesh Thakur, learned Additional Advocate General that the impugned judgment of conviction recorded by the court below is based upon proper appreciation of evidence and there is no scope of interference as far as this Court is concerned. Careful perusal of evidence available on record, be it ocular or documentary, suggests that prosecution successfully prove beyond reasonable doubt that

appellant-accused induced the prosecutrix to solemnize marriage with him during the subsistence of his earlier marriage and thereafter, performed sexual intercourse with prosecutrix, as a consequence of which, she became pregnant. Factum with regard to the appellant's having solemnized marriage with the complainant-prosecutrix on 14.8.2013, stands duly proved. Similarly, this Court finds that there is cogent and convincing medical evidence adduced on record by the prosecution to prove that the prosecutrix and accused are biological parents of the male child.

7. Mr. Rajesh Mandhotra, learned counsel representing the appellant-accused fairly conceded before this Court that there is ample evidence adduced on record by the prosecution to prove that appellant accused during the subsistence of his earlier marriage induced the complainant-prosecutrix to marry with him and thereafter, committed sexual intercourse with her. Mr. Mandhotra, further admitted that there is evidence to the effect that appellant accused is biological father of the baby born from the womb of the prosecutrix after the alleged marriage held on 14.8.2013. However, Mr. Mandhotra, while inviting attention of this Court to the evidence led on record by the respective parties, made a serious attempt to persuade this Court to agree with his contention that factum with regard to the earlier marriage of the appellant accused was very much in the knowledge of the complainant prosecutrix and as such, appellant accused could not be held guilty of having committed offence punishable under Section 376 IPC. While placing reliance upon the judgment rendered by the Hon'ble Apex Court in case titled ***Bhupinder Singh v. Union Territory of Chandigarh (2008) 8 SCC 531***, Mr. Mandhotra, argued that sentence imposed by the court for having committed offence punishable under Section 376, 494 and 495 IPC, needs to be reduced, especially when there is evidence available on record suggestive of the fact that prosecutrix had prior knowledge that appellant accused is already married to somebody else i.e. PW8. Mr. Mandhotra, further contended that accused is behind bars for the last more than 4 years and in case sentence awarded by the court below is not modified/reduced, great prejudice would be caused to the other family members of the accused, who are totally dependent upon the accused.

8. Prosecutrix PW2 while deposing before the court below deposed that her previous marriage was solemnized with Raneet Singh in the Year, 2006, and out of their wedlock, one daughter was born. She further stated that her previous husband Ranjeet Singh expired in the year, 2010, whereafter, she was expelled from her-in-laws house and she started residing with her parents at village Paniala. She deposed that in the month of July, 2013, Ramesh Chand proposed for her re-marriage with the accused, whereafter shealongwith her mother, brother and sister-in-law went to Nurpur for the negotiations of remarriage. She stated that Ramesh Chand, Kirpal Singh and the accused too came for negotiations of remarriage and the accused told them that he is serving in Army at Ambala and is earning Rs. 42,000/- per month. In the month of August, 2013, accused came to her house and asked to perform marriage and accordingly, her marriage was solemnized with the accused at a temple at SugBhatoli. After solemnization of the marriage, accused left her in her village Paniala and the accused used to meet her in her village Paniala and never took her to his native village Tharu. She deposed that accused used to commit sexual intercourse with her after the marriage. Accused directed her not to admit her daughter in the school in her native village on the pretext that she would be admitted in a school at Ambala, but the accused neither took her to Ambala nor to his house. She further stated that when she expressed her intention to live with the accused, he made excuses, whereafter on 3.6.2014, she along with her mother went to the house of the accused at village Tharu and found the first wife of the accused living with her children. She also deposed that she became pregnant from the accused in February, 2014 and gave birth to a male child. She also stated that accused had disclosed his fake name as Ashok Kumar and she came to

know about his real name from some document. In her cross-examination, she admitted that Ramesh Chand is brother in law of her maternal uncle. She also stated that accused disclosed that all his relatives had died. She admitted that neither horoscopes were matched nor photographs of the marriage were taken. She also could not tell the name of the Pandit, who performed the marriage ceremony. She specifically denied suggestion put to her that before marriage, she had knowledge that the accused had wife and son. PW1 Vidya Devi, mother and PW3 Bhawna, sister-in-law of the prosecutrix (PW2), corroborated the aforesaid version of the prosecutrix.

9. PW4 Ramesh Singh, who is the resident of the village of the prosecutrix, deposed that prosecutrix was married to Ranjeet Singh in the year, 2000, who expired in 2010 and thereafter, prosecutrix came to village Panialaalongwith her daughter. He deposed that in the month of August, 2013, he came to know that accused has solemnized marriage with the prosecutrix. The accused disclosed his name as Ashok Kumar and was working in Army. This witness also stated that accused used to reside with the prosecutrix in her house at village Paniala after the marriage, but subsequently, he came to know that reall name of the accused is Atam Singh. He also stated that accused disclosed to him that his first wife had expired and he is alone, however, subsequently, he came to know that the accused is having wife and children at village Tharu. He also stated that prosecutrix became pregnant from the accused and gave birth to a male child. In his cross-examination, this witness admitted that he came to know whereabouts of the accused after his remarriage with the prosecutrix.

10. PW5 Ramesh Singh, who had proposed for the marriage of the accused with the prosecutrix, deposed before the court below that he proposed the marriage at the instance of his colleague Kirpal Singh, who disclosed that first wife of the accused had expired and he intends to perform second marriage. He further stated that he suggested Kirpal Singh for the engagement of the accused with the prosecutrix and contacted the mother of the prosecutrix through his sister Sano Devi, whereafter the accused was called at Nurpur. This witness stated that he alongwith prosecutrix, Vidya Devi, Sano Devi, Bhawna, Dinesh and Ramesh Chand came to Nurpur for engagement, where accused disclosed his name as Ashok Kumar, however subsequently, he came to know that his actual name is Atam Singh and he is not serving in Army. He stated that he came to know about his first wife and children in his native village. It has also come in the statement of this witness that accused had committed sexual intercourse with the prosecutrix by cheating, misrepresenting and concealing the true facts and the prosecutrix also gave birth to a male child from the loins of the accused. This witness in his cross-examination admitted that when he came to know about the false antecedents of the accused, he refused for the marriage. He also admitted that marriage was not solemnized in his presence. If the statement having been made by PW6 Kirpal Singh is read juxtaposing statement of PW5 Ramesh Singh, he also deposed on the similar lines save and except one statement which he made in his cross-examination that address of the accused was not found to be correct.

11. Though prosecution examined 19 witnesses to prove the guilt of the accused, but scrutiny of the statements made by all witnesses may not be very relevant at this stage, especially in view of the limited argument advanced by the learned counsel for the appellant-accused, whereby he while conceding that it stands duly proved on record that appellant accused solemnized marriage with the prosecutrix during the subsistence of his earlier marriage, claimed that complainant-prosecutrix was in the know of earlier marriage of the accused. To ascertain the correctness and genuineness of the aforesaid argument of Mr. Mandhotra, learned counsel representing the appellant, this Court is only required to go through the statements of PW1 to PW6, who were actually in one way or the other involved in talks of re-marriage of the prosecutrix with the appellant-accused. If the statements of

PW1, PW2 and PW3 are read in conjunction, it clearly suggests that proposal for the re-marriage of the prosecutrix with the appellant-accused was made by PW5 Ramesh Singh. It has been categorically stated by PW1 Vidya Devi, mother of the prosecutrix, PW2(prosecutrix) and PW3 Bhawna (sister-in-law of the prosecutrix) that in the month of July, 2013 Ramesh Chand, PW5 proposed for re-marriage of the complainant-prosecutrix with the accused and then, they all went to Nurpur for negotiations of re-marriage. It has also come in the statement of aforesaid witnesses that Ramesh Chand PW5 and Kirpal Singh PW6 had also come for the negotiations along with the accused at Nurpur. Having carefully read/examined statements having been made by the PWs 1 to 6, this Court is inclined to accept the contention having been raised by Mr. Mandhotra, that prosecutrix along with her, brother and sister-in law had come to Nurpur to meet the accused on the askance of PW5 Ramesh Singh. PW5 Ramesh Singh in his statement before the Court below deposed that he had proposed for the re-marriage of the prosecutrix at the instance of his colleague Kirpal Singh PW6, who had disclosed him that first wife of the accused had expired and he intends to perform second marriage. In his examination in chief, this witness deposed that accused disclosed his name as Ashok Kumar and later, we came to know that the name of the accused is Atam Singh and also, he was not serving in the Army. This witness also stated that he came to know that accused was having his wife and children in his native village. Most importantly, in his cross-examination, this witness while stating that he is serving in the forest department, Nurpur for the last 25 years, deposed that when he came to know about the false antecedents of the accused, he refused to perform the marriage. He also admitted that no marriage took place in his presence.

12. If the statement having been made by this witness is read in its entirety, it certainly compels this Court to draw inference that factum with regard to subsistence of earlier marriage of the accused and his not serving in the army had come to the notice of the prosecutrix and other family members, prior to solemnization of her marriage with the accused. This witness (PW5) in his cross-examination has categorically stated that when he came to know about the false antecedents of the accused, he refused to perform the marriage, meaning thereby, that he after having discovered that accused is not a truthful person, had cautioned the prosecutrix not to solemnize marriage with the accused. It is also admitted by this witness that marriage did not take place in his presence. Similarly, PW6 Kirpal Singh, who had actually made PW5 Ramesh Singh to meet with the accused also admitted in his cross-examination that address of the accused was not found correct prior to marriage, meaning thereby, proper inquiry was made by the prosecutrix and her family members with regard to the antecedents of the accused before solemnization of marriage, but they despite having acquired knowledge that accused is already married, proceeded to solemnize the marriage of prosecutrix with the accused.

13. At this juncture, this Court wishes to take note of statement made by PW2 prosecutrix, wherein she stated that in the month of August, 2013, accused came to her house and asked to perform marriage and accordingly, her marriage was solemnized with the accused in the temple at SugBhatoli. There is nothing in the statement of prosecutrix (PW2) as well as her mother (PW1) that after having met the accused for the first time at Nurpur, they had made any attempt to ascertain the antecedents of the accused, rather evidence available on record clearly suggests that prosecutrix and her family members solely relied upon PW5 Ramesh Singh and PW6 Kirpal Singh, who had actually proposed for their marriage. As has been taken note herein above, Ramesh PW5 after having noticed false antecedents of the accused had refused to perform the marriage and they actually did not participate in the marriage. PW5 in his cross-examination has categorically stated that when he came to know about the false antecedents of the accused, he refused to perform the marriage, meaning thereby, he had cautioned the prosecutrix and her family members with

regard to the false antecedents of the accused. Similarly, PW6 Kirpal Singh in his cross-examination admitted that address of the accused was not found correct prior to the marriage and he did not participate in the marriage.

14. Having carefully perused the evidence available on record especially the statements of PW5 and PW6, this Court is compelled to conclude that prosecutrix and her family members had prior knowledge with regard to the earlier/subsisting marriage of the accused, but despite that marriage inter-se accused and prosecutrix came to be solemnized in the month of August, 2013.

15. At the cost of repetition, it may be stated here that there is overwhelming evidence suggestive of the fact that at the time of solemnization of marriage inter-se accused and the prosecutrix, earlier marriage of the accused with PW8 Nirmala Devi was in existence. Similarly, there is un-rebutted medical evidence on record suggestive of the fact that accused is the biological father of the male child born from the womb of the prosecutrix. Similarly, marriage inter-se prosecutrix and accused also stands duly proved and since appellant-accused solemnized marriage with the prosecutrix during subsistence of his earlier marriage, conviction recorded by the court below under Sections 494 and 495 IPC, cannot be interfered with. Argument advanced by Mr. Mandhotra, learned counsel for the accused that since the complainant knew that accused was a married man, yet she consented for sexual intercourse with him, clause "fourthly" of Section 375 of IPC, could not be attracted, though appears to be very attractive, but cannot be accepted in the peculiar facts and circumstances of the case.

16. It is not in dispute that accused was already married and as such, subsequent marriage, if any, has no sanctity in law and is void-ab-initio. Appellant accused being already married could not have lawfully married the prosecutrix, which is quite apparent from the bare reading of the provisions contained under Section 494 and 495 of the IPC. Mr. Mandhotra, argued that when complainant knew that accused was a married man, clause "fourthly" of Section 375 of the IPC, has no application, but aforesaid argument is not tenable and same is without any substance and as such, deserves to be rejected. At this stage, it would be apt to reproduce Section 375 herein below:-

> *"375 Rape - A man is said to commit "rape", who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*
>
> *xxx xxxxxx Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married."*

17. Even if it is presumed that complainant had prior knowledge that accused is already married person and he has living spouse, that will not improve the situation as far as the accused is concerned because he was already married, subsequent marriage, if any, has no sanctity in law and is void-ab-initio and as such, in any event, accused could not have lawfully married with the complainant. It stands duly proved on record that accused after having solemnized marriage with the complainant- prosecutrix, committed sexual intercourse with the prosecutrix, which definitely falls within the provision of clause "fourthly" of Section 375 IPC and as such, learned court below rightly held him guilty of having committed rape. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Bhupinder Singh case*** Supra, which has also been taken note of by the court below. Relevant para of the aforesaid judgment is reproduced herein below:-

> *16. Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause "Fourthly" of Section 375 IPC has no application, the stand is clearly without substance. Even though, the*

complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab-initio. In any event, the accused-appellant could not have lawfully married the complainant. A bare reading of Clause "Fourthly" of Section 375 IPC makes this position clear.

18. However, taking note of the peculiar facts and circumstances of the case, wherein it stands duly proved on record that complainant had prior knowledge with regard to the subsisting marriage of the accused, this Court is persuaded to agree with the contention of Sh. Rajesh Mandhotra, learned counsel that sentence imposed by the court below deserves to be modified/reduced being harsh and excessive.

19. Bare reading of Section 376 IPC clearly provides that whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine. Definitely, case at hand does not fall under Sub-Section 2 of Section 376 IPC and as such, learned court below while holding accused guilty of having committed offence punishable under Section 376 of IPC, convicted and sentenced him to undergo imprisonment for 7 years. But proviso to aforesaid provision of law provides that court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than seven years. Section 376 of IPC as well as its Proviso are reproduced herein below:-

"376. Punishment for rape.—

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

"Proviso:-

376. Punishment for rape: (1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

20. No doubt, subsequent marriage contracted by the accused during the subsistence of his earlier marriage has no sanctity in law and he could not have lawfully married with the prosecutrix but as has been discussed in detail herein above that there is overwhelming evidence available on record indicative of the fact that prosecutrix as well as

her family members were aware of the subsisting marriage of the accused with Nirmala Devi (PW8) at the time of marriage of prosecutrix with the accused and as such, it is difficult to accept that appellant-accused cheated the prosecutrix and fraudulently, induced her to solemnize marriage with him. This Court having perused evidence on record has reason to believe that prosecutrix had prior knowledge about the subsisting marriage of the accused, but yet she consented for marriage and thereafter, sexual intercourse and as such, this case is a fit case for reduction of sentence and award of compensation.

21. At this stage, it would be profitable to take note of following paras of the judgment passed by the Hon'ble Apex Court in ***Bhupinder Singh*** case supra:-.

> *"9. On 16.4.1994, she was admitted in General Hospital and gave birth to a female child. She informed Bhupinder Singh about this as he was father of the child. But Bhupinder Singh did not turn up. On this complaint, case was registered for the offence punishable under Sections 420/376/498-A IPC. It was investigated. Investigating Officer, during investigation, collected many documents showing the accused-Bhupinder Singh and prosecutrix Manjit Kaur as husband and wife. After investigation, challan was presented. Accused-appellant faced trial. After trial, he was convicted and sentenced as aforesaid. He filed an appeal before the High Court.On behalf of the complainant, a Criminal Revision was filed for enhancement of sentence. Further a Crl. Misc. Application was also filed for awarding compensation under Section 357 of the Code of Criminal Procedure, 1973 (in short `Code').*
>
> *10. The High Court referred to the evidence of the witnesses, more particularly, Harvardhan (PW2), the Registrar, Births & Death, U.T. of Chandigarh wherein it was recorded that complainant Manjit Kaur had delivered a female child on 16.4.1994 in General Hospital, Sector-16, Chandigarh and accused-appellant's name was mentioned as the father. Reference was also made to the evidence of Mal Singh (PW10) in whose house the appellant and the complainant used to stay.*
>
> *11. In his statement under Section 313 of the 'Code' the appellant took the stand that he started knowing the appellant after his marriage with Gurinder Kaur. The complainant was known to his wife before her marriage with him and she had come along with her mother to their place in 1988 in Sector 23, Chandigarh where her mother requested him to get her a job as she had finished the studies and wanted to get a job. The complainant stayed in their house for six months. Thereafter, he arranged a job for her. However, she had shifted and being of loose morals, entertained many people. When he learnt that she was of loose morals and was going out with different persons at odd hours, he objected and told the complainant to mend her ways. But she started fighting with him and demanded money which he does not pay and, after delivery of the child, she filed a false complaint. Gurinder Kaur (PW 20) stated that he knew the complainant prior to her marriage. Documents were also produced to show that in official documents, accused-appellant had shown the complainant as his wife and nominee.*
>
> *12. The High Court found that the case at hand was covered by Clause "Fourthly" of Section 375 IPC and, therefore, was guilty of the offence and was liable for punishment under Section 376 IPC. Accordingly, the conviction, as done, was upheld. But taking into account the fact that the complainanthad knowledge about his marriage, and had yet surrendered to him for sexual intercourse, held this to be a fit case for reduction of sentence and award of adequate compensation. Accordingly, custodial sentence of three years*

rigorous imprisonment was imposed in place of seven years rigorous imprisonment as was done by the trial court. The compensation was fixed at Rs.1,00,000/- which was directed to be paid within three months. It was indicated that in case the compensation amount was not paid, the reduction in sentence would not be given effect to.

13. Learned counsel for the accused-appellant submitted that when the complainant knew that he was a married man and yet consented for sexual intercourse with him, Clause "Fourthly" of Section 375 IPC would have no application. It was also submitted that the fact that the complainant knew about his being a married man, is clearly established from the averments made in a suit filed by her where she had sought for a declaration that she is the wife of the accused. The sentence imposed is stated to be harsh. It was, however, pointed out that the compensation, as awarded by the High Court, has been deposited and withdrawn by the complainant.

14. Learned counsel for the State submitted that it is a clear case where Clause "Fourthly" of Section 375 IPC is applicable. Learned counsel for the complainant submitted that this was a case where no reduction in sentence was uncalled for. The High Court proceeded on an erroneous impression that the complainant knew that the accused was a married man. It was also submitted that the compensation as awarded, is on the lower side.

15. Clause "Fourthly" of Section 375 IPC reads as follows:

> *"375 Rape - A man is said to commit "rape", who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*
>
> *xxx xxxxxx Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. xxx xxxxxx"*

16. Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause "Fourthly" of Section 375 IPC has no application, the stand is clearly without substance. Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab-initio. In any event, the accused-appellant could not have lawfully married the complainant. A bare reading of Clause "Fourthly" of Section 375 IPC makes this position clear.

17. It is pointed out by learned counsel for the appellant that the date of knowledge claimed by the complainant is 6.3.1994, but the first information report was lodged on 19.9.1994. The complainant has explained that she delivered a child immediately after learning about the incident on 16.4.1994 and, therefore, was not in a position to lodge the complaint earlier. According to her she was totally traumatized on learning about the marriage of the accused-appellant. Though the explanation is really not satisfactory, but in view of the position in law that the accused was really guilty of the offence punishable under Section 376 IPC, the delayed approach of the complainant cannot, in any event, wash away the offence.

18. The appeal filed by the accused is dismissed. The High Court has reduced the sentence taking note of the peculiar facts of the case, more particularly, the knowledge of the complainant about the accused being a married man. The High Court has given sufficient and adequate reasons for reducing the sentence and awarding compensation of Rs.1,00,000/-. The reasons indicated by the High Court do not suffer from any infirmity and, therefore, the appeal filed by the complainant is without merit and is dismissed. Both the appeals are, accordingly, dismissed."

22. It may be noticed that the appellant-accused is behind bars since the registration of the FIR i.e. 10.6.2014, for the last four years and three months.

23. Consequently, in view of the discussion made herein above as well as law relied upon, the appeal is partly allowed and impugned judgment is modified to the extent that the accused is sentenced to undergo imprisonment for the period he has already undergone qua all the offences he has been convicted by the court below. Besides that, he shall be liable to pay compensation to the tune of Rs. 1.00 lac to the prosecutrix within a period of two months. The accused be set free forthwith, if not required in any other case. Release warrants be prepared accordingly. However, it is made clear that in case amount of Rs. 1 lac is not paid within the stipulated period, judgment rendered by the court below shall revive and accused shall be taken into custody to serve out the remaining sentence in terms of the judgment passed by the learned court below. Appeal is disposed of in the aforesaid terms.

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

Ex and Non-Ex-Servicemen Truck Operators Union .....Petitioner.

Versus

State of Himachal Pradesh & others ....Respondents.

CWP No.6249 of 2012.

Reserved on: 06.08.2018.

Date of decision:14th September, 2018.

Trade Unions Act, 1926- Section 2(h) – Trade Union- Meaning – Whether group of Truck Operators is Trade Union? –Held-Object of Union being to provide transport facility to general public and industries of area – Sole purpose of Union being to regulate freight to be paid to them by people and industrial units of area for transporting goods outside – Arrangement cannot said to be regulating trade relations between workmen and employer or between workmen and workmen – Association not been formed to regulate relations between employers and employers – Truck operators can be registered as Trade Union only when they qualify as 'Trade Union' as contemplated under Section 2(h) of Act – Petition disposed of with direction to Registrar, Trade Unions to look into registration of all Truck Operator Unions in State. (Para-11).

Cases referred:

M/s Met Trade India Ltd. Versus State of Himachal Pradesh and others, 2013 (3) HLR 1730

Sushil Kumar Srivastava, Advocate versus State of U.P. and others, 1999 (1) AWC 821

For the Petitioner : Mr. Sameer Thakur, Advocate vice Mr. Rajnish Maniktala, Advocate.

For the Respondents: Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur, Deputy Advocate General, for respondents No.1 to 4 and Mr. B.C. Balalia, Labour Commissioner-cum-Registrar and Mr. R.P. Rana, Deputy Labour Commissioner-cum- Deputy Registrar, Trade Union.

Mr. Arvind, Advocate vice Mr. Balram Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Court on 06.08.2018 passed the following orders:-

"Arguments heard on question "whether group of truck operators so called association/union can be registered under the provisions of Trade Unions Act, 1926".

In order to adjudicate this question, the records of the petitioner-union was requisitioned from the Registrar of Trade Unions.

2. It is evident from the records that initially the petitioner-union was registered only as 'Ex-servicemen Truck Operators Union' pursuant to application moved by seven ex-servicemen. However, later on, the non-ex-servicemen also joined this union and pursuant to such amalgamation, the petitioner came to be registered as the 'Ex and Non-Ex-servicemen Truck Operators Union' as is evident from the certificate of the registration of Trade Unions dated 29.01.2008. As per the rules and byelaws of the union, the object of the union is contained in Clause-2 thereof which reads thus:-

"The object of the union is to provide transport facility to the people of the area of Tehsil Jaswan and to industries at Sansarpur Terrace."

3. As regards membership, Clause-11 thereof provides as under:-

"The members shall be appointed initially on formation i.e. 5 Managing body plus 6 Executive, followed by election within two years."

4. However, who can be enrolled as member of the union has not been specified in the rules and byelaws. In terms of the Trade Unions Act, 1926 (for short 'the Act'), 'Trade Union' has been defined under Section 2(h) of the Act and reads thus:-

"Trade Union" means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions:

Provided that this Act shall not affect-

(i) any agreement between partners as to their own business;

(ii) any agreement between an employer and those employed by him as to such employment; or

(iii) any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade or handicraft."

5. Under Chapter 2, Section 3, the appropriate Government has been vested with the power to appoint a person to be a Registrar of the Trade Unions (for each State). Under Section 4, the mode of registration is provided and reads thus:-

*"**4. Mode of registration.**-[5][(1)] Any seven or more members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union under this Act:*

[1][Provided that no Trade Union of workmen shall be registered unless at least ten per cent. or one hundred of the workmen, whichever is less, engaged or employed in the establishment or industry with which it is connected are the members of such Trade Union on the date of making of application for registration:

Provided further that no Trade Union of workmen shall be registered unless it has on the date of making application not less than seven persons as its members, who are workmen engaged or employed in the establishment or industry with which it is connected.]

[2][(2) Where an application has been made under sub-section (1) for the registration of a Trade Union, such application shall not be deemed to have become invalid merely by reason of the fact that, at any time after the date of the application, but before the registration of the Trade Union, some of the applicants, but not exceeding half of the total member of persons who made the application, have ceased to be members of the Trade Union or have given notice in writing to the Registrar dissociating themselves from the applications.]

6. Section 5 provides for the manner in which the application for registration is to be made, whereas, Section 6 relates to the provisions as contained in the rules of a Trade Union. Registration is dealt with under Section 8 and reads thus:-

*"**8. Registration**.- The Registrar, on being satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration, shall register the Trade Union by entering in a register, to be maintained in such form as may be prescribed, the particulars relating to the Trade Union contained in the statement accompanying the application for registration."*

7. The minimum requirement about membership of a Trade Union has been prescribed in Section 9A and the same reads thus:-

*"[1][**9A. Minimum requirement about membership of a Trade Union.**- A registered Trade Union of workmen shall at all times continue to have not less than ten per cent. or one hundred of the workmen, whichever is less, subject to a minimum of seven, engaged or employed in an establishment or industry with which it is connected, as its members.]"*

8. Chapter III deals with the rights and liabilities of registered Trade Unions. Chapter IV provides for power of the appropriate Government to make regulations, whereas, Chapter V deals with penalties and procedure.

9. As noticed above, the appropriate Government has been conferred power to make regulations under Section 29 of the Act. In terms thereof, the Central Trade Union Regulations, 1938, has been prescribed wherein regulation No.3 deals with an application for registration of a Trade Union which is prescribed in Form A, attached with this form - Schedule I- List of Officers, Schedule II-Reference to Rules and Schedule III- Statement of Liabilities and Assets along with List of Securities. The other provisions of the regulations are really not necessary for the adjudication of this petition and thus are not being referred to.

10. Adverting to the definition of the 'Trade Union', it would mean- any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions.

11. As observed earlier, there is nothing in the byelaws to indicate as to who all can become members of the union. That apart, as per section (supra), an union can be registered when it is formed primarily for regulating the relations between workmen and employers or between workmen and workmen.

12. Admittedly, the members of the union are not employers or even workmen and are rather owners of the truck, who load them on hire. In some cases, the truck drivers may also be the owners of the trucks. So, there is no question of employer and employee relationship. As a matter of fact, in most of the cases, the truck owners, who are members of the union, have formed a syndicate or cartel in order to restrict the supply of trucks in the area of operation of the society, so that they can charge fare at their own rates and restrict the union members to play in the hands of the local businessmen. It is common knowledge that they do not allow the outsiders to ply the trucks and take load without paying some sort of money through receipt which in common parlance is termed as 'parchi'.

13. The principals of this union are not employers by way of commanding workmen and running any industrial unit. The so-called union has been formed with the sole purpose of regulating freight charges to be paid to them by the residents of Tehsil Jaswan and to industries at Sansarpur Terrace for transporting goods outside and for protecting the interests of the truck operators operating in such area. Therefore, this arrangement cannot also be said to be regulating trade relations between workmen and employer or between workmen and workmen.

14. In the true sense of the term the truck owners are not employers. Even if it is conceded that it is an association of employers, even then this association has not been formed to regulate the relations between employers and employers and thus does not fall within the definition of 'Trade Union'.

15. Even otherwise, it is common knowledge that in most of the cases where the Trade Unions are there, the other trucks cannot ply or engage except on 'parchi' payment which is mandatory. Therefore, by indulging in this activity, it cannot also be held that the petitioner is an union formed for imposing restrictive conditions on the conduct of any trade or business.

16. That apart, now under the garb of this clause, it is frequently noticed in umpteen number of cases that have come up before this Court wherein there are not only repeated claims by Hydel Projects, but also by industrialists that the truck unions are charging 'gunda tax'. Reference in this regard can be conveniently made to the judgment rendered by a Division Bench of this Court in ***M/s Met Trade India Ltd.*** *Versus* ***State of***

Himachal Pradesh and others, ***2013 (3) HLR 1730***. The petitioner therein had approached the Court with a grievance that respondent No.7, a Cooperative Society, was obstructing the business activities of the petitioner and forcing it to engage the vehicles belonging to the Cooperative Society alone and not to any other person of their choice and this Court while allowing the writ petition observed as under:-

> "*4. It is not in dispute that the petitioner is doing business of manufacturing of aluminum sheets and other allied products at Damtal, District Kangra, Himachal Pradesh. In connection with the said business, the petitioner is required to import material and export the finished items from Damtal to other destinations outside Damtal. Respondent No.7 Society is registered under the provisions of the Himachal Pradesh Cooperative Societies Act. The area of operation of respondent No.7 Society covers the revenue jurisdiction of development block Indora (except villages Kandwal, Lodhwan, Rapar and Gangath) and Development Block Fatehpur in Kangra District of Himachal Pradesh and such other areas as may be inducted lawfully at any time or from time to time as is mentioned in the approved bye-laws of the Society, in particular Clause 3 thereof. The objects for which the Society has been registered are mentioned in Clause 5, amongst others, to manage, govern, control, regularize the conduct of truck operating business within the area of operation and to undertake such other measures to spread knowledge of cooperative principles and practices and to undertake other activities as are incidental and conducive to the attainment of the other objects mentioned in clause 5. The fact that respondent No.7 Society is a registered Society and has the area of operation which is overlapping with the activities of the petitioner does not mean that respondent No.7 Society can impose restrictions on the petitioner in relation to their business activities including regarding the movement of trucks engaged by the petitioner.*
>
> *5. The perception of respondent No.7 Society that it can*
>
> *regulate the movement of the trucks to be engaged by the petitioner is completely ill-advised and mis-informed. The terms specified in bye-laws can only bind the members of the Society and cannot be the basis to govern the activities of third party who does not have any dealing with the Society in any manner.*
>
> *6. Reliance placed by respondent No.7 Society on their bye-laws, therefore, is inapposite and cannot be the basis to interdict the business activities of the petitioner and including to obstruct the movements of the trucks employed by the petitioner from third parties who are not the members of respondent No.7 Society. Respondent No.7 is not the repository of authority, which vests in the State. Respondent No.7 Society in that sense is not an instrumentality of the State authorized and empowered or delegated with the authority to regulate the movements of the trucks in its area of operation. This is complete mis-information and mis-interpretation of the provisions of the bye-laws. The bye-laws, as aforesaid, would bind only the Society and the members inter se and not the third parties or their activities.*
>
> *7. A priori, if respondent No.7 Society continues to obstruct the activities of the petitioner, respondent No.3 must take immediate action in the matter, in accordance with law. Failure to comply with that obligation will not only be abdication of power of respondent No.3 but also will be viewed as committing contempt of this Court in terms of this order. Similarly, respondents No.4&5 must take immediate action against all the erring Societies, if they are*

forcing some third parties or obstructing third parties from engaging in their business activities in any manner. If such grievance is brought before the said authorities, the State authorities must immediately take action in accordance with law.

8. We place on record the statement made by the counsel for the State that respondent No.7 Society has been directed by the Registrar to refrain from acting upon bye law 5(iv) or to resort to the said bye-law for creating obstruction to the petitioner and similarly placed persons who are not members of respondent No.7 Society. If that direction is not complied by respondent No.7, we have no manner of doubt that respondent Nos.4&5 may take appropriate measures against respondent No.7 Society in accordance with law.

9. The counsel for respondent No.7 was at pains to point out that the practice followed by respondent No.7 is being adopted even at other places across the State. By imposing restriction on respondent No.7, it would lead to an anomalous situation. We are not concerned with any other society. In the present petition, as aforesaid, respondent No.7 Society cannot rely on its bye-laws and arrogate to itself authority to regulate the transport business in the entire area even in respect of persons who are not its members. That cannot be countenanced.

10. Counsel for respondent No.7 has also contended that the petitioner Industry has been permitted to start the business activities in the stated area by the State Government on condition that they will employ 70% of the locals in all its manufacturing and transport activities. That cannot be a ground to usurp the power which vests in the State Government. It is for the State Government to consider whether engagement of trucks of third parties by the petitioner results in breach of that condition. It will be open to the State Government to proceed against the petitioner on that basis if so advised in accordance with law.

11. In the circumstances this petition ought to succeed and is disposed of on the above basis."

17. Notably, the aforesaid was the case that pertained to a Cooperative Society. However, example of Trade Union obstructing business activities is also not wanting and in this regard, I may conveniently refer to a number of writ petitions that were filed in this Court, for example, ***CWP Nos.11911 of 2011, titled as 'Rakesh Kumar and others versus State of H.P. and others', 10826 of 2011 titled as Hussain Mohd. & others versus State of H.P. and others, 4901 of 2013 titled as M/s Koyla Industries versus State of H.P. & others, 3307 of 2010 titled as M/s Addinath Rubbers Pvt. Limited versus State of H.P. and others, 2259 of 2010 titled as Shivani Alhuwalia versus State of H.P. and others, 2213 of 2010 titled as Ashish Kumar Gupta versus State of H.P. and others, 1494 of 2009 titled as Mohan Goel versus State of H.P. and others, 1481 of 2009 titled as Subhash Chandar Agarwal versus State of H.P. & others, 1257 of 2009 titled as Rajesh Kumar Khanna versus State of H.P. and others, and 1101 of 2012 titled as Ravi Mahandru versus State of H.P. and others.***

18. This Court on 09.05.2013, in majority of the writ petitions, as mentioned above, had passed the following orders:-

"The case made out in these petitions, is that, the Vehicle Operator Unions across the State have indulged in unauthorizedly collecting staggering amount from their members as well as non members. It appears that most of

the Unions are registered unions under the provisions of Trade Union Act and/or under the provisions of H.P.State Co-operative Societies Act. The Unions represented through their respective counsel before this Court, have disputed the claim in these petitions. According to them, they collected the amount from their members, which was a voluntary contribution by the members, in accordance with the resolution passed by the general body. The Mangal Trucks Operator Union has also taken the same stand, but nevertheless, has deposited the amount so collected by it in this Court. Rest of the unions, have not done that so far. In this background, we deem it appropriate that the Registrar under the provisions of Trade Union Act or for that matter Co-operative Societies Act, must forthwith initiate action against the remaining unions to call upon them as to why their registration under the respective enactment should not be revoked and cancelled for the acts of commission and omission. This would be the minimum action that can be proceeded against the erring unions forthwith. In those proceedings, it will be upon for the unions to offer explanation as may be available to them, which will have to be considered by the Registrar appropriately and in accordance with law. The concerned Registrar shall issue notices to the respective unions in this regard, within two weeks from today, calling upon the notices to submit their explanation within two weeks from the date of the notice. The explanation so submitted by the concerned unions be considered and appropriate decision be taken by the Registrar before the next date of hearing of these petitions and compliance report in that behalf be submitted to this Court in respect of each of those unions.

2. We may also add that if during the enquiry by the Registrar, it is noticed that the collection done by the concerned unions was not in accordance with law, it may give rise to initiation of appropriate proceedings against the office bearers of the concerned unions, including the criminal prosecution for appropriate penal offences under the relevant enactments. That would be the second stage after Registrar considers the case of the concerned unions for deregistration, cancelling or revoking the registration granted to the concerned unions.

3. In case, some of the unions are not registered under any of these enactments, the Sub-Divisional Magistrate of the concerned areas must immediately take appropriate action as may be necessary against the office bearers of the said unions for bringing back the amount already collected by them by misrepresentation and without authority of law. The concerned Sub-Divisional Magistrates shall submit compliance report in that regard before the next date of hearing.

4. We make it clear that the proposed action should not be limited to the unions, who are parties to the present proceedings but also to proceed against other unions, who are not parties by name in the present proceedings- as these petitions have been treated as public interest litigation. We also direct the Commissioner of Police/ Superintendent of Police of the respective areas in the State to issue direction to the local police officials to furnish information about such unauthorized activities undertaken by the unions in their respective areas and that information should be shared with the Registrar and/or Sub-Divisional Magistrate of the concerned areas within two weeks from today.

List on 24th June, 2013.

CWP No.2259 of 2012.

Not on the Board. List this petition along with CWP No.11911 of 2011 and connected matters on 24th June, 2013.

Copy dasti."

19. The lead case being CWP No.11911 of 2011 was ultimately disposed of by this Court vide order dated 16.09.2013 which reads thus:-

"*In view of the corrective measures taken by the State Authorities in consonance with the directions issued by this Court from time to time, coupled with the fact that respondent No.5 has deposited the amount unauthorizedly collected by it, in this Court, nothing survives for consideration in this petition. The only question is about the apportionment of the amount, which has been deposited by respondent No.5, which, we are inclined to direct, as submitted by the learned Advocate General, to transfer it to the Chief Minister's Relief Fund as it can be used for common general public purpose. The Registry is directed to take necessary steps in this behalf forthwith. Needless to observe that respondent No.5 shall not ventureto collect such unauthorized amounts in the name of 'Goonda Tax' or otherwise in future.*

2. Although, we are disposing of this petition, we hope that the State Authorities as and when informed about similar unauthorized activities being carried out by any other person or Union/Society, shall take necessary steps not only to restrain the said entity from indulging in such activity but also to recover the amount so collected by the concerned entity and transfer that amount to the Chief Minister's Relief Fund in terms of this order, as has been done in the case of respondent No.5.

3. The petition is disposed of accordingly, so also the pending application(s), if any."

20. Unfortunately, this practice of collecting 'gunda tax', despite the orders passed by this Court, has not stopped and is still continuing, as would be evident from a recent case in Civil Writ Petition No.7538 of 2014, wherein as recent as on 12.03.2018, it was brought to the notice of this Court that the Trade Unions were still collecting 'gunda tax', as is evident from the orders passed on the said date, which reads as under:-

"On instructions learned Counsel representing the petitioners submits that respondent No. 9 is still collecting the Gunda Tax occasionally. Such submissions, however, have been refuted by Mr. B.C. Negi, learned Senior Advocate representing the said respondent being wrong. Anyhow he seeks time to have instructions in this regard. Allowed. We leave it open to consider this aspect of the matter at the time of further hearing in this matter. List for the purpose on 24.4.2018, as prayed."

21. Notably, the menace of 'gunda tax' is not only confined to the State but is rampant throughout the Country. A Division Bench of the Allahabad High Court in ***Sushil Kumar Srivastava, Advocate*** *versus* ***State of U.P. and others***, ***1999 (1) AWC 821***, while dealing with a similar issue held that this kind of forcible extortion of money is wholly illegal and has to be stopped forthwith as this is hindering the progress of business and commerce in the State. It was further held that the situation can no longer be tolerated and, therefore, directions were issued to the State Government, in particular, the Chief Secretary, the Home Secretary and the Director General of Police to deal with the law and order problem and take stern action against this kind of hooliganism and illegal realization of money

throughout the State. In turn, the District Magistrates and Senior Superintendents of Police, in all the Districts of the State, were directed to take stern action in the matter.

22. Adverting to the facts, it is not that the groups of truck operators so called association/union perse are not entitled to be registered as Trade Unions, but then before being registered, they are required to qualify as 'Trade Unions', as contemplated under Section 2(h) of the Act.

23. Apart from what has been observed above with regard to the majority of Trade Unions not fulfilling or qualifying for even being termed as Trade Unions, one of the functional and fundamental test to decide this question qua the existing Trade Unions would be whether such unions have been held entitled to exemption under Section 10(24) of the Income Tax Act. As noticed above, the State and its authority have virtually not bothered to ensure and satisfy themselves both subjectively and objectively before and at the time of registering a Trade Union.

24. Therefore, in the given facts and circumstances, the question as posed is answered by concluding that even though there perse is no bar for the group of truck operators association/union to be registered as Trade Union under the Trade Unions Act, but that, shall, however, be subject to its proving and establishing the conditions as contemplated under Section 2(h) of the Act. The question is accordingly answered.

25. As observed above, since the Registrar of Trade Unions has not undertaken the aforesaid exercise, therefore, he is directed to look into the registration of all the Truck Operators Unions in the State and continue with their registration only if they are found to be eligible to be registered as such under Section 2(h) of the Act. Such exercise be completed as expeditiously as possible and in no event later than **31st December, 2018.**

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

Vijayant Pal alias Vijayant Kumar ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr. Revision No. 127 of 2018
Decided on: September 14, 2018.

Code of Criminal Procedure, 1973- Section 482- Inherent powers- Exercise of – Quashing of criminal proceedings – Scope – Held, power to quash criminal proceedings not to be exercised in cases which involve heinous and serious offences or offences involving mental depravity like murder, rape or dacoity – Such offences not private in nature and have serious impact on society – Offences committed under Special statutes like Prevention of Corruption Act or offences committed by public servants while working in that capacity not to be quashed merely on basis of compromise between victim and offender – Offences under Sections 279 and 304-A of Code not heinous or involve mental depravity – As such, pursuant to compromise, FIR registered for such offences quashed – Judgments of conviction and sentence recorded by Lower Courts set aside – Accused acquitted. (Paras- 9, 12 & 13)

Cases referred:

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

For the petitioner: Mr. Maan Singh, Advocate.
For the respondent: Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 read with Section 401 CrPC is directed against judgment dated 9.3.2018 passed by the learned Sessions Judge, Kullu, District Himachal Pradesh in Cr. Appeal No. 24 of 2015, affirming judgment/order dated 25.2.2015 passed by Judicial Magistrate 1st Class, Manali, District Kullu, Himachal Pradesh in Criminal Case No. 334-1/10: 11-II/11, whereby learned Court below, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offences punishable under Sections 279 and 304A IPC, convicted and sentenced the accused to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1,000/- for the commission of offence punishable under Section 279 IPC and in default of payment of fine to further undergo simple imprisonment for one month; and to undergo simple imprisonment for one year and to pay a fine of Rs.2,000/- for the commission of offence punishable under Section 304A IPC, and, in default of payment of fine, accused has been ordered to further undergo simple imprisonment for two months.

2. Briefly stated the facts, as emerge from the record are that PW-1 Leela Devi, on 2.11.2010, got recorded her statement under Section 154 CrPC, alleging therein that on 2.11.2010 at about 6.45 pm, she alongwith her daughter Sonam, mother-in-law, Minjo and one Shri Krishan Chand of her village was going to have food in the house of near relation. When they reached Hyundai Workshop on NH-21 near Patlikuhal Bazaar, one motorcycle being driven by the accused came in high speed and hit her mother-in-law, who suffered injuries and later succumbed to the said injuries. On the basis of aforesaid statement, FIR Ext. PW-9/A came to be registered against the accused under Sections 279 and 304A IPC. After completion of investigation, *Challan* was presented in the competent Court of law, who being satisfied that prima facie case exists against the accused, put notice of accusation to him, to which he pleaded not guilty and claimed trial. Subsequently vide judgment/order dated 25.2.2015, learned trial Court, on the basis of evidence adduced on record by the respective parties, held accused guilty of having committed offences punishable under Sections 279 and 304A IPC and accordingly, convicted and sentenced him as per description given herein above.

3. Accused preferred an appeal before the learned Sessions Judge, who vide judgment dated 9.3.2018, dismissed the same, as a consequence of which, judgment/order of conviction recorded by learned trial Court came to be upheld. In the aforesaid background, accused approached this Court in the instant proceedings, praying therein for his acquittal after setting aside the judgment of conviction recorded by learned Courts below.

4. Today, during the proceedings of the case, Mr. Maan Singh, learned counsel representing the petitioner, while inviting attention of this Court to the compromise, Annexure A-1, available at page-49 annexed with CrMP No. 1127 of 2018 filed under Section

482 CrPC, contended that since both the parties have arrived at an amicable settlement, this court, while exercising powers under Section 482 CrPC may quash the FIR as well as consequential proceedings. Mr. Maan Singh, learned counsel representing the petitioner further stated that the complainant, Ms. Leela, at whose behest FIR detailed herein above, came to be registered, has also come present in the court for making her statement with respect to the compromise arrived *inter se* parties. Mr. PushpinderJaswal, Advocate, who is present in the Court, has identified her. Complainant has also produced a copy of her Adhaar card, which is taken on record.

5. Having heard the learned counsel for the parties and perused the averments contained in CrMP No. 1127 of 2018, as well as compromise, this court finds that the parties have arrived at an amicable settlement *inter se* them and as such, prayer made for compounding the offence deserves to be considered.

6. Mr. Amit Kumar, learned Deputy Advocate General, while opposing aforesaid prayer contended that since judgments of conviction /sentence stand recorded by the learned Courts below, prayer made for compounding the offence by way of aforesaid application can not be considered at this stage.

7. This court, solely with a view to ascertain the correctness and genuineness of the compromise also got recorded statement of complainant, Leela Devi, on oath today, who stated that she has compromised the matter with the accused of her own volition and without there being any coercion or pressure and she has no objection in case, FIR detailed herein above alongwith consequential proceedings is quashed and set aside and accused is acquitted of the charges framed against him.

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

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

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

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

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at

the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

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

"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

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

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts

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

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

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

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such

a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

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

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

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

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

> (i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;
>
> (ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.
>
> (iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;
>
> (iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

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

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

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

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

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

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

12. In the case at hand also, the offence alleged against the accused is under Sections 279 and 304A IPC, which do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that the complainant has compromised the matter with the accused, in which case, the possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

13. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 253/10 under Sections 279, 304-A IPC and Section 185 of Motor Vehicles Act, registered at Police Station Manali, District Kulu, Himachal Pradesh against the accused; judgment dated 9.3.2018 passed by the learned Sessions Judge, Kullu, District Himachal Pradesh in Cr. Appeal No. 24 of 2015, and judgment/order dated 25.2.2015 passed by Judicial Magistrate 1st Class, Manali, District Kullu, Himachal Pradesh in Criminal Case No. 334-1/10: 11-II/11 are set-aside and the petitioner-accused is acquitted of the charges framed against him. Bail bonds, if any, furnished by the petitioner are discharged.

14. The petition is disposed of in aforesaid terms, alongwith all pending applications.

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

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

Cr.MP(M) No. 1173 of 2018
Decided on : 17.9.2018

Code of Criminal Procedure, 1973- Section 439- Regular bail – Grant of - Rape case – On finding victim a married lady and unexplained delay (21 days) in lodging FIR as well as absence of injuries on person of victim or accused, accused ordered to be released on regular bail subject to conditions. (Paras-2 to 4)

For the petitioner: Mr. Sudhir Thakur, Advocate.
For the respondent: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G., for the respondent.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition, has been filed by applicant/ accused, under Section 439, Code of Criminal Procedure, for seeking, an order, for his being released from judicial custody, whereat he is extantly lodged, for, his allegedly committing an offence, punishable under Sections 376, 342 of the Indian Penal Code, in respect whereof, an FIR No. 144 of 2018, of, 24.5.2018, is, registered with Police Station, Sadar Solan, District Solan, H.P.

2. The accused is suffering judicial incarceration, for, four months. The prosecutrix/victim is a married lady, and, has two minor children. She is deaf and dumb. However, the apt status report discloses qua hers not lacking, the, capacity hence for making an apt communication to her husband or to other members of her matrimonial home. Contrarily, it is manifest, from, a perusal of the status report, that, she could make communications, through, gestures and by using sign language, and, there is also disclosure therein, that, her apt communications, through, gestures and sign language, were understandable by the members, of, her matrimonial home. The effect of the aforesaid, is, that the prosecutrix rather cannot be construed, to, lack the capacity to mete consent, if any, vis-a-vis perpetration, of, sexual intercourse upon her, by the bail applicant/accused. If so, she was enjoined, to, promptly report the incident, to, the police. However, the apt status report discloses qua about 21 days rather elapsing, since the occurrence, upto hers' making apt communications, to her mother-in-law. Even though she in her statement recorded, under, Section 164 Cr.P.C. she makes echoings, qua, her within two days, since the occurrence rather reporting the incident to her mother-in-law, yet, the afore contradictions rather constrains this Court, to conclude, that, there is a manifest delay, in, the reporting, of, the incident to the police. Neither the mother-in-law of the prosecutrix nor the latter has meted any tangible explications qua the apt delay. The effect thereof is (i) qua hence the emergence of apt medical evidence being precluded, (b) nor hence evidence is forthcoming qua bruises, and, abrasions rather occurring on the person of the bail applicant/accused or upon the person of the prosecutrix/ victim, with, any vivid display qua whether prosecutrix had or not resisted, the, sexual intercourses perpetrated upon her, by the bail-applicant/accused, (ii) thereupon at this stage, it cannot be firmly concluded qua the sexual intercourse, which occurred inter-se the bail applicant/accused,

and, the prosecutrix being construable to be a forcible sexual intercourse. Corollary thereof is hence, the apt benefit at this stage, is visitable, upon, the bail applicant/ accused qua his rather with the consent of the prosecutrix, hence sexually accessing the victim.

3. Be that as it may, the prosecutrix, at, the end of her statement, recorded under Section 164 Cr.P.C., has, made acquiescences qua her forgiving, the, mis-demeanor of the accused, acquiescences whereof , is, rather tentatively and prima facie may be readable qua hers consenting, vis-a-vis, the bail applicant hence sexually accessing her.

4. Bearing in mind the aforesaid factum, this Court deems it fit and appropriate, importantly, when the Investigating Officer has reported that the bail petitioner, has throughout associated, hence, in the relevant investigation, to, hence afford, the facility of bail in favour of the bail applicant/petitioner. Moreso, when at this stage, no evidence has been adduced by the prosecution, demonstrating, that in the event of bail being granted to the bail applicant/petitioner, there being every likelihood of his fleeing from justice or tampering with prosecution evidence, Accordingly, the indulgence of bail, is, granted to the bail applicant/petitioner, on, the following conditions:-

i) That he shall join the investigation, as and when required by the Investigating agency;

ii) 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;

iii) That he shall not leave India without the previous permission of the Court;

iv) That he shall deposit his passport, if any, with the Police Station, concerned;

v) 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 above, petition stand disposed of. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

Collector Land Acquisition, National Hydroelectric Power Corporation Limited
..Petitioner/Judgment debtor

Versus

Pune Ram(since deceased) through LRs Purva Devi and others ..Respondents/Award Holders

Civil Revision No. 184 of 2018
Date of Decision: 17.09.2018.

Code of Civil Procedure, 1908- Section 146- Land Acquisition Act, 1894- Sections 18 & 28-A- Enhancement of compensation – Whether reference under Section 18 is necessary? – Held- No- Co-owners who did not avail reference under Section 18 of Act also entitled to enhanced compensation on pro-rata basis as per their shares without having recourse to Section 28-A. (Para- 10)

Cases referred:

Dinesh Kumar &Ors. v. State of Himachal Pradesh &Anr. AIR 2012 HP 68
V. Viswanatha Pillai and others v. Special Tahsildar for Land Acquisition No. IV and others AIR 1991 SC 1966

For the petitioner:	Mr. Devinder Kumar Sharma, Advocate
For the respondent:	Mr. Sunil Mohan Goel, Advocate, for respondents No. 1 to 7. Mr. S.C. Sharma & Mr. Dinesh Thakur, Additional Advocate Generals with Mr. Amit Kumar Dhumal, Deputy Advocate General, for the respondents No. 8 & 9

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Being aggrieved and dissatisfied with order dated 1.12.2017, passed by learned Additional District Judge, Kullu, Himachal Pradesh in Execution Petition No. 13 of 2017 titled **Pune Ram** Versus **LAC and others**, whereby the learned Executing Court has dismissed the objections having been filed by the petitioner/Judgment Debtor (hereinafter referred to as 'Judgment Debtor'), Judgment Debtor has approached this Court by way of instant Revision Petition under Section 115 of the Code of Civil Procedure, praying therein for setting aside the impugned order dated 1.12.2017.

2. Facts as emerge from the record are that the respondents-Award Holders (hereinafter referred to as 'Award Holders') filed an Execution Petition in the learned Court below, seeking therein directions to the Judgment Debtor to pay them enhanced compensation with respect to land measuring 1-01-00 Bigha, comprised in Khasra Nos. 59 min and 90 situated in PhatiDhaugi Kothi Bunga District Kullu, H.P.

3. Judgment debtor, while refuting the claim set up in the Execution Petition, filed objections averring therein that the petition having been filed by the Award Holders, seeking therein enhancement of compensation qua the estate of Pune Ram son of Lajje Ram to the extent of 1/6th share is not maintainable. Judgment Debtor claimed before the learned Executing Court that Tek Ram was missing for the last 40 years and he was not alive at the time of passing of Award by the Land Acquisition Collector, Kullu. Further claimed that neither Tek Ram filed any reference petition under Section 18 of the Land Acquisition Act (hereinafter, referred to as 'Act') nor filed an application under Section 28A of the Act and as such, after passing of the Award, present application for enhancement of amount of compensation is not maintainable. Judgment Debtor also claimed that Lajje Ram was father of Tek Ram, Narayan Singh and Tedhi Singh, and Narayan Singh and his sister Lachhmu Devi are alive and they are entitled to inherit the estate of Tek Ram being 2nd class legal heirs and the mutation in favour of the present Award Holders has been wrongly attested and accepted by the revenue agency. Judgment Debtor further averred in its objections/reply that the Land Acquisition Collector paid amount to one Leela Chand son of Heera Chand, who was alleged to be the nephew of said Tek Ram, on the basis of Special Power of Attorney, but later on it was found that he was not entitled for any compensation on the basis of Special Power of Attorney.

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

5. Having heard the learned counsel for the parties and carefully perused the material available on record, this court finds that there is no dispute with regard to joint

ownership, if any, of Tek Ram as well as co-sharers, who have already received amount on account of enhancement made by learned Additional District Judge vide Award No. 29/03:41/04 in Reference No. 71/03:10/04. Record clearly reveals that Tek Ram was missing for the last 40 years and Award holders had filed a suit for declaration that they are legal heirs of deceased Tek Ram. Learned Civil Judge (Senior Division) Lahul&Spiti at Kullu allowed the aforesaid suit having been filed by the Award Holders vide judgment and decree dated 2.8.2013 and declared them to be the rightful heirs of deceased Tek Ram, who was missing for the last 40 years. It also emerges from the record that on the basis of aforesaid decree passed by the learned Civil Judge(Senior Division), Lahul&Spiti at Kullu, mutation of inheritance on the basis of "Makfool-ul-Khabri" was attested and sanctioned in favour of the Award Holders. Since no appeal what-so-ever was filed against the aforesaid Judgment and Decree passed by the civil court, the same has already attained finality.

6. Mr. Sunil Mohan Goel, learned counsel representing Award Holders vehemently argued that the Award holders are/were well within their right to approach the learned Executing Court by way of application under Section 146 of the Code of Civil Procedure, seeking enhancement of compensation on the basis of award passed by learned Additional District Judge in the reference petition filed by other co–owners qua the same land.

7. Mr. C.N. Singh, learned counsel representing Judgment Debtor was unable to point out any document available on record suggestive of the fact that Judgment and Decree dated 2.8.2013, passed by learned Civil Judge (Senior Division), Lahul&Spiti at Kullu was even put to challenge by any person, who claims himself/herself to be the legal heir of Tek Ram.

8. The question, whether a co-owner can seek enhancement of compensation qua the acquisition of land in Execution proceedings, without having filed Reference Petition under Section 18 of the Act, stands duly answered by this Court in **Dinesh Kumar &Ors**. v. **State of Himachal Pradesh &Anr.** AIR 2012 HP 68, wherein it has been specifically held that co–owner cannot be denied the enhanced amount of compensation on the basis of award under Section 28A of the Act, even if he/she had not filed claim petition before the court. It would be profitable to extract para Nos. 5 to 9 of the aforesaid judgment here-in-below.

> "5. The prayer for enhanced compensation and interest etc. has been declined by the learned Reference Court mainly on the ground that as the petitioners did not come forward for re-determination of the amount of compensation on the basis of the award of the court dated 05.11.2007, Annexure P-2, under Section 28-A of the Act, they were precluded from laying claim for enhanced compensation and interest etc. under Section 146 CPC.
>
> 6. I have heard the learned counsel for the petitioners and the learned Deputy Advocate General with the learned Assistant Advocate General for the respondents and gone through the records.
>
> 7. I have no hesitation to say at the very outset that the learned Reference Court has not addressed the issue involved in the matter in the right perspective even despite the fact that the law laid down by the Hon'ble Supreme Court in A. Viswanatha Pillai &others v. The Special Tahsildar for Land Acquisition No. IV and others .(1991) 4 Supreme Court Cases 17:(AIR 1991 SC 1966) and Jalandhar Improvement Trust vs. State of Punjab and others. AIR 2003 Supreme Court 620, was brought to its notice on behalf of the petitioners who relief upon the same in support of their claim.

8. In the case of A. Viswanatha Pillai & others, supra, the Hon'ble Supreme Court has held as under vide the relevant portion of para 2 of the report:

> "2……. The same ratio would apply to the facts in this case as well. When one of the co-owners or coparceners made a statement in his reference application that himself and his brothers are dissatisfied with the award made by the Collector and that they are entitled to higher compensation, it would be clear that he was making a request , though not expressly stated so but by necessary implication that he was acting on his behalf and on behalf of his other co-owners or coparceners and was seeking a reference on behalf of other co-owners as well. What was acquired was their totality of right, title and interest in the acquired property and when the reference was made in respect thereof under Section 18 they are equally entitled to receive compensation pro rata as per their shares. The courts below committed manifest error in refusing to pass an award and payment thereof to the appellants merely on the ground that there was no mention in this regard in the reference application or two of them sought reference in respect of two awards and the last one made no attempt in their behalf. The claimants are entitled to payment of the enhanced award by the civil court pro rata of their ¼ share each with 15 per cent solatium and 4 per cent interest as awarded by the civil court. The appeals are accordingly allowed with costs of this Court."

9. Thus, it is more than clear that even a co-sharer who has not sought reference to the court is entitled for enhanced compensation pro-rata in accordance with his share in the acquired land."

9. Reliance is also placed on Judgment passed by the Hon'ble Apex Court in **V.Viswanatha Pillai and others** v. **Special Tahsildar for Land Acquisition No. IV and others** AIR 1991 SC 1966, wherein it has been held as under:-

> "2. The sole question for decision is whether in a reference Sought for by one of the co-owners whether the other co- owners who did not expressly seek reference, are entitled to enhanced compensation pro-rata as per their shares. It is not in dispute that under the partition deed, the four brothers as coparceners kept in common the acquired property and Venkatachalam was in management thereof and each are entitled to 1/4 share in the ancient Anicut and the irrigation system. It is also undisputed that total enhanced compensation is Rs.52,009.40 p. Therein all the four brothers including the appellant are entitled to 1/4 share each. In the reference application made by the Venkatachalam indisputably he mentioned that the acquired property be- longed to him and his other brothers and the compensation awarded by the Land Acquisition Officer was inadequate and very low. It was also stated that they Should get an enhanced amount at the figure specified in the reference application. Undoubted he stated therein that he is entitled to 1/4 share. What he stated thereby was that of his entitlement of 1/4 share of the total enhanced compensation and obviously, after the reference on par with his three brothers, he is entitled to receive compensation at 1/4 share. The Courts below disallowed the payment to the appellants on the ground that there is no mention in the claim petition of the partition deed; that they are the co- owners and that there is no averment that the Venkatachalam was seeking reference under section 18 on his behalf and on behalf of his other three brothers. As regards the first two grounds are concerned they are palpably incorrect. It is seen that an express averment was made in the objections filed pursuant to notice under section 9(3) and 10 and also in his reference application under section 18 of the Act, that there was prior partition and

each of the brothers are entitled to 1/4th share and that they are dissatisfied with the award of the Collector. Undoubtedly there is no express averment in the reference application under section 18 that he is seeking a reference on his behalf and on behalf of his three brothers. It is contended by the counsel for the State that the pleadings are to be strictly construed and that as the reference was sought for only by Venkatachalam of all the six awards the other three brothers are not entitled to any share in the enhanced compensation. In support thereof it is also further contended that Viswanathan and Pasupathy had only asked for reference in respect of two awards and Sabhapathy Pillai made no request for reference against any of the six awards made by the Collector. It is true that Viswanathan and Pasupathy made such request in respect of two awards and Sabhapathy did not make any request for reference against any of the awards. But what would be the consequence in law is the question. It is surprising that the State having acquired the property of a citizen would Teke technical objections regarding the entitlement of the claim. The State certainly is right and entitled to resist claim for enhancement and lead evidence in rebuttal to prove the prevailing price as on the date of notification and ask the court to determine the correct market value of the lands acquired compulsorily under the Act. But as regards the persons entitled to receive compensation are concerned it has no role to play. It is for the claimants inter se to lay the claim for compensation and the court would examine and award the compensation to the rightful person. As seen in the objections pursuant to the notice under section 9(3) and 10, Venkatchalam made necessary averments that himself and his brothers had 1/4 share in the Anicut and irrigation system pursuant to the partition deed referred to therein. In his reference application under section 18 also he reiterated the same and stated that the amount awarded by the Collector was in adequate and that they were dissatis- fied with it and that they are entitled to more. It is settled law that one of the co-owners can file a suit and recover the property against strangers and the decree would enure to all the co-owners. It is equally settled law that no co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand he has right, title and interest in every part and parcel of the joint property or coparcenery under Hindu Law by all the coparceners. In Kanta Goel v.B.P. Pathak &Ors,. [1977] 3 S.C.R. 4 12, this Court upheld an application by one of the co-owners for eviction of a tenant for personal occupation of the co-owners as being maintainable- The same view was reiterated in Sri Ram Pasricha v. Jagannath &Ors., [1977]1 S.C.R. 395 and Pal Singh v. Sunder Singh (dead) by Lrs. &Ors., [1989] 1 S.C.R. 67. A co-owner is as much an owner of the entire property as a sole owner of the property. It is not correct to say that a co-owner's property was not its own. He owns several parts of the composite property along- with others and it cannot be said that he is only a part owner or a fractional owner in the property. That position will undergo a change only when partition Tekes place and division was effected by metes and bounds. Therefore, a co- owner of the property is an owner of the property acquired but 'entitled to receive compensation pro-rata. The State would plead no waiver nor omission by other co-owners to seek reference nor disentitle them to an award to the extent of their legal entitlement when in law they are entitled to. Since the acquired property being the ancestral coparcenary and continued to be kept in common among the brothers and the income derived therein was being shared in proportion of their shares by all the brothers it remained as joint property. As co-owners everyone is entitled to 1/4 share therein. It was also laid by this Court in a recent judgment in Ram Kumar &Ors. v. Union of India &Ors., [1991] 1 SCR 649 that it is the duty of the Collector to send full information of the survey numbers under acquisition to the court and

make reference under section 18 and failure thereof is illegal. The same ratio would apply to the facts in this case as well. When one of. the co-owner or coparceners made a statement in his reference application that himself and his brothers are dissatisfied with the award made by the Collector and that they are entitled to higher compensation, it would be clear that he was making a request, though not expressly stated so but by necessary implication that he was acting on his behalf and on behalf of his other co-owners or coparcen- ers and was seeking a reference on behalf of other co-owners as well. What was acquired was their totality of right, title and interest in the acquired property and when the reference was made in respect thereof under section 18 they are equally entitled to receive compensation pro-rata as per their shares. The courts below committed manifest error in refusing to pass an award and payment thereof to the appellants merely on the ground that there was no mention in this regard in the reference application or two of them sought reference in respect of two awards and the last one made no attempt in their behalf. The claimants are entitled to payment of the enhanced award by the Civil Court pro-rata of their 1/4 share each with 15 per cent solatium and 4 per cent interest as awarded by the Civil Court. The appeals are accordingly allowed with costs of this Court".

AIR 2003 Supreme Court Cases 620 case titled as Jalandhar Improvement Trust v State of Punjab and others."

10. It is apparent from the aforesaid exposition of law laid down by the Hon'ble Apex Court as well as this Court that co-owners, who have/had not sought reference under Section 18 of the Act, are also entitled to enhanced compensation on pro-rata basis as per their shares. In the instant case, it is not in dispute that co-owners of Award Holders had filed petition under Section 18 of the Land Acquisition Act and in those proceedings amount of compensation awarded by the Land Acquisition Collector was enhanced and as such Award Holders being co-owners qua the land acquired for construction of Parvati HEP at PhatiDhaugi are also entitled for enhanced amount of compensation.

11. 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 interfere with the well reasoned judgment passed by the learned court below, which otherwise appears to be based upon proper appreciation of evidence as well as law and as such, the same is accordingly upheld.

12. Accordingly, the present petition is dismissed being devoid of any merits. Pending application(s), if any, stand disposed of.

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

Ankit .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr.M.P.(M) No. 895 of 2018 a/w
Cr.MP(M) Nos. 896, 902 and 937 of 2018
Reserved on: 11.9.2018.
Date of decision: 18. 9. 2018.

Code of Criminal Procedure, 1973- Section 438- Anticipatory Bail- Right to investigate – Police custody – Held, When person not in custody approaches police officer investigating offence and offers to give information leading to discovery of fact, having bearing on charge, he may appropriately be deemed to have surrendered himself to police –There is no warrant for proposition that where legitimate case for remand of offender to police custody can be made out by investigating agency, power under Section 438 of Code should not be exercised. (Para-19)

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Grant of – Economic offences – Held, it is not proper to hold that in economic offences involving blatant corruption at higher rungs of executive and political power discretion under Section 438 of Code should not be exercised – It is not possible for Court to assess blatantness of corruption at stage of anticipatory bail. (Para-20)

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Essential requirements – Held – Under Section 438 of Code applicant has to make out case for grant of anticipatory bail – But one cannot go further and say that he must make out 'special case' –(Para-22)

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Custodial interrogation – What is? – Held, Custodial interrogation means custody of accused by police and interrogation by them – Accused released on bail is under nobody's custody – When bail granted, custody ceases-If there be any interrogation by police while on bail, it cannot be termed to be custodial interrogation – It is mere interrogation without police custody – Relying ***Hyderali vs. State of Kerala.*** (Para-35)

Code of Criminal Procedure, 1973- Section 438- Anticipatory bail- Custodial interrogation, whether can be denied? – Held, it may not be proper to deny investigator an opportunity for custodial interrogation in fit cases - Court shall not stand in way of police discharging their official duty sanctioned by law – Relying ***Hyderali vs. State of Kerala.*** (Para-35)

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- Grant of – 'A' and 'C' allegedly printing fake currency and then purchasing 'charas' with it– Petitioners seeking pre-arrest bail – Applications resisted by State on ground that their custodial interrogation required for effective investigation – Held, Custodial interrogation of petitioners necessary for investigating agency to unearth all links of common intention – Case revolves around sale and purchase of huge quantity of narcotics, which if established and proved can entail serious consequences – Anticipatory bail declined – Custodial interrogation allowed but for specific period only – After that, petitioners ordered to be released on regular bail subject to conditions (Paras- 45 and 46)

Cases referred:

Gurbaksh Singh Sibbia and others vs. State of Punjab (1980) 2 SCC 565

SiddharamSatlingappaMhetre vs. State of Maharashtra and others (2011) 1 SCC 694

BhadreshBipinbhaiSheth vs. State of Gujarat and another (2016) 1 SCC 152

Central Bureau of Investigation vs. V. Vijay Sai Reddy (2013) 7 SCC 452

CBI vs. Anil Sharma, (1997) 7 SCC 187

Muraleedharan vs. State of Kerala AIR 2001 SC 1699

Del Agha vs. Directorate of Revenue Intelligence (2001) 2 JCC (Delhi) 110

Bharat Chaudhary vs. State of Bihar AIR 2003 SC 4662

Parvinderjit Singh &Anr. vs. State (U.T. Chandigarh) and another (2008) 4 SCC 2873

Promod Kumar Panda vs. Republic of Indian (2015) 60 Orissa Criminal Reports, 660

For the Petitioner (s) : M/s. N.S. Chandel, Vinod Kumar Gupta, Ashwani Dhiman, Prashant Chaudhary and Mr. Dhairya Sushant, Advocates.

For the Respondent : Mr. Vinod Thakur, Mr. Sudhir Bhatnagar, Addl. A.Gs., with Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. A.Gs.
SI/SHO Manoj Kumar, Police Station, Gohar, District Mandi, H.P. present alongwith records.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since all these petitions arise out of the same FIR bearing FIR No. 40 of 2018 dated 26.4.2018, registered at Police Station, Gohar, District Mandi, H.P. under Sections 489A, 489B, 489C, 489D, 120-B, 201 and 34 IPC, therefore, these were taken up together for consideration and are being disposed of by a common judgment.

2. Cr.M.P.(M) Nos. 895 and 896 of 2018 have been filed by the petitioners seeking pre-arrest bail, whereas Cr.MP(M) Nos. 902 and 937 of 2018 have been filed for securing regular bail.

3. The case of the prosecution is that on 26.4.2018 Sanjay Kumar son of Sh. Prakash Dohru resident of Palampur District Kangra, at present Manager Himachal Gramin Bank, Thunag, District Mandi, H.P. made a complaint to the police to the effect that one Lal Singh son of Dhani Ram, resident of Drunu, P.O. Shikawari, Tehsil Thunag, District Mandi, H.P. had brought 2000 x 25 notes to the bank for depositing the same in the bank. On the aforesaid date at about 11 a.m. Lal Singh came to the bank and asked the official of the bank for depositing the money by way of F.D. of sum of Rs.50,000/- and had shown the notes to the bank official. On seeing the same, it was found to be fake one. The bank official kept the notes with him. Lal Singh was informed that the notes which he had brought to the bank were fake and was asked about source of these notes and further asked whether he had some more notes with him. The Manager of the Bank checked the pocket of Lal Singh from where some more notes of the denomination of Rs.2000 x25 were found. The bank manager kept all the 50 notes of Rs.2000/- with him and informed the police, out of which two notes of Rs.2000/- were found to be torned. Lal Singh also tried to deposit the notes of Rs.2000/- in the bank as genuine, but due to the vigilance of the bank official he could not succeed. The police registered the case FIR against the accused person and he was arrested and taken into custody. During the course of investigation the house of accused Lal Singh situated at Village Drunu was also got searched, where the accused Lal Singh had also kept the fake currency notes of the denomination of Rs.2000 x 55 which were kept by him in the box which worked out to be Rs.1,10,000/-. The police also took into custody the currency notes vide separate memo. The accused Lal Singh disclosed that this amount of Rs.2,10,000/- he had received from one Teju Ram in lieu of selling half Kg of charas. After that the accused Teju Ram was searched at place Malana Dam. The accused Lal Singh identified the accused Teju who is in fact Deva son of Ganga Ram resident of Maklana, Tehsil Bhunter, District Kullu, H.P. The accused Deva was also investigated by the police and took him to the Police Station. During the course of investigation, accused Deva told to the police that he alongwith other person Kishah alias Bhut resident of Malana on 15.4.2018 had sold 2 kg of Charasto three persons of Haryana and from them they have received Rs.5,60,000/-. The currency notes were checked and found to be fake. Out of the three persons, one of them was named Ankit. The police searched the other accused

persons, but they had gone to Gurgaon, Haryana. During the course of investigation, the other accused person Vikrant Bachan son of Sunil Kumar R/o H.No. 206/3, Gali No.4, Gopal nagar near Bus Stand, Gurgaon and other accused Parvesh Kundu son of Rakesh R/o H.No. S38 Chanakya Palace Uttamnagar, New Delhi were associated in the investigation and it was found that Ankit son of Ram Krishan and Chankya alias Chintu son of Kamal, Vikrant and Parvesh Kundu were students of law in Rohtak University.

4. After conducting investigation in Gurgaon, Rohtak, Faridabad, Jind, etc., the SI/SHO alongwith accompanying officials came back to the Police Station with the vehicle, i.e. Swift Dezire bearing Registration No. HR51-BG-0297, on 7.5.2018. On the same day, the aforesaid accused Vikrant Bachchas and Parvesh Kundu, who had been directed to come present in the Police Station for enquiry, came with their respective fathers. They were associated in the investigation and were subjected to deep and intensive interrogation. Both of them disclosed that in the first week of March, 2018, all four of them were residing together in Flat No. 428 of Omex City and such flat was on the second floor. All four of them decided to buy a vehicle since they did not have any conveyance there. Pravesh Kundu disclosed to his three other friends that he had a colour printer with which he had printed one note of Rs.100 denomination and he was able to use and circulate it in the market. Whereupon all of them arrived at a consesus that they would print fake currency notes. Ankit said that a person by the name of Deva was known to him in Malana from whom he had purchased charas in the past. Deva was an illiterate and gulible person and it would be easy to deceive him. Ankit and Chanakya @ Chintu said that they would print fake currency and buy charas from Deva. Therafter, they would sell the same in Gurgaon and Rohtak and buy a vehicle. As per their plan, Pravesh Kundu and Ankit went to the house of Pravesh Kundu in Delhi and brought thecolour printer from there. They got it re-filled in the market at Rohtak and Vikrant bought a ream of A4 sheets for Rs. 300 and a green sparkle pen from a stationery shop. Vikrant had 7-8 notes of Rs.2000/- denomination, whereas Ankit, Chanakya @ Chintu and Parvesh Kundu also had 3-4 genuine notes of Rs. 2000/-. It has been verified that on 4.4.2018 and 5.4.2018, Vikrant had deposited and withdrawn money in his account bearing No. 09392191011967 in Rohtak Bank. All aforesaid four accused had printed fake currency notes in their said flat in the first week of April. They exchanged the genuine currency notes, with the help of which they had printed fake currency, in the bank, petrol pump and with the shopkeepers and again printed fake currency notes of Rs. 2000/- denomination as 8/9 notes of one series had been found amongst the recovered notes of Rs.2000/- denomination(SIC). From the investigation carried so far, it has been revealed that all four of them, i.e. Ankit, Chanakya @ Chintu, Vikrant and Parvesh Kundu had played different roles while printing fake currency. The notes had been cut by Parvesh Kundu but he sustained injuries in his hand in this process and hence, Ankit cut the remaining notes. While Vikrant Bacchchas made a strip of green water mark on the notes with the help of green sparkle pen and Chanakya counted the notes and cleaned them up and thus had printed fake currency worth 5/6 lakh rupees. On 12.4.2018, all four of them set out on a tour from Rohtak by their SwiftDezire car bearing No. HR51-BG-0297 and on 13.4.2018, at around 10.00 A.M., arrived in the Guest House at Kasol in District Kullu after having travelled through Panipat, Ropar and Mandi. They rested for a while at Kasol and thereafter, they went around in Kasol and Manikaran and spent their night in Guest House at Kasol itself. On 14.4.2018, they stayed back at Kasol till 3.00 p.m. as Parvesh Kundu was not feeling well. Vikrant brought him medicine and the latter stayed back at Kasol on that day while Ankit made Chanakya @ Chintu and Vikrant to board his vehicle and drove them to Malana. Chanakya @ Chintu drove the vehicle and they reached Malana around 6.00 p.m. Ankit phoned up his old friend Deva of Malana and after some time Deva came to Malana Road at Narang in order to meet Ankit. Both of them talked for quite some time and thereafter Ankit paid Deva four lakh rupees in the denomination of

Rs.2000/- and thereafter Deva left for his village in Malana. Ankit repeatedly called up Deva but he did not come. Thereafter, at about 2.00 to 2.30 a.m., Deva came alongwith a long bearded fellow, whose name was later found to be Kishah @ Bhoot. Deva firstly sent the other person and then the other person phoned up Deva and called him to the vehicle. At that time, everybody was sitting in the vehicle and then Deva boarded the vehicle and handed over a polythene bag containing charas to Ankit. Then Ankit took out some more money in the form of Rs.2000/- denomination from his purse and dashboard of the vehicle and paid it to Deva. Subsequently, all three of them reached back by their vehicle in their Guest House in Kasol at 5.00 a.m. Thereafter, they took along their friend Parvesh Kundu and reached Rohtak by their vehicle on 15.4.2018 at around 3.00 p.m. Later, they left for their respective hostels. Next day, i.e. on 16.4.2018, Ankit went to his home in Faridabad by his vehicle. The SIM bearing No. 9518437990 with which Ankit had spoken to the accused Deva regarding purchasing of charas was found to have been issued in the name of Vikrant since January, 2018 in Rohtak. However, the said SIM No. was being used by Chanakya @ Chintu since February, 2018 and he only had given it to Ankit for making calls during the incident. Whatever calls were made to Deva on his mobile No. 9805914335 were made from the said mobile No. 9518437990 only because Ankit only knew Deva as Ankit had purchased charas from him in small quantities earlier also. Chanakya @ Chintu had also met Deva earlier in the company of Ankit in Malana. Accused Deva identified Ankit, Chanakya @ Chintu and Vikrant Bachchas from their photographs. On finding sufficent grounds, the accused Vikrant Bachchas and Parvesh Kundu (were arrested) on 7.5.2018 at 10.00 a.m. and section 120 B was added in the instant case.

5. On 9.5.2018, IO/ ASI Narayan Lal took the accused Vikrant Bachchas and Parvesh Kundu, under police custody, to the Poornima Guest House atKasol, District Kullu and carried out their interrogation. Spot Map qua pointing out was prepared and the Entry Register of Poornima Guest House, Kasol was checked. As per the entry at Sl. No. 503, three men were found to be staying in Room No. 202 on 13.4.2018 while as per Sl. No. 504, one man and a woman were found to be staying in Room No. 203. According to the entries, two boys were staying with Parvesh Kundu in Room No. 202 while one woman namely Anu was staying with Vikrant Bachchas in Room No. 203. On checking the record of Guest House, it was found that Room No. 202 was booked in the name of Parvesh Kundu. However, his ID and that of other two boys namely Ankit and Chanakya @ Chintu were not found while IDs of Vikrant and his girl friend namely Anu, D/o Sher Singh, R/o Koyalpur, District Jhajjar, Gurgaon, Haryana who stayed in room No. 203 were found. One Mobile No. 8950005969 was found mentioned in the entry register which belonged to Chanakya @ Chintu, apart from a car No. HR51-BG-0297 which belonged to Ankit's father Sh. Ram Krishan. The IDs so produced and the attested photocopies of entry registry were taken into police possession vide a memo. Statements u/s 161 Cr.P.C of the witnesses were recorded. During interrogation, Vikrant Bachchas revealed that he alongwith Anu, Parvesh Kundu had given their respective IDs to Ankit and Chanakya @ Chintu and had already paid the expenditure of the tour to Ankit. While in the guest house, only Ankit and Chanakya @ Chintu talked about getting rooms on rent and negotiated their tariff and they only made entries in the names of Parvesh and Vikrant and also appended signatures in their names. The ID s of Parvesh Kundu, Ankit and Chanakya, which were deposited in the guest house at the time of making entries were found to have been pulled out by Ankit and Chanakya @ Chintu. They have tried to conceal their presence (in the said guest house) so that no proof against them could be found out. Hence, Section 201 IPC was added in the said case against the accused Ankit and Chanakya @ Chintu. During the course of interrogation, Vikrant Bachchas revealed that the aforesaid Anu was his girl friend who had accompanied him on this tour. However, on 14.4.2018, she was not keeping well, hence she and Parvesh Kundu stayed back in the Guest House only and did not go to Malana. Anu did not know about the

said incident (of buying charas etc.). Sections 489A, 489C and 489D have been imposed against the accused Ankit, Chanakya @Chintu, Vikrant Bachchas and Parvesh Kundu in the instant case.

6. On 11.5.2018, the SI/SHO, took accused Parvesh Kundu, under police custody, to New Delhi and Rohtak and carried out the investigations. During the course of investigation, the house of accused Parvesh Kundu was searched and it was found that Parvesh Kundu had knowingly burnt down the printer at Dwarka Park and dumped it in the 'Nullah' of Sector 19 of New Delhi with the intention to destroy the evidence. The said place was pointed out and the spot map thereof was prepared. The flat in OMEX City at Rohtak where fake currency had been printed was searched and the spot map was prepared. Statements u/s 161 Cr.P.C. of witnesses were recorded. All four accused were found to have cleaned up the room with an intention of destroying the evidence. Whereupon, Section 201 IPC was imposed against all the four accused, i.e. Vikrant Bachchas, Parvesh Kundu, Ankit and Chanakya @Chintu, for destroying the evidence. Anu, the girl friend of Vikrant, was also associated in the investigation and her statement was recorded. Statement u/s 161 Cr.P.C of the shopkeeper Vinay Kumar, from whose shop in Civil Lines, Rohtak, Ankit and Parvesh Kundu had got the refilling of colour printer done and also bought ink for the printer, was recorded.

7. On 28.6.2018, ASI/IO Narayan Lal, visited the Everest Power Private Ltd. at Malana-II, District Kullu, and got the footage of 14.4.2018 and 15.4.2018 of the CCTV camera installed outside their office which records the activities of people and movement of vehicles crossing on Malana road. The said footage was uploaded on the DVD. On watching the footage/DVD, the aforesaid vehicle bearing registration No. HR51-BG-0297, was found to be going from Jari to Malana side at 5.13.58 p.m.on 14.4.2018 and the same was found returning from Malana to Jari side at 04.31.49 a.m. on 15.4.2018.

8. One accused Kishah @ Bhoot, R/o VPO Malana, Tehsil Bhuntar, P.S. and District Kullu has been absconding since 28.4.2018 in the case who is being looked for both secretively as well as in an open manner at his home, village and in his area and has not been apprehended till date. Whereupon, arrest warrant from the Ld. Court of JMIC, Gohar, has been obtained in order to carry out the proceedings u/s 82 of Cr.P.C. against him.

9. According to the respondents, from the investigations carried out till date, it has been found that the accused Ankit, VikranBachchas, Parvesh Kundu and Chanakya @ Chintu together had printed fake currency amounting to six lakh rupees with the help of colour printer of accused Parvesh Kundu in the flat of OMEX City at Rohtak in the first week of April. On 12.4.2018, all four accused alongwith Anu, the girl friend of Vikrant, had stayed in the Poornima Guest House at Kasol in District Kullu with their car bearing Registration No. HR51-BG-0297. In the evening of 14.4.2018, accused Ankit, Vikrant Bachchas, and Chanakya @ Chintu went to Malana by the said vehicle. On reaching there, Ankit phoned up Deva on his mobile phone No. 9805914335 from the phone No. 9518437990, which had been issued in the name of Vikrant Bachchas, and called him to the spot named Narang in Malana. Whereupon Kishah @ Bhoot also came along with Deva to the spot at Narang at night. They purchased 2 Kg. Charas from both of them and Ankit, in the presence of his two other friends Vikrant and Chanakya @ Chintu, paid accused Deva fake currency amounting to Rs.5,60,000/- and thereafter all the three accused came back to Guest House at Kasol and later returned to Rohtak along with their other friend Parvesh Kundu and Anu. On 16.4.2018, the said Deva bought 1/2 Kg charas from the accused Lal Singh at the spot, i.e. near Malana River close to Bridge IV and paid him fake currency amounting to Rs.2,10,000/- in the denomination of Rs.2000/- notes. On 26.4.2018,during investigation Rs. 1,00,000/- was recovered from the accused Lal in Bagsyad Bank and subsequently on

27.4.2018, Rs.1,10,000/- was recovered from his house. As per the CDR of the mobile phones of the aforesaid accused, they were found to have spoken with each other on the day of incident and their location was traced to the Malana area of Himachal Pradesh. During the course of investigation, it was found out that accused Ankit, Chanakya @ Chintu, Parvesh Kundu and Vikrant Bachchas had entered into a criminal conspiracy and printed fake currency and the printer they used for printing such currency was destroyed by the accused Parvesh Kundu. Offence u/s 489B, 489C of IPC by the accused Lal Singh, offence u/s 489B, 489C, 120B, 34 IPC by the accused Deva, offence u/s 489A, 489B, 489C, 489D, 201, 120B of IPC by Vikrant Bachchas, offence u/s 489A, 489B, 489C, 489D, 201, 120B by the accused Parvesh Kundu, offence u/s 489A, 489B, 489C, 489D, 201, 120B by the accused Chanakya @ Chintu and offence u/s 489A, 489B, 489C, 489D, 201, 120B by the accused Ankit and u/s 489B, 489 C, 34 IPC by the accused Kisha @ Bhoot were found to be committed. Challan against the accused Lal Singh, Deva Vikrant Bachchas and Parkash Kundu was prepared and presented in the Ld. Court of JMIC, Gohar, District Mandi on 24.7.2018.

10. The petitioner Chanakya @ Chintualongwith his three friends Ankit, Vikrant Bachchas and Parvesh Kundu had printed fake currency in their residential flat in Rohtak as per their plan. He drove the vehicle bearing No. HR51-BG-0297 to Malana from Kasol and his friends Vikrant Bachchas and Ankit accompanied him. Chanakya @ Chintu along with his friends Ankit and Vikrant Bachchas was sitting in the aforesaid vehicle when Ankit bought 2 Kg. charas from Deva and paid the latter in fake currency. He had given his ID for effecting entries (in the Register) in Poornima Guest House at Kasol, however, he pulled out his ID from the other ID s in order to conceal his presence in the Guest House. The location of mobile number 8950005969 of the accused Chanakya @ Chintu was traced in Malana and Kasol of District Kullu in Himachal Pradesh from 13.4.2018 to 15.4.2018.

11. Both the petitioners Ankit and Chanakya alias Chintu had filed petition(s) for anticipatory bail in the Court of learned Additional Sessions Judge (2), Mandi, which were rejected on 11.7.2018. Both the petitioners thereafter remained associated in the investigation of the instant case and on 21.8.2018 learned Court again directed the petitioners to remain associated in the investigation and they complied with the orders.

12. On the basis of the analysis of call details of mobile No. 9654290381 belonging to petitioner Ankit, it has been revealed that petitioner Ankit had continuously spoken on mobile Nos. 8800456880, 9873591598, 9899076606, 7011805340 and 8076820001. Whereas, the call details of mobile No. 8950005969 belonging to petitioner Chanakya alias Chintu, it has been revealed that petitioner Chanakya alias Chintu had continuously spoken to mobile Nos.999277612, 9034604360, 9896205294, 8708371711, 8708271769 and 7988748009 and whereupon the petitioners were enquired about it.

13. The petitioner Ankit had disclosed that first mobile number was that of his friend Manish, phone number at serial No.2 was that of mother of Manish, phone number at serial No.3 belongs to his brother Sanjeev, phone number at serial No.4 belongs to his father Ram Krishan, whereas phone number at serial No.5 belongs to the sister of Manish and they even regularly talked to each other as Manish was good friend of Ankit and had in fact accompanied him last year on a visit of Himachal Pradesh. Upon this, Manish S/o Sh. Satish Kumar, R/o House No. 145 Police Line, Sector 30, Faridabad was summoned for questioning at Police Station and he informed that Ankit was a good friend of his and, therefore, they are regularly in touch with each other over telephone numbers and for this purpose would also use the phone numbers belonging to other family members.

14. Likewise, when the petitioner Chanakya alias Chintu was questioned about the phone numbers, he revealed that the mobile No. at Sl. No. 1 belonged to Shekhar

Sharma, son of his maternal aunt, R/o Hissar, mobile No. at Sl. No. 2 belonged to his friend Om Shankar, R/o Jind, mobile No. at Sl. Nos. 3 & 4 belonged to his father Sh. Kamal Raj Sharma, mobile No. at Sl. No. 5 belonged to his friend Rohit, R/o Jind, and mobile No. at Sl. No. 6 belonged to his mother Vinod Bala. He often used to speak to all of them.

15. In the status report filed before the Court, it has been averred that both the petitioners are not revealing the truth with regard to fake currency and Charas and are consistently telling lies and, hence, they are required to be interrogated in police custody and are yet to be taken to Malana and Kasol for pointing out the spot(s). It is further averred that the petitioner Ankit has been found to be the main accused because at two or three times earlier he had purchased Charas from Deva and knows him very well. It is lastly averred that both the petitioners belong to the other State and are clever and cunning and crime committed by them relates to the security of the State being students of law as they are studying in 4th year and are well acquainted with law. Therefore, if they are enlarged on bail, there is every likelihood of their jumping the bail, which would adversely affect the investigations.

16. I would first deal with the petitions seeking pre-arrest bail because the two petitions seeking pre-arrest bail as the result thereof is bound to have an effective bearing on the two petitions seeking regular bail.

17. At the outset, it may be observed that the considerations for grant of bail envisaged under Sections 437 and 439 Cr.P.C.are different. An anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. A direction under Section 438 Cr.P.C. is therefore intended to confer conditional immunity from the 'touch' or confinement contemplated by Section 46 of the Code.

18. There is no warrant for reading into Section 438 the conditions and limitations subject to which bail can be granted under Section 437 (1). The expression 'if it thinks fit', which occurs in Section 438 (1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437 (1). The High Court, therefore, erred in laying down that the discretion under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Circumstances may justify grant of anticipatory bail in cases such as criminal breach of trust for which the punishment provided is imprisonment for life, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

19. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. While granting relief under Section 438 (1), appropriate conditions can be imposed under Section 438 (2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail. When a person not in custody approaches a police officer

investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. So also there is no warrant for the proposition that where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency, the power under Section 438 should not be exercised.

20. It is also not proper to hold that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power the discretion under Section 438 of the Code should not be exercised. It is not possible for the court to assess the blatantness of corruption at the stage of anticipatory bail.

21. It is also not possible to hold that anticipatory bail cannot be granted unless it is alleged and shown that the proposed accusations are malafide.

22. Under Section 438 the applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a 'special case'. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use.

23. No one is justified in reading the conclusion that the power under Section 438 must be exercised in 'exceptional cases only' merely because it is of an extraordinary character.

24. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. In fact, there are numerous considerations, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the state" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.

25. The question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. Therefore, the High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code. The judicial discretion granted under Section 438 should not be read down by reading into the statute conditions that are not to be found therein. The Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide

discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges which have to be met. (See:***ShriGurbaksh Singh Sibbia and others vs. State of Punjab (1980) 2 SCC 565).***

26. The Constitution Bench of the Hon'ble Supreme Court in ***Sibbia's*** case (supra) after taking into consideration the entire law clarified the legal position with regard to anticipatory bail in the following terms:

> *"34. This should be the end of the matter, but it is necessary to clarify a few points which have given rise to certain misgivings.*
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> *35. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non- bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.*
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> *36. Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section*
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> *438.*
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> *37. Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed.*
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> *38. Fourthly, anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested.*
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> *39. Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy*

under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested."

27. However, before parting, the Hon'ble Supreme Court cautioned the Courts granting blanket order of anticipatory bail, as according to it, a blanket order would protect and every kind of allegedly unlawful activity and is therefore, bound to cause serious interference with the findings of the police. The Courts are required to apply its own mind and decide whether a case has been made out for grant of anticipatory bail. It was lastly held that in certain exceptional circumstances, the Court can on the basis of material placed on record directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, according to the Hon'ble Supreme Court have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The Court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police.

28. The legal position has thereafter been meticulously analyzed by the Hon'ble Supreme Court in ***SiddharamSatlingappaMhetre vs. State of Maharashtra and others (2011) 1 SCC 694*** wherein the Hon'ble Supreme Court again took into consideration the entire law on the subject of anticipatory bail and regular bail including Constitution Bench decision of the Hon'ble Supreme Court in ***Gurbaksh Singh Sibbia's***case (supra) and held that the following factors and parameters can be taken into consideration by the Court while dealing with anticipatory bail:

i. *The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*

ii. *The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*

iii. *The possibility of the applicant to flee from justice;*

iv. *The possibility of the accused's likelihood to repeat similar or the other offences.*

v. *Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.*

vi. *Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.*

vii. *The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;*

viii. *While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;*

ix. *The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;*

x. *Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of*

grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

29. It was further observed that arrest should be the last option and it should be restricted to those exceptional cases where arresting of the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record. However, it was also clarified that the factors as set out above are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. This is best left for discretion of the Judge, who after taking into consideration the entire material on record and then pass an order and this power was vested only with the Judges of the superior courts so that the discretion would be properly exercised.

30. Another landmark decision on the issue is or fairly recent judgment rendered by the Hon'ble Supreme Court in ***BhadreshBipinbhaiSheth vs. State of Gujarat and another (2016) 1 SCC 152***, wherein it was held that while considering application for grant of anticipatory bail, Court is not concerned with feasibility of framing charge or merits thereof as that would be a matter before trial court for arriving at finding on evidence.

31. The Hon'ble Supreme Court after taking into consideration the various judgments including one rendered by the Constitution Bench of the Hon'ble Supreme Court in ***Gurbaksh Singh Sibbia's***case (supra) and latter decision of the Hon'ble Supreme Court in ***SiddharamSatlingappaMhetre***case (supra), culled out the following principles for grant of bail as under:

25.1. The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

25.2. The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

25.3. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make

any distinction between arrest at a pre-conviction stage or post-conviction stage.

25.4. There is no justification for reading into Section 438CrPC the limitations mentioned in Section 437CrPC. The plentitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438CrPC to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

25.5.The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of anticipatory bail at any time if liberty granted by the court is misused. The anticipatory bail granted by the court should ordinarily be continued till the trial of the case.

25.6. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

25.7. In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

25.8. Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438CrPC should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

25.9. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

32. In addition to that, the factors and parameters that need to be taken into consideration while dealing with anticipatory bail as laid down in ***SiddharamSatlingappaMhetre***case (supra), were reiterated in para 25.10 and, therefore, the same are not being reproduced.

33. Thus, what can be reasonably taken from the aforesaid exposition of law is that while granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail,

the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial. (See :***Central Bureau of Investigation vs. V. Vijay Sai Reddy (2013) 7 SCC 452).***

34. The instant bail petitions have been vehemently opposed by the respondent-State on the ground that the petitioners are required for custodial interrogation.

35. What is custodial interrogation, its purpose, whether it is legal and recognized by law**,** has been meticulously considered by the learned Single Judge of Kerala High Court in bail application No. 4274 of 2008 titled ***Hyderali vs. State of Kerala,*** decided on 5.8.2008, wherein it was observed as under:

> *"19. Custodial Interrogation means? "Custodial interrogation" does not mean mere questioning of the accused by the police. It has a different connotation in law. To constitute "custodial interrogation", there must be: (i) "custody" of the accused by police and also (ii) "interrogation" by the police. If an accused is released on bail, he is set at liberty by the court and he is not under anybody's custody. When bail is granted, custody ceases. The question of police custody does not arise thereafter, unless the bail is cancelled. By granting bail, accused is absolutely released from police custody and it may not be proper to say that the accused is in "custody" of police, after he is released on bail. If there be any interrogation by the police while on bail, it cannot be termed to be "custodial interrogation" it is mere "interrogation" without police custody.* This is clear from what the Constitution Bench of the Supreme Court held in Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565) thus :
>
> > "to grant bail, as stated in Wharton's LAW LEXICON, is to `set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial".
>
> *20. So, strictly speaking, there will not be any "custodial interrogation" by police, once the accused is released on bail. If a police officer interrogates the accused in a case, after his release on bail, it will not amount to "custodial interrogation", because the police cannot claim his "custody". He is an absolutely free person upon his release on bail, being not under anybody's custody, much less, the police custody.*
>
> *21. Custodial interrogation is legal: It is also relevant to note that "custodial interrogation" is not forbidden by law. On the other hand, it is legal and recognized by the statute. Under section 167(2) of the code, the Magistrate is empowered to release the accused to "police custody" and such custody is allowed, mostly for the purpose of interrogation. During such period, an accused is interrogated by the police in police custody and recovery may also be effected. But, even such custody cannot be given to the police, after expiry of the first fifteen days of remand. That is the settled legal position. Therefore, the custodial interrogation at the early stage of investigation after the arrest has some statutory importance.*
>
> *22. The police has the right to keep the accused in their custody for some time after the arrest and it is enough that the accused is produced before*

Magistrate within 24 hours. During this period, between arrest and production, the accused is subjected to some restraint and he will be under the physical control by the police. His movements will be restricted and it can then be said that he was in "police custody". It is during such custody that he is subjected to "custodial interrogation" and recovery of various material objects are effected through him.

23. Custodial interrogation - purpose. Thus, "custodial interrogation" appears to have a specific purpose which is recognized by law also. The confession, statement or information given to the police officer while in police custody is given certain amount of sanctity also, as per law. Such statements are admissible under section 27 of Evidence Act under certain circumstances. Section 26 of the Evidence Act also indicates that confession made by an accused while in custody of a police officer, in the immediate presence of a Magistrate, may be proved against an accused. Thus, statement or confession made by an accused in police custody can be proved against him, as per law. The confession made by an accused to a police officer in police custody is admissible under certain enactments like TADA Act etc.

24. Thus, the police can, in law, procure or elicit confession, statement or information, which is admissible in law or not, by interrogation of the accused in police custody. Such interrogation is ordinarily referred to as "custodial interrogation". The court may accept or reject the materials collected during such custodial interrogation, after putting them to judicial scrutiny.

25. Denial of custodial interrogation if proper? But, it may not be proper to deny an investigator an opportunity for "custodial interrogation" of an accused, in fit cases. Unless there are strong reasons to avoid an accused being subjected to "custodial interrogation", the court shall not stand in the way of the police discharging their official duty, which is sanctioned by law. It must be remembered that investigating agency also plays a very vital role in criminal justice system. The evidence- collection is a part of investigation, as per law. The aggrieved or the victim ordinarily approaches the police and not the court, for redressing their grievance, immediately after an offence is committed.

26. As per the provisions of the code, when a crime is committed against him or her, he may move the police first, unless otherwise prescribed. On doing so, the investigator may proceed to collect evidence relating to such crime. The accused may also be subjected to custodial interrogation, especially in cases where certain facts whether incriminating or not are in his exclusive knowledge. Such materials are collected legally by interrogation of the accused in "police custody". There is no illegality in "custodial interrogation". But it is legally recognized by statute.

27. So, when the investigator alerts the court on the need for custodial interrogation, the court must pay due attention to the need expressed and if the court finds that his request is reasonable, the court shall not refuse the same and deny the opportunity to "custodial interrogation", as permitted by law. It must be remembered that it is based on the materials collected by the investigator, which includes evidence through custodial interrogation also, that he forms an opinion whether there is a case to place the accused before the court for trial or not by filing of a charge-sheet under Section 173.

28. Referring to "investigation", the Supreme Court in Union of India v. Prakash P. Hinduja, (2003) 6 SCC 195 held as follows:

> *"Section 2(h)CrPC defines "investigation" and it includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. It ends with the formation of the opinion as to whether on the material collected, there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by filing of a charge-sheet under Section 173."*

The purpose of "custodial interrogation" is also thus, a factor which has to be borne in mind.

29. Interrogation means? The word, "interrogate ", as per dictionary means, "to ask somebody a lot of questions over a long period of time, especially in an aggressive way" (vide Oxford Dictionary). Such 'aggressiveness' within a reasonable limit may not amount to torture, because the very expression "interrogation" itself is attached with some sort of aggressiveness. Therefore, any allegation of a possible aggressiveness in questioning by police may not be a sufficient ground to deny to the police, their opportunity to have "custodial interrogation" of the accused. This is intended for collecting evidence and to redress the grievance of the victim by bringing the accused before law. When the police officer confronts a guilty person, needless to say, he may not readily give answers to all the queries made. He may be reluctant to avoid the inconvenient truth and hence it may require sustained questioning of the accused over a long period and in some cases, in an aggressive manner also.

30. A few observations made by the Supreme court may be relevant in this context. While setting aside an order of anticipatory bail granted by Andra Pradesh High court, rejecting the plea for "custodial interrogation", the Supreme Court in State rep. by the CBI v. Anil Sharma, (1997) 7 SCC 187 held as follows:

> *"We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders".*

31. The ground realities have to be understood by the courts and it shall not be impractical, especially when the investigation is at the initial stage. It must be remembered that it is the duty of the investigating agency to collect sufficient materials and place them before court. So, in short the court has to

strike a balance between the right of a victim to be protected by law and also the freedom or liberty of the accused which shall not be interfered with, except in accordance with law. While the liberty of a citizen is of grave concern of the court, that alone must not be the concern. The court must see the other side of the coin as well, and justice must be delivered to both sides equally.

32. In the above circumstances, the argument by learned counsel for petitioner to the effect that it would suffice, if a condition is imposed while granting anticipatory bail that he shall subject himself to interrogation by police cannot be accepted."

36. Dealing further with the question of Interrogation Vs. Custodial Interrogation, the Court held as under:

"33. Interrogation Vs. Custodial Interrogation: I have already elaborated on what "custodial interrogation" is. It will be clear from the discussion made that any direction given to the accused as per a condition imposed while granting bail to subject himself to "interrogation" may not, in strict terms, constitute "custodial interrogation". Because, in such cases, there is no submission of the accused to "police custody" because he is free, well-protected and insulated by order for an anticipatory bail. "Bail is basically release from restraint, more particularly, release from the custody of the police", as the Supreme Court held in Gurbakh Singh Sibbia's case. Hence, interrogation effected by police while the accused is on anticipatory bail cannot be termed as "custodial interrogation", especially since there is no cancellation of bail, before the accused is so interrogated,in accordance with or compliance of the condition imposed while granting bail.

34. It is true that sub-section (2) of section 438 of the code lays down that a condition may be imposed that the accused shall make himself available for "interrogation" by the police as and when directed. It is relevant to note that the expression used is,"interrogation" and not "custodial" interrogation. The legislature is aware that after granting bail, in the event of arrest, there cannot be any "custodial interrogation," though mere "interrogation" may be possible.

35. At any rate, imposition of a condition arises only after the court "thinks fit" to issue a direction under sub-section (1) of Section 438. The court is empowered to impose certain conditions as stated in sub-section(2) of section 438, only when the court makes a direction under sub-section(1) and, not before. That means, the order passed under Section 438(1) takes effect immediately in the event of arrest and the accused has to be released on bail immediately thereafter. Therefore, any interrogation of the accused by the police in cases where the accused is released on bail, as per an order issued under Section 438(1) of the Code, will not constitute "custodial interrogation.

36. It is worthy to bear in mind that anticipatory bail application is filed by a person who wishes to evade arrest, custodial interrogation and detention in custody also, whether "police custody" or "judicial custody". Such a person may either be guilty or not guilty. But, the court presumes him to be innocent, even if he is actually guilty and proceed on such presumption of innocence. But, an investigator may not be able to proceed on any such presumption because, from the evidence collected during investigation, he will be able to form a reasonable belief about the guilt of the person.

> *37. So, while exercising jurisdiction under section 438 of the code, at the very early stage of investigation, that is, even before the arrest is effected, it may not be proper, under all circumstances, to apply the presumption of innocence blind-fold, and refuse the request for "custodial interrogation". The court has to weigh the materials before it and consider the request made by the Investigator for "custodial interrogation" and decide whether it is a reasonable one and if such custodial interrogation will be necessary to bring out the truth and also for an effective investigation.*
>
> *38. The court's concern shall not, at that juncture be one- sided that too, on the sole theory of presumption innocence of the accused or on any pre-conceived notion that the accused will be subjected to custodial "torture". The court shall be concerned about the victim also and his or her grievances, on whose behalf the police acts and collects evidence. It is wise to remember that police also has their own vital role to play. If the court interferes with such role, without sufficient reason, the net result may be lawlessness in the society. The victim of a crime may become yet another victim at the hands of the criminal justice delivery system also. In such circumstances, it is wise to remind oneself that an order passed without application of mind may end up in drastic results and the police will be prevented from collecting sufficient materials and place them before the court to prove the alleged offence. The court must be able to distinguish the genuine request and the fake one."*

37. Section 438 of the Cr.P.C. confers extra ordinary powers upon a High Court and a Court of Session to direct that in the event of his arrest, an accused shall be enlarged on bail. This power is not to be exercised in routine, but has to be exercised with great care and circumspection. The factors to be kept in mind while adjudicating a plea for grant of anticipatory bail are significantly different from those of a plea of regular bail. The provisions of Section 438 Cr.P.C. are in the nature of an exception to general rule that an investigating agency must be given a free reign to arrive at the truth. A few of the factors to be taken into consideration are the gravity or the seriousness of the offences complained of, the proposed charges that are likely to be levelled, the possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that the witnesses would tamper with the evidence as also public interest and the interest of the State. However, no hard and fast rule of law can be laid down for the exercise of such powers. It is for a Court considering a plea of anticipatory bail to arrive at a conclusion for or against the prayer made. A significant fact that must be taken into consideration when the circumstances so warrant is that interrogation of an individual clothed with a protective shield of interim protection is qualitatively less effective than a custodial interrogation.

38. At this stage, it shall be apposite to refer to the observations of the Hon'ble Supreme Court in ***CBI vs. Anil Sharma, (1997) 7 SCC 187*** wherein as regards the nature of custodial interrogation it was observed as under:

> "6. *We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconded with a favorable order under Section 438if the code. In a case like this effective interrogation of suspected person is of tremendous advantage in disintering many useful informations and also materials which would have been concealed. Succession such interrogation would elude if the suspected person knows that he is well protected and insulted by a pre-arrest bail during the time he interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods*

need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The court has to presume that responsible Police Officers would conduct themselves in task of disinterring offences would not conduct themselves as offenders."

39. Dealing with the custodial interrogation, the Hon'ble Supreme Court in***Muraleedharan vs. State of Kerala AIR 2001 SC 1699*** held as follows:

"7.....Custodial interrogation of such accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to the capital tragedy. We express our reprobation at the supercilious manner in which the Sessions Judge decided to think that no material could be collected by the investigating agency to connect the petitioner with the crime except the confessional statement of the co-accused. Such a wayward thinking emanating from a Sessions Judge deserves judicial condemnation. No court can afford to presume that the investigating agency would fail to trace out more materials to prove the accusation against an accused. We are at a loss to understand what would have prompted the Sessions Judge to conclude, at this early stage, that the investigating agency would not be able to collect any material to connect the appellant with the crime. The order of the Sessions Judge, blessing the appellant with a pre-arrest bail order, would have remained as a bugbear of how the discretion conferred on Sessions Judges under Section 438 of the Cr.P.C would have been misused. It is heartening that the high Court of Kerala did not allow such an order to remain in force for long."

40. A learned Single Judge of the Delhi High Court in ***Del Agha vs. Directorate of Revenue Intelligence (2001) 2 JCC (Delhi) 110***, observed as under:

"10. The judgments of the Apex Court, referred to above, clearly lay down that for invoking the powers of the Courts under Section 438 of the Code for grant of anticipatory bail, an accused has to show something more than what he is required to show for exercising discretion under Section 439 of the Code. The reason is that a pre-arrest bail order puts the Investigating Agency into a disadvantageous position by reducing the efficacy of custodial interrogation. It also emboldens the accused and demoralises the complainant and general public, who feel that inspite of serious allegations, the accused remains beyond the reach of law. Such orders sometimes have the tendency of eroding public faith in the administration of justice. The seriousness of the offence and gravity of the allegations is always on important factor for an order under Section 439 of the Code if something more is required to be shown for exercise of discretion under Section 438 of the Code, it is obvious that seriousness of offence and the gravity of the allegations remains a relevant factor for orders under Section 438 of the Code also."

41. In ***Bharat Chaudhary vs. State of Bihar AIR 2003 SC 4662,*** the Hon'ble Supreme Court held that the object of section 438 of the Code is to prevent undue harassment of the accused person by pre-trial arrest and detention. It was further held that the gravity of the offence is an important factor to be taken into consideration while granting anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the Courts concerned while entertaining for grant of anticipatory bail.

42. In ***Parvinderjit Singh &Anr. vs. State (U.T. Chandigarh) and another (2008) 4 SCC 2873***, the Hon'ble Supreme Court observed as under:

> "17. *Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his dis-appearance to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code. The above position was highlighted in Adri Dharan Das v. State of West Bengal (2005 (4) SCC 303)."*

43. In ***Promod Kumar Panda vs. Republic of Indian (2015) 60 Orissa Criminal Reports, 660,*** the Orissa High Court while dealing with the anticipatory bail application of the petitioner in that case, held as follows.

> *"17. What is custodial interrogation? Custody means formal arrest or the deprivation of freedom to an extent associated with formal arrest. Interrogation means explicit questioning or actions that are reasonably likely to elicit an incriminating response. Questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his or her freedom in any significant way is called custodial interrogation. The Court has to strike a balance between individuals right to personal freedom and the investigational rights of the police. On one hand, the Court has to prevent harassment, humiliation and unjustified detention of an accused, on the other hand it is to see that a free, fair and full investigation is not hampered in any manner. When an application for anticipatory bail of an accused is objected to by the State on the ground of necessity of custodial interrogation, the Court can scan the materials available on record and ask the State to satisfy as to in what way the custodial interrogation would benefit the prosecution. The satisfaction of the Court would depend upon several facts viz., the nature of offence, the stage at which the investigation is pending, the materials which could not be traced out by the Investigating Agency due to absence of custodial interrogation and the benefit which the prosecution would get on account of custodial interrogation of the accused. It cannot be stated that in which particular type of cases or particular type of accused, the custodial interrogation would be mandatory. It would all depend upon the facts and circumstances of each case. No strait jacket formula could be laid down. When the accused makes out a case for anticipatory bail, it is not to be defeated by mere asking for custodial interrogation by the prosecution without satisfying the necessity for the same. Of course in terms of section 438 Cr.P.C., the Court can impose a condition on the accused to make himself available for interrogation by the Investigating Officer as and when required. Sometimes the custodial interrogation of suspects would give clue regarding criminal*

conspiracy and identity of the conspirators and it may lead to recovery of the incriminating materials. Sometimes at the crucial stage of investigation, the custodial interrogation would be a boon to the Investigating Officer. The person in custody likely to be interrogated has a right to remain silent. On some questions, he may answer and on some questions, he may remain silent or refuse to answer. Nobody can be compelled to answer to a particular question. No third-degree method is to be adopted for elicitating any answer. It is illegal to employ coercive measures to compel a person to answer. The Investigating Officer is bound to provide the arrested accused to meet an advocate of his choice during interrogation though not throughout interrogation as required under ***section 41-D Cr.P.C."***

44. Adverting to the facts, it would be noticed that even though the anticipatory bail of the petitioners was rejected by the learned Additional Sessions Judge (1), Mandi, however, the same was granted by this Court at the time when the records of the case were not available with it. Now, that the records are available and have been perused. I am of the considered view that custodial interrogation of the accused is necessary in the interest of investigation.

45. As observed in ***Anil Sharma's*** case (supra), success in such interrogation eludes if the suspected person knows that he is protected and insulated by a pre-arrest bail order during the time he is interrogated. Even otherwise, the custodial interrogation of the petitioners in this case is indispensably necessary for the investigating agency to unearth all the links of common intention. As held by the Hon'ble Supreme Court in ***Muraleedharan's***case (supra), no Court can afford to presume that the investigating agency would fail to trace out more materials when the gravity of the offences for which the petitioners have been accused is taken into consideration as admittedly some of the accusations against the petitioners are punishable with even imprisonment for life.

46. In addition to the aforesaid, it would be noticed that one of the leads on which the Investigating Agency is currently working is the involvement or rather sale and purchase of huge quantity of narcotic substance which if established and proved can entail serious consequences especially if it happens to be commercial quantity which is an offence punishable with rigorous imprisonment for a term which shall not be less than 10 years but may extend to 20 years and shall also be liable to pay fine which shall not be less than Rs.1,00,000/- but may extend to Rs.2,00,000/-.

47. Considering the fact that the petitioners have already been interrogated on earlier occasions and yet have not been arrested because of the interim protection granted by this Court and weighing the right of liberty of the petitioners on one hand and the interest of the investigation on the other hand, I am of the considered view that the period for custodial interrogation may be fixed. For this purpose, five days period would be sufficient for custodial interrogation of the petitioners and are, therefore, direct:

(a) The petitioners Ankit and Chanakya alias Chintu will surrender before the Investigating Officer immediately;

(b) The Investigating Officer shall complete the interrogation of the petitioners within five days of their surrender. On the completion of the interrogation and recovery of any material object/fact, if any, within the aforesaid period, the petitioners thereafter shall be released on bail on their furnishing bonds in the sum of Rs.1,00,000/- each with two sureties of like amount, one surety would be the father or mother and other would be a close relative;

(c) The petitioners shall surrender their passport, if any, and hand over the same to the Investigating Officer;

(d) *The petitioners shall thereafter make themselves available as and when required by the Investigating Officer ;*

(e) *The petitioners shall not influence the witnesses or otherwise tamper with the evidence;*

(f) *It is clarified that if the petitioners mis-use the bail or violate the conditions imposed upon them, the Investigating Officer shall be at liberty to move this Court for the cancellation of the bail.*

48. Now, adverting to the regular bail applications filed on behalf of the petitioners Parvesh Kundu and Deva, since the other petitioners Ankit and Chanakya alias Chintu have already been directed to surrender before the Investigating Officer immediately for the purpose of custodial interrogation for the period of five days, these petitioners shall on completion of the aforesaid period be released on bail alongwith petitioners Ankit and Chanakya alias Chintu on the same terms and conditions as in the case of petitioners Ankit and Chanakya alias Chintu.

49. Any observations made hereinabove, shall not be construed to be any reflection on the merits of the case.

50. All the petitions are accordingly disposed of in the aforesaid terms.

****

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

M/s Banjara Camps and Retreats Private Limited .....Petitioner.

Versus

Shiv Lal and another .....Respondents.

CWP No.247 of 2018.
Judgment reserved on: 12.09.2018.
Date of decision: 18th September, 2018.

Himachal Pradesh Transfer of Land (Regulation) Act, 1968- Sections 3 and 5-Quasi-Judicial functions- Breach of principles of natural justice – Effect- Held- Even when there is infraction of principles of natural justice, still Court is required to see whether any purpose would be served by remitting matter to administrative authority to decide afresh after giving opportunity of being heard to parties – As per Govt. permission, lease of land in favour of petitioner was for five years and it stood lapsed– No further agreement between parties – No permission of State Govt. to extend lease was obtained – Divisional Commissioner was justified in holding that there was no lease of land on and after 31.12.2010 and dismissing petitioner's appeal-Petition Dismissed though order of Deputy Commissioner appealed against held to be in breach of principles of natural justice. (Paras-23 to 25 & 30).

Cases referred:

Municipal Corporation, Shimla through its Commissioner versus Savitri Devi, The Indian Law Reports, Himachal Series, 2015 (5) Vol.45, 1143

Km. NeelimaMisraversus Dr.Harinder Kaur Paintal and others, AIR 1990 SC 1402

Manohar s/o ManikraoAnchuleversus State of Maharashtra and another, (2012) 13 SCC 14,

Dharampal Satyapal Limited versus Deputy Commissioner of Central Excise, Gauhati and others, (2015) 8 SCC 519

RBI versus Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424

Gaurav AseemAvtejversus Uttar Pradesh State Sugar Corporation Limited and others, (2018) 6 SCC 518,

Ram Prasad Narayan Sahi and another versus The State of Bihar and others, AIR 1953 SC 215

P. Sambamurthy and others etc. etc. versus State of Andhra Pradesh and another, AIR 1987 SC 663

B.B.Rajwanshi versus State of U.P. and others, AIR 1988 SC 1089.

For the Petitioner :	Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.
For the Respondents:	Mr. P.P. Chauhan, Advocate, for respondent No.1. Mr.Sudhir Bhatnagar, Additional Advocate General with Mr.Bhupinder Thakur, Deputy Advocate General, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

What is the nature of authority exercised by the Deputy Commissioner under Section 5 of the Himachal Pradesh Transfer of land (Regulation) Act, 1968, (for short 'the Act')? Is it administrative or quasi-judicial? Is he bound to comply with the principles of natural justice? If yes, then to what extent? Do the provisions of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') apply to the proceedings conducted by him? Whether under all circumstances in such proceedings, a party could have a right to adduce evidence or cross-examine a person/witness. All these issues require consideration of this Court.

2. However, before answering these questions, certain minimal facts need to be noticed.

3. Respondent No.1 belongs to the scheduled tribe and is a resident of village Batseri, Tehsil Sangla, District Kinnaur, where he initially in the year 1998 allowed the petitioner to utilize his land comprised in KhataKhatauni No. 54/155, Khasra Nos. 1193, 1194, 1195, 1198, 1205 and 1219, measuring 0-61-00 hectares. Respondent No.1 thereafter obtained permission as required under Section 3 of the Act. On 01.01.2006, the Principal Secretary (Tribal Development) to the Government of Himachal Pradesh recommended the transfer of the aforesaid land in favour of the petitioner. In the meanwhile, respondent No.1 on 21.08.2006 executed an agreement with the petitioner to utilize the land in question for 12 years. However, this agreement was superseded and supplemented by another agreement dated 08.09.2006 and this time the lease was executed for a period of 5 years. On 03.09.2010, respondent No.1 executed another lease agreement with the petitioner, however, this agreement according to the petitioner only pertained to the built-up structure and not the land and the same was permissible under the Act. On 21.09.2013, respondent No.1 got issued a legal notice to the petitioner calling upon it to stop further illegal and unauthorized construction allegedly being carried on by the petitioner and hand over peaceful and vacant possession of the land comprised in KhataKhatauni No. 50min/149, Khasra Nos. 1194 and 1198, kitas 2, measuring 00-52-64 hectares. This notice was duly replied by the petitioner wherein it was claimed that the construction being raised

by it was lawful and was being raised with the consent of respondent No.1. On 22.01.2014, respondent No.1 filed an application under Section 5 of the Act before the Deputy Commissioner, Kinnaur, who summoned the petitioner and thereafter commenced the proceedings on 11.02.2014. The application filed by respondent No.1 was allowed by the Deputy Commissioner vide order dated 27.03.2017. The appeal filed by the petitioner against the said order before the Divisional Commissioner also came to be dismissed on 04.01.2018, constraining the petitioner to file the instant petition on the grounds that the order passed by the Divisional Commissioner on 04.01.2018(for short 'impugned order') is the result of wrongful and illegal exercise of jurisdiction vested in him under law. The Divisional Commissioner could not have a matter on merits of the case which jurisdiction under law was vested in the Deputy Commissioner. Apart from that the impugned order suffers from grave illegality as the Divisional Commissioner has ignored the fact that the Deputy Commissioner had never conducted proceedings in accordance with law inasmuch as there was complete deviation from principles of natural justice and minimum judicial procedure which rendered the order passed by the Deputy Commissioner totally illegal and against all norms of law and justice. It is further averred that the Divisional Commissioner ignored the fact that despite framing of an issue by the Deputy Commissioner, no evidence was sought from the parties and in absence of the opportunity to the parties to prove their cases, the order passed by the Divisional Commissioner could not have been sustained. Lastly, it is averred that the impugned order being wrong, illegal, arbitrary and is against the settled position of law and has been passed by the Divisional Commissioner in complete ignorance of the provisions of Sections 52, 54 and 55 of the Easements Act which clearly attract to the facts and circumstances of the case.

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

5. At the outset, certain provisions of the Act and Rules need to be noticed. These provisions would infact be determinative while answering most of the questions as posed.

6. However, before adverting to the provisions, it needs to be noticed why the Act has been enacted. The object and purpose of the Act are as follows:-

> *"An Act to regulate the transfer of land in the State of Himachal Pradesh in the interest of persons belonging to the Scheduled Tribes and matters connected therein."*

7. The Act is very short and, therefore, reproduced in its entirety:-

> ***"The Himachal Pradesh Transfer of Land (Regulation) Act, 1968***
>
> ***(Act No.15 of 1969)[1]***
>
> ***[****Received the assent of the President of India on the 15th May, 1969, and was published in R.H.P., dated the 28th June, 1969 at pages 526-528]*
>
> *Amended, repealed or otherwise affected by,-*
>
> *(i) A.O. 1973, published in R.H.P. Extra, dated the 20th January, 1973 at pages 91-112.*
>
> *An Act to regulate the transfer of land in the [2][State of Himachal Pradesh] in the interest of persons belonging to the Scheduled Tribes and for matters connected therewith.*
>
> *Be it enacted by the Legislative Assembly of Himachal Pradesh in the Nineteenth Year of the Republic of India as follows:-*

1. Short title, extent and commencement.*-(1) This Act may be called the Himachal Pradesh Transfer of Land (Regulation) Act, 1968.*

(2) It extends to such area[3] of the [2][State of Himachal Pradesh] as from time to time, be notified in the Official Gazette.

(3) It shall come into force at once.

2. Definitions.*- In this Act, unless the context otherwise requires,-*

(a) "Commissioner" means the Commissioner appointed under the Land Revenue Act in force in Himachal Pradesh;

(b) "Co-operative Land Mortgage Bank" means a Co-operative Land Mortgage Bank registered as such under the Punjab Co-operative Land Mortgage Banks Act, 1957 (26 of 1957) as in force in the [2][State of Himachal Pradesh];

(c) [4]["Co-operative Society" means a co-operative Society registered as such under the Himachal Pradesh Co-operative Societies Act, 1968];

(d) "Deputy Commissioner" in relation to any district, means the Deputy Commissioner of the district;

(e)"Financial Commissioner" means the Financial Commissioner of Himachal Pradesh;

(f) "Land" means a portion of the earth's surface, whether or not under water, and includes all things attached to, or permanently fastened to anything attached to such portion but does not include minerals, natural gas, petroleum, timber, tress, growing crops and grass;

(g) "Prescribed" means prescribed by rules made under this Act;

(h) "Scheduled Tribes" shall have the same meaning as assigned to it in clause (25) of Article 366 of the Constitution;

(i) [1]["State Government" means the Government of Himachal Pradesh].

3. Regulation of transfer of land.*- (1) No person belonging to any Scheduled Tribe shall transfer his interest in any land by way of sale, mortgage, lease, gift or otherwise to any person not belonging to such tribe except with the previous permission in writing of the Deputy Commissioner:*

Provided that nothing in this sub-section shall apply to any transfer-

(a) by way of lease of a building on rent;

(b) by way of mortgage, for securing loan, to any Co-operative Land Mortgage Bank or to any Co-operative Society, all or a majority of the members of which are persons belonging to any Scheduled Tribe;

(c) by acquisition by the State Government under the Land Acquisition Act, 1894. (1 of 1894).

(2) Every transfer of interest in land made in contravention of the provisions of sub-section (1) shall be void.

4. Application for permission for transfer of land.*-(1) Any person belonging to any Scheduled Tribe who desires to make a transfer of his interest in any land to a person not belonging to such tribe, may make an application to the Deputy Commissioner for the grant of permission for such transfer.*

(2) Every application under sub-section (1) shall be made in the prescribed form and shall contain the prescribed particulars and shall be accompanied by such fees as may be prescribed.

(3) On receipt of any such application for the grant of permission, the Deputy Commissioner may, after making such inquiry as he thinks fit, by order, either grant or refuse permission to transfer the land:

Provided that where permission is refused, the Deputy Commissioner shall record in writing the reasons for such refusal.

(4) Before granting or refusing permission under this section, the Deputy Commissioner shall have regard to the following matters, namely:-

(a) the financial position of the applicant;

(b) the age and physical condition of the applicant;

(c) the purpose for which the transfer is proposed to be made; and

(d) such other relevant matters as the Deputy Commissioner may think fit in the circumstances of the case.

*"**5. Ejectment.-(1)** If, as a result of transfer of any land in contravention of the provisions of section 3, any person, other than a person belonging to any Scheduled Tribe, is found to be in possession of that land, the Deputy Commissioner or any other officer authorised in writing by the State Government in this behalf, may, without prejudice to the provisions of section 9 serve a notice upon such person requiring him to vacate the land within ninety days from the date of service of the notice and to remove any building, fence or any other structure which may have been raised on such land:*

Provided that if there are any crops actually growing on the land at the time of such requisition, such person shall be entitled to retain possession of the land until such crops are harvested.

(2) Every person to whom a requisition is made under sub-section(1) shall be bound to comply with such requisition."

***6. Appeal** .- (1) Any person aggrieved by an order made under section 4 or section 5 may, within thirty days from the date of communication of the order, prefer an appeal to the Commissioner:*

Provided that if there be no Commissioner such appeal shall lie to the Financial Commissioner:

Provided further that the Commissioner, or as the case may be, the Financial Commissioner, may entertain the appeal after the expiry of the said period of thirty days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) On receipt of an appeal under sub-section (1), the Commissioner or the Financial Commissioner, as the case may be, shall after giving the appellant an opportunity of being heard, dispose of the appeal as expeditiously as possible.

***7. Finality of orders.**- The order made in appeal by the Commissioner or the Financial Commissioner, as the case may be, under section 6 and, subject only to such order, the order made by the Deputy Commissioner under section 4 or section 5, shall be final.*

***[1][8. (1) Right, title or interest held by persons belonging to Scheduled Tribes in land not to be attached.**- No right, title or interest held by a person belonging to a Scheduled Tribe in any land shall be liable to be attached or sold in execution of any decree or order in favour of any person not belonging to a Scheduled Tribe of any court except when the amount due*

under such decree or order is due to the State Government or to any Co-operative Land Mortgage Bank or Co-operative Society.]

[2][(2) Notwithstanding anything to the contrary contained in the Code of Civil Procedure or any other law for the time being in force, any court, vested with the appellate or revisional jurisdiction, may, either on its own motion or on an application moved to it by any person belonging to a Scheduled Tribe, set aside any sale of his property in execution of a decree in favour of a person not belonging to a Scheduled Tribe.]

Explanation.-For the removal of doubts, it is hereby declared that the court shall not refuse to take cognizance of an application, or refuse to exercise the power conferred upon it, under this sub-section, simply for the reason that the applicant or the person to whom the property in question belonged failed to raise the objection to that extent before the court which either passed the decree or passed any order in execution proceedings thereof.

***[8-A. Amendment of the Limitation Act, 1963, in its application to proceedings under Section 8**.-In the Limitation Act, 1963, in its application to the proceedings under section 8, in the Schedule after the words 'Twelve years' occurring in the second column against article 65, the words, brackets and figure 'but thirty years in case of immovable property belonging to a member of Scheduled Tribe specified in relation to the State of Himachal Pradesh in the Constitution (Scheduled Tribes) Order, 1950 shall be inserted.]*

***9. Penalty.**- If any person contravenes or attempts to contravene or abets the contravention of any of the provisions of Section 3 or section 5, he shall be punishable with fine which may extend to two hundred rupees and, in the case of a continuing contravention, with an additional fine which may extend to fifty rupees for every day during which such contravention continues after conviction for the first such contravention.*

***10. Power to make rules.** – (1) The State Government may make rules for the purpose of carrying out the provisions of this Act.*

(2) Without prejudice to the generality of the foregoing power, such rules may provide for –

(a) the form of application for the grant of permission under section 4, the particulars it may contain, the fees which should accompany it and the manner of depositing such fees; and

(b) any other matter which has to be, or may be, prescribed under this Act."

8. Under Section 10, the Government in exercise of powers conferred under Section 10 of the Act, have framed Rules known as the Himachal Pradesh Transfer of Land (Regulation) Rules, 1969 and the same are reproduced hereinunder in entirety:-

"*THE HIMACHAL PRADESH TRANSFER OF LAND (REGULATION) RULES, 1969.*

Arrangement of Rules

Rules

b) *Short title and commencement.*

c) *Definitions.*

d) *Application form and fees*

e) *Mode of enquiry.*

f) *Order of the Deputy Commissioner.*

Form

WELFARE DEPARTMENT

Simla-2, the 6TH December, 1969.

No.22-1/69-Wel.Sectt. *– In exercise of the powers conferred by sections 4 and 10 of the Himachal Pradesh Transfer of Land (Regulation) Act, 1968, the Lieutenant Governor, Himachal Pradesh is pleased to make the following Rules:-*

(24) ***Title and Commencement****. – (a) These rules may be called the Himachal Pradesh Transfer of Land (Regulation) Rules, 1969.*

(b) These shall come into force at once.

2. ***Definition****. – In these rules unless there is anything repugnant in the subject or context. –*

(a) "Act" means the Himachal Pradesh Transfer of Land (Regulation) Act, 1968 (15 of 1969):

(b) All words and expressions used in these rules and not defined herein shall have the same meaning as are respectively assigned to them in the Act.

3. ***Application form and fees****. – (a) A member of scheduled tribe who intends to transfer his interest in any land to a person not belonging to such tribe may make an application to the Deputy Commissioner in Form I (Attached to these Rules) for the grant of permission for such transfer.*

(b) The rate of application fee will be rupee one for each application in the form of court fee stamp to be affixed on the application submitted by an applicant under Section 4(1) of the Act.

*4****. Mode of enquiry****. – (a) The Deputy Commissioner shall make or cause to make an enquiry on the receipt of application on the following lines:-*

(i) The Enquiry Officer should satisfy himself that the object of transfer stated by the applicant is the true object and that all other information given in the application is correct.

(ii) Has the officer advised the applicant to apply for a loan from the Government or any Co-operative Land Mortgage Bank, or to any Co-operative Society of the kind mentioned in clause 3(b) of the Act.

(iii) The officer should report whether the applicant agrees to take a loan from the Government and if so, whether transfer would still be necessary?

If he disagrees to take such loan, reasons should be mentioned.

(iv) Is the applicant has been inducted by any body to sell the land?

(v) Is the officer satisfied that the permission if granted would be in the best interest of the applicant.

5.Orders of the Deputy Commissioner ***[1]****[(a) After the enquiry has been made, the Enquiry Officer who shall not be below the rank of the Sub-Divisional Magistrate or Revenue Assistant, shall return the application to the Deputy Commissioner alongwith his recommendations.]*

(b) On receipt of the application with the recommendations of the Enquiry Officer, the Deputy Commissioner shall pass orders, thereby granting or refuse permission to transfer of land and inform the applicant in writing."

9. Having dealt with the statutory provisions, I, now proceed to examine the law on the relevant questions. However, before doing so, it may be observed that the task of this Court in answering these questions has become relatively easy in view of the binding decision of this Court (Hon'ble Mr. Justice Sanjay Karol, J, now ACJ) in ***Municipal Corporation, Shimla through its Commissioner*** *versus* ***Savitri Devi, The Indian Law Reports, Himachal Series, 2015 (5) Vol.45, 1143*** wherein the question arose as to the nature of authorityexercised by the Commissioner under the provisions of Section 253 of the Himachal Pradesh Municipal Corporation Act, 1994 and it is for this precise reason that all these questions would be answered not only after drawing assistance but quoting *in extenso* the observations made therein.

(i) Does the Commissioner function as a Court or as the Tribunal?

10. In order to answer this question, it is necessary to understand the distinction between quasi-judicial and administrative functions. An administrative function is called quasi-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice. Where there is no such obligation, the decision is purely administrative. The quasi-judicial act implies that the act is not wholly judicial, it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power. Here, it shall be apposite to refer to a decision of the Hon'ble Supreme Court in ***Km. NeelimaMisra****versus* ***Dr.Harinder Kaur Paintal and others***, ***AIR 1990 SC 1402***, wherein it was held as under:-

"19.*We find it difficult to accept the reasoning underlying the aforesaid view. Before we consider the correctness of the proposition laid down by the High Court we must, at the expense of some space, analyse the distinctions between quasi-judicial and administrative functions. An administrative function is called quasi-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice. Where there is no such obligation. the decision is called 'purely administrative' and there is no third category. This is what was meant by Lord Reid in Ridge v. Baldwin, [1963] 2 All E.R. 66, 75-76:*

> *"In cases of the kind with which I have been dealing the Board of Works ..... was dealing with a single isolated case. It was not deciding, like a judge in a law suit, what were the rights of the persons before it. But it was deciding how he should be treated-something analogous to a judge's duty in imposing a penalty ..... " "So it was easy to say that such a body is performing a quasi-judicial task in considering and deciding such a matter and to require it to observe the essentials of all proceedings of a judicial character the principles of natural justice. Sometimes the functions of a minister or department may also be of that character and then the rules of natural justice can apply in much the same way ..... "*

20.Subba Rao, J., as he then was, speaking for this Court in G. Nageshwara Rao v. Andhra Pradesh State Transport Corporation, [1959] 1 SCR 319 : (AIR 1959 SC 308) put it on a different emphasis (at 353) (of SCR):(at p. 326 of AIR):

"The concept of a quasi-judicial act implies that the act is not wholly judicial, it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power ..... "

21. Prof. Wade says "A judicial decision is made according to law. An administrative decision is made according to administrative policy. A quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial. A quasi- judicial decision is, therefore, an administrative decision which is subject to some measure of judicial procedure, such as the principles of natural justice." (Administrative Law by H.W.R. Wade 6th Ed. p. 46-47).

22. An administrative order which involves civil consequences must be made consistently with the rule expressed in the Latin Maxim audi alteram partem. It means that the decision maker should afford to any party to a dispute an opportunity to present his case. A large number of authorities are on this point and we will not travel over the field of authorities. What is now not in dispute is that the person concerned must be informed of the case against him and the evidence support thereof and must be given a fair opportunity to meet the case before an adverse decision is taken. Ridge v. Baldwin, (supra) and state of Orissa v. Dr. Binapani Dei &Ors., [1967] 2 SCR 625."

11. In ***Savitri Devi's case*** (supra), one of the questions framed was – Does the Commissioner function as a Court or a Tribunal and it was observed as under:-

"20.InVirindar Kumar Satyawadi vs. State of Punjab, AIR 1956 SC 153 (Three Judges), the Court has made broad distinction between a Court and a quasi judicial Tribunal.

21.The Court in Thakur Jugal Kishore Sinha Vs. Sitamarhi Central Coop. Bank Ltd., AIR 1967 SC 1494 (Two Judges), has upheld the following test for determining as to whether the authority constituted under a particular Act is exercising judicial or quasi judicial powers as a Court or not:

"(i) the dispute [which is to be decided by him] must be in the nature of a civil suit;

(ii) the procedure for determination of such a dispute must be a judicial procedure; and

(iii) the decision must be a binding one."

2. Relying upon Associated Cement Companies Ltd. vs. P.N. Sharma &anr., AIR 1965 SC 1595 (Five Judges), the Court in Union of India vs. R.Gandhi, President, Madras Bar Association, (2010) 11 SCC 1 (Five Judges), held that:-

"The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law." ... ...

> … … *"…Though both Courts and Tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and Tribunals. They are:*
>
> *(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.*
>
> *(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions."*

12. Bearing in mind the aforesaid exposition of law as rightly held by a Co-ordinate Bench of this Court, it cannot be said that the Deputy Commissioner is functioning as a Court as there is no dispute of a civil nature before him, even the procedure for determination of such dispute is not strictly a judicial procedure and the decision so rendered is otherwise not final and is subject to appeal under Section 6 of the Act.

13. In addition to above, the Rules only provide for mode of inquiry, however, the same only relates to matters covered under Section 4 of the Act i.e. 'Application for permission for transfer of land' and not to Section 5 i.e. 'Ejectment'.

(ii) Are the provisions of the Evidence Act applicable to the proceedings conducted by the Commissioner?

14. While answering a similar question in ***Savitri Devi's case*** (supra), it was observed as under:-

> "24.*The word "Court" defined under the Indian Evidence Act includes Judges, Magistrates and all persons except Arbitrators, legally authorized to take Evidence. A person can be cross-examined (under Chapter X) only if he is called as a witness and examined.*
>
> *25. Evidence Act has no application to inquiries conducted by the Tribunal even though they may be judicial in character has been so held by the Constitution Bench in Union of India Versus T.R. Varma, AIR 1957 SC 882 (Five Judges).*
>
> *26. Also inquiry held by an Administrative Tribunal is not governed by the strict and technical rules of the Evidence Act. [The State of Orissa and another Versus Murlidhar Jena, AIR 1963 SC 404 (Five Judges)].*
>
> *27. In Maharashtra State Board of Secondary and Higher Secondary Education Versus K.S. Gandhi and others, (1991) 2 SCC 716 (Two Judges), the Court held that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. Therefore, when an inference of proof that a fact in dispute has been held established, there must be some material facts or circumstances on record from which such an inference could be drawn. The standard of proof is not proof beyond reasonable doubt "but" the*

preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof cannot be put in a strait-jacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case. The standard of proof is same both in civil cases and domestic enquiries. Similar view was taken in State of Haryana and another vs. Rattan Singh, (1977) 2 SCC 491 (Three Judges).

28.Even while dealing with the provisions of the Industrial Disputes Act, the Court in Essen Deinki Vs. Rajiv Kumar, (2002) 8 SCC 400 (Two Judges) has held that the provisions of the Evidence Act per se are not applicable in an Industrial adjudication. But however general principles would be applicable and it would be imperative upon the Industrial Tribunal to ensure that principles of natural justice are complied with. The view stands reiterated in Manager, Reserve Bank of India, Bangalore vs. S. Mani and others, (2005) 5 SCC 100 (Three Judges)."

15. On the basis of the aforesaid exposition of law, this Court has no difficulty in holding that the office of the Commissioner does not fall within the definition of the Court because neither the provisions of the Code of Civil Procedure nor the Evidence Act are made applicable to the proceedings before the Commissioner, as is evident from the Act and Rules already reproduced in totality (supra). Hence, it is only the material placed by the parties, based on the principles of preponderance of probabilities, which is required to be considered and appreciated by the Deputy Commissioner while adjudicating an application under Section 5 of the Act.

(iii) Does the Deputy Commissioner exercise administrative or judicial or quasi-judicial?

16. It cannot be disputed that whether or not an administrative body or authority functions as purely administrative one or in a quasi-judicial capacity, has to be determined in each case on an examination of the relevant statues and rules framed thereunder. In ***Savitri Devi's case*** (supra), while answering a similar question, as to whether the Commissioner exercises administrative or judicial or quasi-judicial function, it was observed as under:-

"32.Whether an Administrative Tribunal has a duty to act judicially or not, and whether Secretary Incharge of transport department was discharging functions as such, came up for consideration before the Constitution Bench in Gullapalli Nageswara Rao & others vs. Andhra Pradesh, State Road Transport Corporation & another, AIR 1959 SC 308 (Five Judges). The Court was dealing with a case where the Motor Vehicles Act, 1939, imposed a duty upon the Tribunal to decide as to whether certain persons were to be excluded from the routes upon which the vehicles were to be plied under the provisions of the Motor Vehicles Act and the Rules framed thereunder. The Court held that if the authority is called upon to decide the rights of the contesting parties, a duty is cast upon the Tribunal to act judicially.

33. In A. K. Kraipak& others vs. Union of India & others, (1969) 2 SCC 262 (Five Judges), the Court held that dividing line between an administrative power and quasi-judicial power, which is quite thin, is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law

conferring that power, the consequences resulting from the exercise of that power and the manner in which that power is expected to be exercised.

34. In Smt. Saraswati Devi & others vs. State of Uttar Pradesh & others, (1980) 4 SCC 738 (Five Judges) the Constitution Bench again had an opportunity of dealing with the scope of the powers to be exercised by the State Government under the provisions of the Motor Vehicles Act, 1939. Sections 68-C and 68-D empowered the State Government to modify the scheme, affecting rights of a private party. The Act provided opportunity of hearing to the parties, particularly whose rights were likely to be affected. The Court reiterated the principles laid down in Gullapalli (Supra).

35. Lately in State of Maharashtra & others vs. Saeed Sohail Sheikh & others, (2012) 13 SCC 192 (Two Judges), Court was called upon to decide as to whether the nature of the power exercised in transferring the undertrial from one to another prison was ministerial or judicial/quasi judicial in nature. While referring to its earlier decisions rendered in Province of Bombay vs. Khushaldas S. Advani, AIR 1950 SC 222; R. vs. Dublin Corpn. (1978 2 LR Ir 371; Frome United Breweries Co. Ltd. vs. Bath JJ, 1926 AC 586: 1926 All ER Rep 576 (HL); State of Orissa vs. Binapani Dei, AIR 1967 SC 1269; A. K. Kraipak (supra); Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405, Hon'ble Mr. Justice T. S. Thakur, J., speaking for the Bench, held that:

> *"27. Prof. De Smith in his book on 'Judicial Review' (Thomson Sweet & Maxwell, 6th Edn. 2007) refers to the meaning given by Courts to the terms 'judicial', 'quasi-judicial', 'administrative', 'legislative' and 'ministerial' for administrative law purposes and found them to be inconsistent. According to the author 'ministerial' as a technical legal term has no single fixed meaning. It may describe any duty the discharge whereof requires no element of discretion or independent judgment. It may often be used more narrowly to describe the issue of a formal instruction, in consequence of a prior determination which may or may not be of a judicial character. Execution of any such instructions by an inferior officer sometimes called ministerial officer may also be treated as a ministerial function. It is sometimes loosely used to describe an act that is neither judicial nor legislative. In that sense the term is used interchangeably with 'executive' or 'administrative'. The tests which, according to Prof. De Smith delineate 'judicial functions', could be varied some of which may lead to the conclusion that certain functions discharged by the Courts are not judicial such as award of costs, award of sentence to prisoners, removal of trustees and arbitrators, grant of divorce to petitioners who are themselves guilty of adultery etc.We need not delve deep into all these aspects in the present case. We say so because pronouncements of this Court have over the past decades made a distinction between quasi-judicial function on the one hand and administrative or ministerial duties on the other which distinctions give a clear enough indication and insight into what constitutes ministerial function in contra- distinction to what would amount to judicial or quasi-judicial function."*
>
> *… …. …*

"34. Recently this Court in Jamal Uddin Ahmad v. Abu Saleh Najmuddin (2003) 4 SCC 257 dealt with the nature of distinction between judicial or ministerial functions in the following words: (SCC p. 270, para 14)

> *"14. The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or performance whereof may be secured through authorization.*
>
> > *'The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all State officials who are neither legislators nor judges.'*
>
> *(See Constitutional and Administrative Law, Phillips and Jackson, 6th Edn., p. 13.) P. Ramanatha Aiyar's Law Lexicon defines judicial function as the doing of something in the nature of or in the course of an action in court. (p. 1015) The distinction between "judicial" and "ministerial acts" is:*
>
> > *If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting ministerially. (pp. 1013-14).*
>
> *Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, maybe after making an enquiry, and the decision affects the rights and obligations of the parties. There is a duty to act judicially. The Judge may construe the law and apply it to a particular state of facts presented for the determination of the controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. (Law Lexicon, ibid., p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty.""*

[Emphasis supplied]

36. In Godrej & Boyce Manufacturing Company Ltd. & another vs. State of Maharashtra & others, (2014) 3 SCC 430 (Three Judges), Hon'ble Mr. Justice Madan B. Lokur, J., speaking for the Bench, has also observed that the first rule of interpretation being that words in a statute must be interpreted literally. However at the same time, if the context in which a word is used and the

provisions of a statute inexorably suggests a subtext other than literal, then the context becomes important.

37. In B.A. Linga Reddy & others vs. Karnataka State Transport Authority &othrs, (2015) 4 SCC 515 (Two Judges), Hon'ble Mr. Justice Arun Mishra, J. speaking for the Bench reiterated the principle that the power exercised by the authority in modifying the scheme under the Motor Vehicles Act is quasi judicial in nature mandating the authority to assign reasons and pass a speaking order. This alone would exclude arbitrariness in an action.

38. Ex-proprietary legislation, which deprives a person of his right of property, has to be strictly construed."

17. Applying the aforesaid principles to the instant case, it can conveniently be held that the Deputy Commissioner while adjudicating the claim is required to apply his mind and arrive a positive finding affecting rights of the parties. Such rights of the parties can be adversely affected with the exercise of such powers and any adverse order may entail civil consequences. Hence, the power exercised by the Commissioner can be said to be quasi-judicial and not administrative or ministerial.

(iv). Principles of natural justice, its facets and obligation of the Deputy Commissioner to comply with the same.

18. While, answering the similar question in ***Savitri Devi's case*** (supra), it was observed as under:-

42. In *Nagendra Nath Bora* (supra) the court observed that:-

"17. … … this Court has laid down that the rules of natural justice vary with the varying constitution of statutory bodies and the rules prescribed by the Act under which they function; and the question whether or not any rules of natural justice had been contravened, should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions. In the instant case, no such rules have been brought to our notice, which could be said to have been contravened by the Appellate Authority. Simply because it viewed a case in a particular light which may not be acceptable to another independent tribunal, is no ground for interference either under Art. 226 or Art.227 of the Constitution." (Emphasis s

43.The question of applicability of audi alteram partem in the proceedings before the Tribunal has been inviting attention of the Courts in India. The rule that a party to whose prejudice any order is intended to be passed is entitled to hearing applies to judicial Tribunals and Bodies or persons invested with the authority to adjudicate upon the matters involving civil consequences. [Gullapalli (Supra)]. It is one of the fundamental rules of our Constitutional set up that every citizen is protected against the exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the functions intended to be performed. If there is power to decide and determine the prejudice of a person, duty to act judicially is implicit in the exercise of such power. This is the basic concept of rule of law.

44. While construing the meaning of expression "hearing and objections", under the provisions of Section 68-D of the Motor Vehicles Act, 1939, even where evidence could be produced and adduced, the Constitution Bench in Malik Ram vs. State of Rajasthan & others, AIR 1961 SC 1575 (Five Judges), held as under:

> *"7. We may however point out that the production of evidence (documentary or oral) does not mean that the parties can produce any amount of evidence they like and prolong the proceedings inordinately and the State Government when giving the hearing would be powerless to check this. We need only point out that though evidence may have to be taken under S. 68-D (2) it does not follow that the evidence would be necessary in every case. It will therefore be for the State Government, or as in this case the officer concerned, to decide in case any party desires to lead evidence whether firstly the evidence is necessary and relevant to the inquiry before it. If it considers that evidence is necessary, it will give a reasonable opportunity to the party desiring to produce evidenceto give evidence relevant to the enquiry and within reason and it would have all the powers of controlling the giving and the recording of evidence that any court has, Subject therefore to this overriding power of the State Government or the officer giving the hearing, the parties are entitled to give evidence either documentary or oral during a hearing under S. 68-D(2)."*
>
> *[Emphasis supplied]*

45. In Union of India & another vs. P. K. Roy & others, AIR 1968 SC 850 (Five Judges), the Constitution Bench held that the extent and application of doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. Application of the doctrine is dependent upon the nature of jurisdiction conferred on the administrative authority; the character of the rights of the persons affected; the scheme and policy of the statute and other relevant circumstances disclosed in the particular case.

46. In *A. K. Kraipak*(Supra), the Court observed that rules of natural justice operate in areas not covered by any law validly made, that is, they do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice.

It further held that:-

> *"The concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that enquiries must be held in good faith and without bias, and not arbitrarily or unreasonably, is now included among the principles of natural justice."* *[Emphasis supplied]*

47. In the *Government of Mysore & others vs. J. V. Bhat & others*, (1975) 1 SCC 110 (Three Judges), the Court further held that the nature of hearing, would vary according to the nature of functions, and what is a just and fair, is required to be exercised in the context of rights affected.

48. In *The Government of Mysore* (Supra), the Court has held as under:-

> "5. The *audi alteram partem* rule was held to be applicable by implication, to a case of deprivation of a right in property in *Daud*

Ahmed vs. District Magistrate Allahabad & others, (1972) 1 SCC 655, where this Court held (SCC para 12):

> *"It is the nature of the power and the circumstances and conditions under which it is exercised that will occasion the invocation of the principle of natural justice. Deprivation of property affects rights of a person. If under the Requisition Act the petitioner was to be deprived of the occupation of the premises the District Magistrate had to hold an enquiry in order to arrive at an opinion that there existed alternative accommodation for the petitioner or the District Magistrate was to provide alternative accommodation." "*

49. A Constitution Bench has laid down in Krishna Swami vs. Union of India, (1992) 4 SCC 605 (Five Judges) that if a statutory or public authority/functionary does not record reasons, its decision would be rendered arbitrary, unfair, unjust and violative of Articles 14 and 21 of the Constitution. Reasons are links between the material, the foundation for their erection and the actual conclusions, demonstrative of the mind of the maker, activated and actuated with the rational nexus and synthesis with the facts considered and the conclusions reached.

50. Significantly in Cantonment Board & another vs. Mohanlal & another, (1996) 2 SCC 23 (Two Judges), the Court was of the view that where the party admitted having breached the provisions of law qua the action sought to be rectified, there was no question of applicability of provisions of principles of natural justice.

51.While dealing with a case where the assessee himself had tampered and pilfered with the electricity connection, the Court in M. P. Electricity Board, Jabalpur & others vs. Harsh Wood Products & another, (1996) 4 SCC 522 (Two Judges) held non issuance of prior statutory notice for disconnecting the electricity supply by the authority not to be violative of Articles 20(1) & 14 of the Constitution of India or the principles of natural justice.

52.As to what is the meaning of the word 'natural justice", came up for consideration in Canara Bank vs. V. K. Awasthy, (2005) 6 SCC 321 (Two Judges), wherein disciplinary action taken against the employee was subject matter of challenge and the Court held that it is not easy to determine the term principle of natural justice as it would contextually depend upon given fact situation. The Court held that natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. It is the substance of justice which has to determine its form. The court further held that the principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. The intent being to prevent the authority from doing injustice. It observed that the concept of natural justice having undergone a great deal of change, such rules are not embodied, for they may be implied from the nature of duty to be performed under a statute.

53.What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of each case, the framework of the statute under which the enquiry is held. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

54. What is "fair hearing" stands deliberated in Natwar Singh vs. Director of Enforcement and another, (2010) 13 SCC 255 (Two Judges) in the following terms:

> *"30. The right to fair hearing is a guaranteed right. Every person before an Authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognized by this Court in Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal, AIR 1955 SC 65: (1955) 1 SCR 941. <u>However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not brought to his notice</u>. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future [See R vs. Secretary of State for Home Department, ex. p. H- (1995) QB 43: (1994) 3 WLR 1110: (1995) 1 All ER 479 (CA)].*
>
> *31. The concept of fairness may require the Adjudicating Authority to furnish copies of those documents upon which reliance has been placed by him to issue show cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in built into the Rules. A noticee is always entitled to satisfy the Adjudicating Authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry."*
>
> *(Emphasis supplied)*

55. In Automotive Tyre Manufactures Association vs. Designated Authority & others, (2011) 2 SCC 258 (Two Judges) the Court held that:-

> *"80. It is thus, well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a strait-jacket nor is it a general rule of universal application.*
>
> *81. Undoubtedly, there can be exceptions to the said doctrine. As stated above, the question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of these matters that the question of application of the said principle can be properly determined. (See: Union of India vs. Col. J.N. Sinha &Anr. (1970) 2 SCC 458.)"*
>
> *[Emphasis supplied]*

56. Further in Ashwin S. Mehta & another vs. Union of India & others, (2012) 1 SCC 83 (Two Judges) Court observed that the underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by any authority, irrespective of whether the power which is conferred on a statutory body or tribunal is administrative or quasi-judicial. The Court elaborated that discretion when applies to a court of justice means discretion guided by law. It must not be arbitrary, vague and fanciful, but legal and regular.

57. In A. S. Motors Pvt. Ltd. vs. Union of India & others, (2013) 10 SCC 114 (Two Judges) the Court had an occasion to deal with a case where on account of certain violations noticed by the National Highway Authority of India, right of a licensee to collect toll fee, on the basis of certain reports, stood forfeited. The court reiterated the principle that rules of natural justice are not embodied rules. The question whether requirements of natural justice stood met by the procedure adopted would, to a great extent, be dependent upon the facts and circumstances of the case in point, the constitution of the Tribunal and its governing rules. The court reiterated the principles laid down in Keshav Mills Co. Ltd. vs. Union of India, (1973) 1 SCC 380 (Three Judges) that the concept of natural justice could not be put into a strait-jacket. Hence it would be futile to look for definitions or standards of natural justice from various judicial pronouncements and then try to apply them to the facts of any given case. Primarily, what is essential, in all cases, is that the person concerned should have had reasonable opportunity of presenting his case and that the authority should have acted fairly, impartially and reasonably. Grievance with regard to correctness of the report resulting into forfeiture of right was turned down keeping in view earlier litigation and absence of any act of malafide, bias or

prejudice on the part of the officers dealing with the issue. Eventually Hon'ble Mr. Justice T. S. Thakur, J, speaking for the Bench, observed that:-

> *"8. Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion. We may refer to only some of the decisions on the subject which should in our opinion suffice."*

58. It be only observed that recently in Union of India & others vs. Sanjay Jethi&another, (2013) 16 SCC 116 (Two Judges), Hon'ble Mr. Justice Dipak Misra, J., speaking for the Bench, observed that:-

> *"51.The principle that can be culled out from the number of authorities fundamentally is that the question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a Court or tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy of interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being coram non-judice. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. It is to be kept in mind that what is relevant is actually the reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias. To adjudge the attractability of plea of bias a tribunal or a Court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition."*

19. In addition to the above, I may also note that whether an act is administrative or quasi-judicial that per se does not repel the application of the principles of natural justice, as was held by the Hon'ble Supreme Court in ***Manohar s/o***

ManikraoAnchule*versus* ***State of Maharashtra and another, (2012) 13 SCC 14***, wherein it was held as under:-

> "18. *In the case of A.K. Kraipak&Ors. v. Union of India &Ors. [(1969) 2 SCC 262], the Court held as under : (SCC pp.271-73, paras 17 & 20)*
>
> > *"17. … It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding…*
> >
> > *20.The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.… The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (Nemo debetesse judex propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. University of Kerala the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.*
>
> *19. In the case of Kranti Associates (P) Ltd. &Ors. v. Masood Ahmed Khan &Ors. [(2010) 9 SCC 496], the Court dealt with the question of demarcation*

between the administrative orders and quasi-judicial orders and the requirement of adherence to natural justice. The Court held as under : (SCC pp. 510-12, para 47).

> *"47. Summarising the above discussion, this Court holds:*
>
> *(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b) A quasi-judicial authority must record reasons in support of its conclusions.*
>
> *(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
>
> *(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi- judicial or even administrative power.*
>
> *(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.*
>
> *(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
>
> *(g) Reasons facilitate the process of judicial review by superior courts.*
>
> *(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.*
>
> *(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*
>
> *(j) Insistence on reason is a requirement for both judicial accountability and transparency.*
>
> *(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*
>
> *(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.*
>
> *(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-*

makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'."

20. The Court has also taken the view that even if cancellation of the poll were an administrative act that per se does not repel the application of the principles of natural justice. The Court further said that:

"53.....classification of functions as judicial or administrative is a stultifying shibboleth discarded in India as in England. Today, in our jurisprudence, the advances made by the natural justice far exceed old frontiers and if judicial creativity blights penumbral areas, it is also for improving the quality of Government in injecting fair play into its wheels."

Reference in this regard can be made to Mohinder Singh Gill v. Chief Election Commissioner [(1978) 1 SCC 405],(SCC pp. 435-36, para 53).

21. Referring to the requirement of adherence to principles of natural justice in adjudicatory process, this Court in the case of Namit Sharma v. Union of India [2012 (8) SCALE 593], held as under: (SCC p. 799, para 99)

"99. It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are required to pass reasoned orders. In this regard, reference can be made to the judgments of this Court in the cases of Siemens Engineering & Manufacturing Co. of India Ltd. v. Union of India &Anr. [(1976) 2 SCC 981]; and Assistant Commissioner, Commrcial Tax Department Works

Contract and Leasing, Kota v. Shukla & Brothers [(2010) 4 SCC 785]."

20. It is, thus, seen that the Deputy Commissioner is bound to comply with the principles of natural justice and, therefore, his actions must be reasonable, just, fair, impartial, reasoned, logical and honest. However, the extent of applicability of principles of natural justice would be dependent on the given facts and situation obtaining in each case.

21. Bearing in mind the aforesaid principles, it would be noticed that as regards the order passed by the Deputy Commissioner, the same is totally unsustainable in the eyes of law as admittedly the same was passed without hearing the parties. What is rather more shocking is that on 05.10.2016, he passed the following order:-

"Case called. Sh. Shiv Lal appellant with Ld. Counsel Mukesh Boris for appellant is present. Sh. D.C. Negi is present as Ld. Counsel for the respondent. The respondent be directed to vacate the said land from the area of appellant within a month. Detail order passed which is placed on the case file. Copy of order be sent for the respondent through SHO, Sangla for compliance. Case file of this Court be consigned to the record room after due completion. Announced."

22. However, apparently no detailed order or judgment was ever passed by the Deputy Commissioner until 27.03.2017 whereby he allowed the application by passing somewhat a detailed order which apparently was passed without hearing the parties and, therefore, principles of *audi alteram partem* have been violated. However, then the Courts have repeatedly remarked that the principles of natural justice are very flexible principles, they cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For these two reasons, certain exceptions to the aforesaid principles have been invoked under certain circumstances which have been duly noted and laid down by the Hon'ble Supreme Court in ***Dharampal Satyapal Limited*** *versus* ***Deputy Commissioner of Central Excise, Gauhati and others, (2015) 8 SCC 519***in the following terms:-

"42. So far so good. However, an important question posed by Mr. Sorabjee is as to whether it is open to the authority, which has to take a decision, to dispense with the requirement of the principles of natural justice on the ground that affording such an opportunity will not make any difference? To put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action is contemplated? Answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. This was so held by the English Court way back in the year 1943 in General Medical Council v. Spackman 1943 AC 627. This Court also spoke in the same language in Board of High School and Intermediate Education, U.P. &Ors. v. Kumari Chittra Srivastava &Ors. (1970) 1 SCC 121, as is apparent from the following words: (SCC p. 123, para 7).

"7. The learned counsel for the appellant, Mr. C.B. Agarwala, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show cause notice on the petitioner. He says that in view of these circumstances it was not necessary for the Board to have issued a

show cause notice. We are unable to accept this contention. Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed."

43. In view of the aforesaid enunciation of law, Mr. Sorabjee may also be right in his submission that it was not open for the authority to dispense with the requirement of principles of natural justice on the presumption that no prejudice is going to be caused to the appellant since judgment in R.C. Tobacco(P) Ltd. v. Union of India (2005) 7 SCC 725 had closed all the windows for the appellant.

44.At the same time, it cannot be denied that as far as Courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in ECIL versus B. Karunakar (1993) 4 SCC 727 itself in the following words: (SCC p. 758, para 31)

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/ Tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/ Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as it regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

23. Keeping in view the aforesaid principles in mind, even when this Court has found that there is an infraction of principles of natural justice, I still have to further address a question as to whether any purpose would be served in remitting the case to the authority to take fresh decision after hearing the appellant. However, would it not be a mere ritual of hearing, particularly, when the appeal by the appellate authority, i.e. the Divisional Commissioner, has already been decided. Similar, issue was considered in ***Dharampal's case (supra)*** wherein after observing as above, it was held as under:-

"45.Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case,

we find that such an exercise would be totally futile having regard to the law laid down by this Court in R.C. Tobacco (supra).

46.To recapitulate the events, the appellant was accorded certain benefits under Notification dated July 08, 1999. This Notification stands nullified by Section 154 of the Act of 2003, which has been given retrospective effect. The legal consequence of the aforesaid statutory provision is that the amount with which the appellant was benefitted under the aforesaid Notification becomes refundable. Even after the notice is issued, the appellant cannot take any plea to retain the said amount on any ground whatsoever as it is bound by the dicta in R.C. Tobacco (supra). Likewise, even the officer who passed the order has no choice but to follow the dicta in R.C. Tobacco (supra). It is important to note that as far as quantification of the amount is concerned, it is not disputed at all. In such a situation, issuance of notice would be an empty formality and we are of the firm opinion that the case stands covered by 'useless formality theory'.

47. In Escorts Farms Ltd. (Previously known as M/s. Escorts Farms (Ramgarh) Ltd.) v. Commissioner, Kumaon Division, Nainital, U.P. &Ors., (2004) 4 SCC 281, this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same time, it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms: (SCC pp. 309-10, para 64)

> *"64. Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure prescribed and violation of rules of natural justice. In these appeals preferred by the holder of lands and some other transferees, we have found that the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the Constitution of India."*

48. Therefore, on the facts of this case, we are of the opinion that non- issuance of notice before sending communication dated June 23, 2003 has not resulted in any prejudice to the appellant and it may not be feasible to direct the respondents to take fresh action after issuing notice as that would be a mere formality."

24. Now, adverting to the order passed by the Divisional Commissioner, the only right which the petitioner could have claimed was a right of fair hearing as I have already held that the petitioner had no right to lead evidence as the same is otherwise not contemplated either under the Act or the Rules framed thereunder. It is evident from the order passed by the Divisional Commissioner that the same is a detailed and reasoned one and has been passed after affording proper opportunity of hearing to the petitioner.

25. Admittedly, the petitioner had entered into an agreement on 21.08.2006 whereby as per terms and conditions an advance of Rs.3,00,000/-was paid by it to

respondent No.1 in lieu of the land given to it on lease for 12 years and actual rent of Rs.1,00,000/- was fixed which was required to be increased at the rate of 5% after every two years. This proposal was sent to the Tribal Development Department for according permission under the Act which was duly accorded. Even though, the Tribal Development Department did accord the permission, however, instead of lease for 12 years, the same was approved only for 5 years with effect from 01.01.2006 subject to the condition that the minimum annual lease amount would be Rs. 50,000/- with an annual increase of 7.5% as annual lease amount of Rs.25,000/-, as is evident from the letter dated 24.01.2006 (Annexure P-1) which reads thus:-

"No.TD(F) 10-1/97-IV
Government of Himachal Pradesh
Tribal Development Department

From

The Principal Secretary(TD) to the
Government of Himachal Pradesh.

To

The Divisional Commissioner,
Shimla Division, Shimla-2.

Dated: Shimla-171002, 21, January, 2006.

Subject:- Land Transfer permission case under section 3(1) of the H.P. Transfer of Land (Regulation) Amendment Act, 2002.

Sir,

I am directed to refer to your letter No.Div. Commr(SML) LR-1(4)KNR/2001-2855 dated 17 May, 2003 on the subject cited above and to say that the proposal of transfer of land in favour of Banjara Camp & Travels Delhi by Shri Shiv Lal S/O Shri Inder Singh, Village Batseri, Tehsil Sangla, Distt. Kinnaur is recommended for five years lease w.e.f. 1.01.2006 subject to the condition that the minimum annual lease amount is Rs.50,000/- with annual increase of 7.5% as the annual lease amount of Rs.25,000/- for an area of about 8 bighas is too meager which amounts to exploitation. All relevant papers as received from your office letter referred above are returned in original herewith for necessary action accordingly please.

Yours faithfully,
sd/-
Under Secretary(TD) to the
Government of Himachal Pradesh.

Endst. No. As above. Dated: Shimla-171002, January, 2006.

Copy forwarded to Shri Shiv Lal, S/O Shri Inder Singh, Village Batseri, Tehsil Sangla, Distt. Kinnaur for information and necessary action please.

Under Secretary(TD) to the
Government of Himachal Pradesh."

26. Consequent upon such permission, the lease which commenced on 01.01.2006 and was signed between the parties on 08.09.2006 automatically came to an end on 31.12.2010. Earlier to that on 03.09.2010, the parties entered into an another lease deed which was signed by respondent No.1 and petitioner, but the same only pertained to the built-up portion and its permission was for 23 years commencing from 01.10.2010 on yearly rent of Rs.2,00,000/-for the first five years with increase of 25% for every three years and further increase at the rate of 15% after every three years. The other terms and conditions of the lease includes para-4.

27. Shri Satyen Vaidya, Senior Advocate, assisted by Shri Vivek Sharma, Advocate, for the petitioner would argue that this lease is, in fact, in continuation of the earlier lease and it is for this precise reason that the lease amount has not only been substantially, but has been increased by doubling the amount from Rs.1,00,000/- to Rs.2,00,000/-.

28. However, I find no force in this submission for more than one reason. Firstly, there is not even a whisper in the lease deed executed on 01.10.2010 that this lease was in continuity of the earlier lease commencing from 01.01.2006 that was signed between the parties on 08.09.2006 having validity of five years. Secondly, the first lease which admittedly was to expire on 31.12.2010 was already in force and, therefore, there was no question of having executed the second lease. Thirdly, in absence of any permission for transfer of interest in land, the same would otherwise be void under sub-section (2) of Section 3 of the Act.

29. That apart, the earlier lease pertained to land comprised in KhataKhatauni No. 51/151 min, Khasra Nos. 1193, 1194, 1195, 1198, 1205 and 1219, kitas-6, measuring 0-61-00 hectares qua which no further agreement was entered into between the parties nor any permission obtained from the State Government, whereas, the subsequent agreement that was entered into between the parties on 03.09.2010, the same only pertains to five numbers of single storey structures/houses constructed over a piece of land in Khasra No.1194, as is clearly evident from a perusal of the lease deed itself. In addition to that, in absence of there being any express permission from the State Government, the transfer of land in favour of the petitioner would automatically be void in terms of Section 3(2) of the Act which is once again reproduced and reads thus:-

"*(2) Every transfer of interest in land made in contravention of the provisions of sub-section (1) shall be void."*

30. In the given circumstances, the learned Divisional Commissioner was absolutely right in observing that the agreement dated 03.09.2010 was a separate (termed as parallel agreement in the order) and not in supersession to the agreement dated 08.09.2006 and this only remained confined to the built-up structure for which no permission was required under the Act.

31. Adverting to the plea of the petitioner that it is entitled to the protection under Sections 52, 54 and 55 of the Easement Acts to raise the plea of licensee, however, I find the same to be totally misplaced. Rather, the Divisional Commissioner is absolutely correct in observing that this plea is not open to the petitioner as it is not covered by any arrangement between the parties earlier since the lease agreement has already expired on 31.12.2010 and further there is no arrangement for allowing use of land partly or wholly by

the petitioner between the parties. Even if that was so, the same otherwise would be void in absence of any permission from the State Government as per sub-section (2) of Section 3 of the Act.

32. Sections 52, 54 and 55 of the Easements Act upon which much reliance has been placed by the learned counsel for the petitioner are reproduced hereinunder:-

> "***52. "Licence" defined.***- **.-***Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license***.**
>
> ***54.Grant may be express or implied.****-The grant of a license may be express or implied from the conduct of the grantor, and on agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license***.**
>
> ***55.Accessory licences annexed by law.****-All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right***. *Such licenses are called accessory licenses***."**

33. In addition thereto, what is more relevant for the purpose of adjudication of this lis is Section 53 which deals with the provisions as to who may grant licence and reads thus:-

> "***53. Who may grant licence.****- A licence may be granted by any one in the circumstances and to the extent in and to which he may transfer his interest in the property affected by the licence."*

34. Admittedly, respondent No.1 has not expressly granted any licence in favour of the petitioner and the same otherwise cannot be handed over or implied from the conduct of respondent No.1. Even otherwise, it is settled law that the owner of the land, who is subject to certain restrictions in respect of the use of land imposed by statute in the interest of the public, or otherwise, cannot lawfully grant a licence to make any use of the land which is an use within restriction.

35. It is more than settled that a statute is best interpreted when one knows why it was enacted. If statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. (Refer: ***RBI*** *versus* ***Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424, para 33****)* and reiterated in ***Gaurav AseemAvtej****versus* ***Uttar Pradesh State Sugar Corporation Limited and others, (2018) 6 SCC 518,*** wherein it was observed as under:-

> *"15. A statute is best interpreted when we know why it is enacted. If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. (Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. And Others (1987) 1 SCC 424 para 33). Reasons for the enactment of the 1971 Act are set out in the statement of objects and reasons. The serious problems created for the cane growers and labourers due to mismanagement of certain sugar mills led to a situation where the only solution was to acquire the said sugar mills with a*

view to renovate and rehabilitate the mills. The interpretation of the provisions of the 1971 Act should be made by keeping in mind the above background. The contention of the Appellant is that the land belonging to him was leased out to the sugar mill and the vesting is only of the leasehold interest in the land and that he continues to be the title holder. We are unable to agree. A detailed examination of the provisions of the Act would make it clear that the intention was to secure all assets which were being used for the purposes of the factory. (State of U.P. v. Lakshmi Sugar & Oil Mills Ltd., (2013) 10 SCC 509). The crucial words in Section 2 (h) (vi) are "held or occupied for purposes of that factory."

36. Reasons for enactment of the Act have already been set out (supra). Bearing in mind the aforesaid objects and reasons coupled with the factual legal position, it is difficult to hold that the petitioner after the expiry of the agreement on 31.12.2010 became a licensee expressly or impliedly. In addition to that, as already observed above, such arrangement would otherwise be contrary to the Act.

37. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

38. However, before parting, it needs to be observed that the manner in which the decision has been rendered by the Deputy Commissioner is wholly subvertive to judicial decorum and propriety which forms the basis of judicial procedure.

39. This Court in ***CMPMO No. 259 of 2016****, titled* ***Balak Ram Sharma*** *versus* ***The Ex-Committee of Bhagal Land Loosers Transport Co-operative Society Darlaghat and others****,* decided on 17.05.2017, while dealing with the role of adjudicatory authority under the provisions of the H.P. Co-operative Societies Act, 1968, observed as under:-

"19. It will be naive to mention that deciding the question of right, title and interest even in matter relating to co-operative societies involve complicated question, but nonetheless such power has been vested with the authorities under the Act. It has, therefore, to be accepted that such officers/ authorities would be well equipped in law to factually adjudicate such question. Therefore, those entrusted or required to adjudicate such disputes should have studied law or at least trained in law. A litigant entering into the precincts of the Court should have the trust and confidence that the person who sit on the chair as an adjudicator/Judge is competentto appreciate and understand matter having regard to his knowledge and capability and is adequately equipped to decide. For such litigants high sounding designation is not of much worth, and it is only his confidence and trust what matters. For often one comes across instances where orders patently show lack of rudimentary and fundamental knowledge of law. It has to be remembered that people who go before the authority, go there with feeling that they are going to get substantive and effective justice and they should not come back with the feeling that the adjudicating machinery prosecuted under the act is a mockery.

20. At this juncture, it shall be apt to refer to a Division Bench Judgment of Hon'ble High Court of Orissa in ***Raghunath Mukhi v. Chakrapani Mukhi (Dead) and after him Musa Bewa, 1992 (1) Orissa LR 191****, wherein it was observed as under:-*

[3] Under the scheme of the Act, the revisional authority being the highest forum in the hierarchy adjudicating questions of facts and

law should be a substitute in reality and not theoretically. Law is respected and obeyed when the people have trust and faith in it. Law is made for the weal of the people. Hence, if the well being of the people is the object of the law, they should have trust not only in the contents of the law but also in its implementation by the agency entrusted therewith. If implementation is not commensurate with the object and purpose of the law, it fails to create confidence in the minds of the people and loses their trust. The result is disenchantment and chaos. It therefore behaves the implementing agency to implement the law not only in letter but also in spirit.

[4] This prologue is considered warranted having regard to our perception of the implementation of the scheme of the Consolidation Act by the Government.

[5] The consolidation authorities by the very nature of the jurisdiction vested in them are required to adjudicate civil right involving personal law and relating to immovable property and other civil rights. Even the questions that crop up and posed are of complicated nature. It, therefore, obligates the authorities to know the law before they assume and exercise jurisdiction to adjudicate in accordance with law and for the litigants, an ignorant judge is a devil's representative putting on the mask of an adjudicator. It is no doubt true that ail adjudicators and Judges are not learned in law in all its branches. Law is a vast ocean. Study for a lifetime even would not be enough to make it. But those who are required to adjudicate civil rights including personal and properly rights should have studied law or are trained in law. It is a trite saying that justice must not only be done, but seem manifestly to have been done. Hence a person involved in a civil dispute before he enters the precincts of the Court should have the trust and confidence that the person who sits on the chair as an adjudicator. Judge is competent to appreciate and understand matters having regard to his knowledge and capability and is adequately equipped to decide. For him high sounding designation is not of much worth, his confidence and trust are what matters. When the people make laws through their representatives for their happiness and well-being, they intend that the authorities under the Act who are being made substitutes of the Presiding Officers in the Civil Courts and the High Court should also be competent by virtue of their ability to function truly as substitutes. Otherwise, it will be a fraud on the peoples' intention. Therefore, as we have said, the psychological factor in the mind of the litigant is more important than how a is lis decided by the adjudicating authority. A person ignorant and innocent of law cannot create that trust nor is he capable of adjudicating by hearing both the sides. It is the duty of the Judge to utilise his own insight into law even where the parties have tumbled or failed. For adjudicating the lis in accordance with law to the best of his Judgment is his responsibility and obligation. To decide to the best of his Judgment, he must be properly equipped in law to understand, appreciate and decide.

[6] Can one think of a highly eminent engineer or erudits Judge ignorant of human anatomy or surgery conducting operation on

human body. It is unthinkable ; it is preposterous for someone not versed in surnery or anatomy of the body making an attempt. That is why specialities and super specialities abound. So also in the matter of administration of law, the person concerned should have the knowledge of law howsoever gathered-either by courses in college or otherwise or should be trained in law.

[7] To call upon an administrative officer howsoever eminent or competent he might be in his own field but who does not have the knowledge of law or is not trained in law or does not have the judicial aptitude and acumen, is akin to a Judge being called upon to conduct a surgical operation. Hence it follows that as a Judge or an engineer cannot be appointed as a Professor of Surgery or even as a surgeon so too a person unversed in law; ignorant in law should not be entrusted with the responsibility of adjudicating questions of law for, that would amount to breach of trust that the people imposed on the implementing agency. They intended that competent and worthy persons capable of adjudicating civil rights involving questions of law-simple and complicated-should be appointed as adjudicators.

[8] So far as the Assistant Consolidation Officer is concerned, it is a different matter. Matters in which parties come to an amicable settlement are disposed of by him. But where the parties differ and are out for a fight, do not the people expect that the referee, the Judge, the adjudicator should be competent ? Now coming to the question of referee if a person does not know the rules of the game of football, can he be a competent referee ? Should such a 'person be appointed as a referee ? So also in matters of adjudication under the Consolidation Act.

[9] We are constrained to dilate at length because of our experience in the High Court day after day, month after month and year after year in regard to matters arising under the Consolidation Act. Very often we find persons adjudicating know not even the rudiments of the laws and procedures. To appreciate questions of law presented by both the parties, it is necessary to appreciate, comprehend and then adjudicate. Therefore, to appreciate and comprehend, the adjudicator should know the fundamentals, the rudiments of law or must have been trained in law or must to have been involved in adjudication of legal matters for a number of years so as to clothe him with competence. We do not want to generalize because some Officers in the lower rung as well as at the highest level have displayed a good comprehension of the law and its application, and have brought to bear a judicial mind on matters in dispute but, as we said, the chair does not confer competence. It is the competence of the parson that confers dignity and trust on the chair.

[10] From our experience we can boldly say that while appointing the Commissioner or the revisional authority, the implementing agency, i. e., the Government, has not always kept this in mind. Law was not framed for the purpose of statistics. It was framed for the object and purposes depicted in the objects and reasons and the Preamble to the Act.

[11] The law may be inter vires but if it is implemented in a manner inconsistent with the objects and purpose, action could be challenged as ultra vires, as a fraudulent imposition. Hence appointment of an incompetent person to adjudicate legal matters can be challenged as ultra vires being contrary to the intendment.

[12] No doubt jurisdiction is vested in this Court under Arts. 226 and 227 of the Constitution to set right injustice, mistakes in proceeding before the consolidation authorities. But it should be borne in mind that such jurisdiction is discretionary and is not a matter of right and is otherwise also circumscribed. Besides the more important question is ; Why should not the people have faith in the adjudication by the consolidation authorities but have to rush to this Court with their grievances. Faith and faith alone in the adjudicator is the paramount consideration.

26. Conducting judicial business does require certain amount of acumen and judicial discipline, the order sheets have to be maintained and must be self speaking, the files have to be properly indexed and paged and it is only then that credence is lent to such adjudicatory process, which are lacking in the instant case.

27. Notably, it is respondent No. 3, who in another case titled ***Manoj Kumar vs. ARCS, Dharamshala*** *had on 4.8.2015, passed the following order:- "4.8.2015*

Present: Ms. Ashima Sharma, Advocate, vice for Rahul Mahajan for respondents No. 2 to 4.

(2). Sh. Subhash Chand, Inspector for respondent No.1.

(3). Sh. Surinder Saklani, Counsel for the petitioner.

I am satisfied with the orders passed by the Hon'ble High Court of H.P. while allowing the period spent in pursuing the writ petition and condoning the same. Hence application under Sec. 5 of the Limitation Act is allowed. The case will come up for hearing on the issue of maintainability/ argument as 24.09.2015 at 3:00 P.M."

29. In the case of ***Satya Pal Anand v. State of Madhya Pradesh and another, reported in (2014) 7 SCC 244****, Hon'ble Supreme Court has held that the Registrars, Joint Registrars of the Co-operative Societies and other officials discharging quasi-judicial functions are supposed to be conscious of competing rights and decide issues justly, fairly and by legally sustainable orders. The State Government was directed to appoint suitable persons as Registrars, Joint Registrars, etc. commensurate with the functions exercised under scheme of State Cooperative Societies Act and it was observed as under:-*

20. Having determined the question raised, we would like to emphasize the need for appointment of suitable persons not only as Registrar, Joint Registrar etc. but as Chairman and members of the tribunal as well. While discharging quasi-judicial functions Registrar, Joint Registrars etc. have to keep in mind that they have to be independent in their functioning. They are also expected to acquire necessary expertise to effectively deal with the disputes coming before them. They are supposed to be conscious of competing rights in order

to decide the case justly and fairly and to pass the orders which are legally sustainable.

*21. In this behalf, we would like to refer to judgment dated 3.9.2013 passed in the Review Petition (C) No.2309/2012 (**Namit Sharma case**). In that case, one unfortunate feature that was noted was that experience over the years has shown that the orders passed by Information Commissions have, at times, gone beyond the provisions of the Right to Information Act and that Information Commissions have not been able to harmonise the conflicting interests indicated in the preamble and other provisions of the Act. The reasons for this experience about the functioning of the Information Commissions could be either that the persons who do not answer the criteria mentioned in Sections 12(5) and 15(5) have been appointed as Chief Information Commissioner or that the persons appointed even when they answer the aforesaid criteria, they do not have the required mind to balance the interests indicated in the Act. It was therefore insisted that experienced suitable persons should be appointed who are able to perform their functions efficiently and effectively. In this behalf certain directions were given and one of the directions was that while making recommendation for appointment of CIC and Information Commissioners the Selection Committee must mention against name of each candidate recommended the facts to indicate his eminence in public life (which is the requirement of the provision of that Act), his knowledge and experience in the particular field and these facts must be accessible to the citizens as part of their right to information under that Act, after the appointment is made.*

*22. Taking clue from the aforesaid directions, and having gone through the similar dismal state of affairs expressed by the petitioner in the instant petition about the functioning of the cooperative societies, we direct that the State Government shall, keeping in mind the objective of the Act, the functions which the Registrar, Joint Registrar etc. are required to perform and commensurate with those, appointment of suitable persons shall be made. Likewise, having regard to the fact that the Chairman of the Tribunal is to be a judicial person, namely, Former Judge of the High Court or the District Judge, we are of the opinion that for appointment of the Chairman and the Members of the Tribunal, the respondent-State is duty bound to keep in mind and follow the mandate of the Constitution Bench judgment of this Court in **R.Gandhi (supra)**. Thus, for appointment of the Chairman and Members of the Tribunal, the selection to these posts should preferably be made by the Public Service Commission in consultation with the High Court."*

*30. The aforesaid judgment along with host of other judgments was taken note of by a Co-ordinate Bench of this Court (Justice Rajiv Sharma,J.) in CMPMO No. 421 of 2014, titled **Tara Chand &Ors. v. Virender Singh &Anr., 2015(149) All India Cases 823,** decided on 19.3.2015 and it was observed as under:-*

"13. This Court is of the considered view that the Assistant Collector or Collector, Commissioner and Financial Commissioner (Appeals), must have the requisite legal background to adjudicate the matters

under the H.P. Land Revenue Act, 1953. They determine the valuable rights of the parties. The quasi judicial authorities are also required to take notice of the facts and thereafter to apply the law. The adjudication by the revenue authorities has certain trappings of the Court as well.

14. Their lordships of the Hon'ble Supreme Court in the case of ***Thakur Jugal Kishore Sinha vrs. The Sitamarhi Central Co-operative Bank Ltd. and another, reported in AIR 1967 SC 1494****, have held that the Assistant Registrar discharging functions of Registrar under S. 48 read with S. 6 (2) of Bihar and Orissa Co-operative Societies Act is a Court. Their lordships have held a under:*

> *"11. It will be noted from the above that the jurisdiction of the ordinary civil and revenue courts of the land is ousted under s. 57 L4 Sup. Cl/67-12 of the Act in case of disputes which fell under S. 48. A Registrar exercising powers under S. 48 must therefore be held to discharge the duties which would otherwise have fallen on the ordinary civil and revenue courts of the land. The Registrar has not merely the trappings of a court but in many respects he is given the same powers as are given to ordinary civil courts of the land by the Code of Civil Procedure including the power to summon and; examine witnesses on oath, the power to order inspection of documents, to hear the parties after framing issues, to review his own ,order and even exercise the inherent jurisdiction of courts mentioned in s. 151 of the Code of Civil Procedure. In such -a case, there is no difficulty in holding that in adjudicating upon a dispute referred under s. 48 of the Act, the Registrar is to all intents and purposes a court discharging the same functions and ,duties in the same manner as a court of law is expected to do.*

20. It was sought to be argued that a reference of a dispute had to be filed before the Registrar and under sub-s. 2(b) of s. 48 the Registrar transferred it for disposal to the Assistant Registrar and therefore his position was the same as that of a nominee under the Bombay Co-operative Societies Act. We do not think that contention is sound merely because sub-s. (2) (c) of s. 48 authorises the Registrar to refer a dispute for disposal of an arbitrator or arbitrators. This procedure was however not adopted in this case and we need not pause to consider what would have been the effect if the matter had been so transferred. The Assistant Registrar had all the powers of a Registrar in this case as noted in the delegation and he was competent to dispose of it in the same manner as the Registrar would have done. It is interesting to note that under r. 68 sub-r. (10) of the Bihar and Orissa Cooperative Societies Rules, 1959 :

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

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

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

"106. We may summarize the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for `Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is

the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

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

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

"18. Tribunals have primarily be en constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore,

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

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

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

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

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

> *"88....It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself....." The Court further observed that the creation of this Tribunal is founded on the premise that, specialised bodies comprising of both, well trained administrative members and those with judicial experience, would by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. The contention that the said Tribunal should consist only of a judicial member was rejected, and it was held that such a direction would attack the primary grounds of the theory, pursuant to which such Tribunals were constituted.*

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

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

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

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

.....

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

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

31. The very object of Constitution of adjudicatory authorities under the Act in the scheme of administrative justice was to provide an additional and speedy forum of adjudication. It is, therefore, of utmost importance to ensure that these authorities work in a proper, effective

and efficacious manner while exercising their powers to hear and dispose of quasi-judicial matters, which require some basic knowledge of law. While making decisions, such authorities must not lack judicious approach.

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

33.The adjudicatory authorities are conferred with the discretion to adjudicate upon quasi-judicial matters and such discretion is governed by the maxim "discretioest discerner per lagan quid sit justum" (discretion consists in knowing what is just in law). Discretion in general is the discernment of what is right and proper. It denotes knowledge and prudence that discernment which enables a person to judge critically of what is correct and proper, united with caution, to discern between falsity and truth, between shadow and substance, between equity and colourable glosses and pretences and not to do according to will and private affections or ill-will. It has to be done according to rules of reasons and justice, not according to private opinion. It has to be done according to law and not humour. It is not be arbitrary, vague and fanciful but legal and regular.

34.Understandably, the State could come up with a defence that it does not have the requisite number of officers who are well equipped in the field of law or have legal trainingand legal acumen, however, that by itself cannot be an excuse for playing havoc with the valuable rights of the litigants.

35. Incidentally, this Court was faced with somewhat identical situation in ***Cr.MMO No. 277 of 2016****,* ***titled Pankaj Mahajan vs. State of Himachal Pradesh****, decided on 26.4.2017, regarding the implementation of the Food Safety and Standards Act, 2006, wherein also the authorities were totally ill-equipped and lacked of basic knowledge of the provisions of the Act, constraining this Court to direct the authorities responsible for the enforcement of the Act to undergo training at the H.P. Judicial Academy.*

36.As the position in the instant case is no better or different, therefore, the Secretary, Cooperative Societies to the State is directed to take up the issue of training with the Director, H.P. Judicial Academy and thereafter draw up a calendar for imparting regular training to the officers vested with the adjudicatory powers and authority under the Act. Let, a copy of this order be supplied to the Secretary, Cooperative Societies for the State and to the Director, H.P. Judicial Academy, for compliance.

37. It is established that respondent No. 3 is not alone in the band-wagon amongst the authorities conferred with the adjudicatory powers who has exhibited lack of judicial approach and necessary expertise to effectively deal with the dispute coming before him and at the same time has been totally unconscious of the competing rights in order to decide the case justly and fairly and to pass the order which are

> *legally sustainable. Therefore, in the given circumstances, it will neither be fair or even prudent to accede to the request of the petitioner to restrain respondent No. 3 from discharging quasi-judicial function. At the same time, the Secretary (Cooperative Societies) as also the Registrar of Cooperative Societies have to ensure that the judgment rendered by the Hon'ble Supreme Court in* ***Satya Pal Anand case (supra)****, is complied with in its letter as also spirit."*

40. It is on account of repeated misdemeanours of the executive in exercise of its quasi-judicial functions that the Courts have understandably expressed intolerance in the investiture of essential judicial functions in the executive. More so, when they tend to erode the rights of a citizen conferred under the Constitution or the laws.

41. In the significant orders of the Hon'ble Supreme Court in ***Ram Prasad Narayan Sahi and another*** *versus* ***TheState of Bihar and others****,* ***AIR 1953 SC 215***, it was held that "*political party's desire cannot override the working of the legal system."* Other decisions where statutory provisions invading areas of quasi-judicial and judicial process have been struck down are ***P. Sambamurthy and others etc. etc.*** *versus* ***State of Andhra Pradesh and another, AIR 1987 SC 663*** and ***B.B.Rajwanshi****versus* ***State of U.P. and others, AIR 1988 SC 1089.***

42. Needless to say, when the statute under which an adjudicatory power is exercised by an untrained agency like the executive wing and when experience has shown a reckless way of handling such adjudicatory process and when it is demonstrated that such adjudications have adverse impact of an enormous proportion, the Court necessarily has to declare these acts as arbitrary and invalid.

43. At this stage, one may notice a recent judgment of the learned Division Bench of this Court in ***CWP No.981 of 2018****, titled as,* ***Mohan Mehta*** *versus* ***State of H.P. and others****, decided on 10.08.2018,* whereby while dealing with a matter under the Cooperative Societies Act, this Court has passed strictures against Capt. R.S. Rathore, Additional Registrar (Administration), Cooperative Societies, H.P. and the relevant observations read thus:-

> *"Without going into the question as to whether the Authority had jurisdiction to pass the impugned order dated 27th April, 2018, passed by Additional Registrar (Administration), Cooperative Societies, Himachal Pradesh, Shimla, in Revision Petition under Section 94(2) (b) of the H.P. Cooperative Societies Act, 1968, titled as Dharam Singh vs. The Distt. Audit Officer-cum-Registration Officer & another (Annexure P-6), leaving all issues open, we dispose of the present petition, solely on the ground that the order supplied to the writ petitioner, annexed as Annexure P-6, is totally different and distinct from what we find to be there in the record of proceedings maintained by the officer in the very same case, which we have perused in Court. It may not be a case of interpolation, but the manner in which, Capt. R.S. Rathore, Additional Registrar (Administration), Cooperative Societies, H.P., conducted the proceedings, to say the least, is absolutely illegal and shocking. We find his conduct to be most unbecoming that of a quasi judicial officer and in our considered view, he is absolutely unfit to discharge any such functions.*
>
> *6. As such, we direct the Chief Secretary to the Government of Himachal Pradesh, to forthwith withdraw such powers exercised by the said officer under the provisions of H.P. Cooperative Societies Act, 1968. However, if this officer stands transferred to any other place, in future, he shall not be*

assigned the duty of discharging functions, under any statute, wherever he is required to pass an order which is in the nature of quasi judicial."

44. This Court would only hope and trust that the State Government would conduct regular training for its Officers, especially, those who are handling adjudicatory process, so that the blunder as committed by the Deputy Commissioner is not repeated in future. It has to be remembered that the decisions by untrained adjudicators only add to the un-necessary pressure upon the Courts and consequently clog its dockets.

****

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

Oriental Insurance Company, Divisional Office, Shimla ....Petitioner.

Vs.

Anju Kumari and others .....Respondents.

CMPMO No.: 257 of 2018
Date of Decision: 19.09.2018

Constitution of India, 1950- Article 227- Supervisory jurisdiction – Nature – Held, in exercise of Supervisory jurisdiction conferred by Article 227 of Constitution of India, High Court not to act as Appellate Court – Findings returned by Lower Court if palpable and within its jurisdiction then High Court in exercise of Supervisory jurisdiction not to interfere with said findings. (Para-7)

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Order XVIII Rule 17- Re-examination/further cross-examination of witnesses – Permissibility – Claims Tribunal permitting insurer to place on record report of Investigator indicating cause of accident - Insurer also examining investigator to prove report – Insurer filing application for recall of earlier order and praying for further cross-examination of witnesses already examined vis-à-vis report of Investigator and also for examining witnesses examined by investigator during his investigation – Tribunal dismissing application by holding that application not disclosing purpose or object behind it – Petition against – Held- In guise of application filed for recalling order, Insurer cannot be permitted to fill up lacunae in its case – Order not perverse – Petition dismissed. (Paras- 8 & 9)

For the petitioner: Dr. Lalit K. Sharma, Advocate.

For the respondents: Mr. Sanjeev K. Suri, Advocate, for respondents No. 1 to 3.
Mr. M. A. Khan, Senior Advocate, with Ms. Hem Kanta Kaushal, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for the following reliefs:

"i) It is therefore, respectfully prayed that this petition may very kindly be allowed and the impugned order dated 25.05.2018 passed by Ld. Motor Accident Claims Tribunal-II Una, District Una, H.P. in Civil Misc.

Application No. 382/2018 in main petition No. 107/2015 titled Anju Kumari & others Versus Pankaj Sharma and another filed by the petitioner for recalling the order dated 18.04.2018 may kindly be set aside and while allowing such application, the witnesses of the claimants who were earlier examined, may kindly be recalled for further cross-examination as well as the persons who were examined by the investigator may also be permitted to be examined as the witnesses of the petitioner and further the matter be referred to the Ld. Registrar, High Court of Himachal Pradesh at Shimla for S.I.T. as per guidelines issued by the Hon'ble Supreme Court in case titled 'Safiq Ahmad V/s ICICI Lombard General Insurance Company Ltd.' SLP (C) CC No. 23628/2016.

ii) Record of the case may kindly be summoned for the kind perusal of this Hon'ble Court.

iii) Such other or further order as may be deemed just and proper by this Hon'ble Court may also be passed in favour of the petitioner."

2. Vide impugned order, dated 25.05.2018, learned Motor Accident Claims Tribunal (I), Una has dismissed an application filed by the present petitioner for recalling/reviewing order, dated 18.04.2018, passed by the said Tribunal. Record demonstrates that on 18.04.2018, learned Tribunal passed the following two orders, which stand appended with the petition as Annexures P-7 and P-8, respectively:

"Anju Kumar. Vs. Pankaj Sharma etc.

Application for placing on record investigation report dated 21.3.2018.

Present: Sh. Raman Kant, Advocate, counsel for thepetitioner.

Sh. Vikas Kashyap, Advocate, counsel for the respondent No. 1.

Sh. Ajay Thakur, Advocate, counsel for the respondent No. 2.

Order

This order shall dispose of an application filed by the Insurance Company to place on record a report prepared by Sh. Kashmir Singh allegedly an Investigator appointed by the company. It is alleged that at that time when the insurance company closed the evidence, it was not in possession of the said report and the report has been supplied to the counsel subsequently. According to the insurance company, said report is essential to show that the truck No. HP.67-4181 has been implicated. The insurance company has also been obtained permission under Section 170 of the Motor Vehicles Act, 1988.

The application is opposed on the ground of belatedly filing and maintainability. It has been submitted that there is an admission of respondent No. 1 and this is not a fraudulent case, which has been proved by cogent evidence.

Heard.

No doubt the application is belatedly filed. However, it has been averred in the application by the counsel of insurance company that the report has been supplied to him subsequently and it was not available with him at the time when the evidence was closed, therefore, I find that if

permission is granted to the insurance company to adduce evidence by examining the witness, compensating the claimants for belated filing, it will not cause any prejudice to the claimant. Consequently, the application is allowed with cost of Rs.5,000/-

Application stands disposed of. Be tagged.

Sd/-

Announced *(Aman Sood)*

18.04.2018 *M.A.C.T.-II, Una,*

Circuit Court at Amb,

Distt. Una, H.P."

"18.04.2018:Present:

Sh. Raman Kant, Advocate, counsel for the petitioner.

Sh. Vikas Kashyap, Advocate, counsel for the respondent No. 1.

Sh. Ajay Thakur, Advocate, counsel forthe respondent No. 2.

Vide separate order of even date placed on record, the application filed by the insurance company to place on record report of its investigator is allowed. It be tagged.

One R.W. Sh. Kashmir Singh is examined as RW-2. The claim made in the application is as follows:

"Application for placing on record the investigation report dated 21.3.2018 conducted by the Royal Associates and prove the same by examining the investigation officer namely Sh. Kashmir Singh, Prop. Of Royal Associates and refer the matter to Registrar, High Court Shimla for investigation through SIT (Special Investigation Team).

Sh. Kashmir Singh is examined. Whether the matter is fraudulent or not, is to be decided on merits.

For arguments, put up on 194.2018

sd/-

(Aman Sood)

M.A.C.T.-II, Una,

Circuit Court at Amb,

District Una, H.P."

3. After the passing of said two orders on 18.04.2018, an application was filed by the present petitioner before the learned Tribunal for recalling/reviewing order, dated 18.04.2018 and for permission to recall the witnesses already examined for cross-examination as well as for calling those persons for being examined as witnesses, who were examined by the Investigator and for further reference of matter to the Registrar, Himachal Pradesh High Court for the purpose of Special Investigation Team. Incidentally, the application so filed is not supported by any affidavit whatsoever. It stood mentioned in the application that the need for recalling/ reviewing the order passed by the learned Tribunal on 18.04.2018 was that in view of the report of the Investigator, the witnesses already examined needed to be re-examined and further the persons whose statements were

recorded by the Investigator were required to be called and examined in the Court as witnesses.

4. This application was opposed by the claimants. Learned Tribunal vide impugned order, dated 25.05.2018, has dismissed this application by holding that the driver/respondent No. 1 before it, in his affidavit, had maintained that the deceased, i.e., motorcyclist was talking on his mobile phone and was not attentive on the road and on a turn, when he blew horn, the motorcyclist suddenly lost control and hit the same with the drum of the truck. Learned Tribunal further held that as per the version of the driver, it was not the truck, which struck the motorcycle, but the motorcycle struck the truck after skidding. It further held that in his cross-examination by the Insurance Company, he had admitted that on the relevant day, i.e., on the day when the accident took place, there was no valid permit. Learned Tribunal also observed that the driver was also facing prosecution after the accident. It further held that perhaps the Insurance Company was mis-interpreting order, dated 18.04.2018, vide which its application to place on record the report of the Investigator was allowed and the Insurance Company intended to recall the said order with the intent to also recall the entire evidence by seeking the examination of those persons who stood examined by the Investigator. Thus, learned Tribunal held that prayer made in the application was without indicating either any purpose or object behind it. On these basis, it was held by the learned Tribunal that no case for reviewing or recalling the order dated 18.04.2018 was made out.

5. Feeling aggrieved, the petitioner has filed the present petition.

6. I have heard the learned counsel for the parties and have also gone through the pleadings appended with the petition.

7. Before adverting to the factual matrix involved in the case, it is necessary to state at this point that in exercise of its supervisory jurisdiction so conferred under Article 227 of the Constitution of India, this Court is not to act as an Appellate Court. If the findings returned by the learned Court below are within its jurisdiction and further are one of the probable findings which could have been returned on the basis of the controversy involved in the case, then this Court in exercise of its supervisory jurisdiction is not to interfere with the said findings.

8. At the very out set, it may be pointed out that the learned counsel for the petitioner has not been able to make out a case that the order passed by the learned Tribunal was without jurisdiction. He has also not been able to demonstrate from the records that the findings returned by the learned Tribunal are either not borne out from the records or are perverse. His only contention is that once the report of the Investigator was permitted to be placed on record, then the learned Tribunal ought to have had allowed the application for recalling of order dated 18.04.2018 and should have had permitted re-examination of all the witnesses earlier examined, as also fresh examination of those persons whose statements were recorded by the Investigator so appointed by the Insurance Company. Vide order dated 18.04.2018, the prayer made by the Insurance Company to place on record the report of the Investigator was allowed. On 18.04.2018, Shri Kashmir Singh was examined as RW-2. This witness was the Investigation Officer, whose report was ordered to be taken on record. After recording the statement of the said witness, it stood recorded by the learned Tribunal in one of its orders dated 18.04.2018 that whether the matter is fraudulent or not, is to be decided on merits. Now, in this background, when one peruses the impugned order, one cannot find any infirmity with the same. The statements of the witnesses, who have deposed before the learned Tribunal, already stand recorded and they have also been cross-examined by the Insurance Company after opportunity in this regard was given to the said Company. The statement of the Investigation Officer, who has

prepared the investigation report has also been recorded and learned Tribunal has already observed in its order dated 18.04.2018 that whether the matter is fraudulent or not shall be decided on merits. In these circumstances, it cannot be said that the learned Tribunal has erred in dismissing the application filed by the present petitioner for recalling order dated 18.04.2018.

9. Apparently, there is no perversity in either of the orders which were passed on 18.04.2018. In the guise of filing an application for recalling the said order(s), the petitioner-Insurance Company cannot be permitted to fill up lacunae in its case. Learned Tribunal has rightly held that perusal of the application so filed for recalling the said orders does not specify the purpose and object as to why the said prayer was being made.

10. As I have already held above, in exercise of its supervisory jurisdiction so conferred under Article 227 of the Constitution of India, this Court is not to sit as an Appellate Court over the orders passed by the learned Tribunal and interference is possible only if the order passed is either without jurisdiction or there is perversity on the face of the order. In the present case, in my considered view, neither the impugned order is without jurisdiction nor the same is perverse. Learned Tribunal, after appreciating the contentions of the rival parties and after applying its judicial mind, by a reasoned and speaking order, has dismissed the application so filed by the present petitioner. The reasons assigned by the learned Tribunal are duly borne out from the records of the case and this Court concurs with the said reasons.

11. In view of above, as there is no merit in the present petition, the same is dismissed, so also miscellaneous applications, if any. No order as to costs.

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

Brij Lal & others … Petitioners.

Versus

State of Himachal Pradesh … Respondent.

CRMMO No. 53 of 2018
Reserved on: 31.08.2018
Date of Decision: September 20, 2018

Code of Criminal Procedure, 1973- Section 179 - Place of trial- 'Act done' and 'consequences ensued' - Meaning – 'A' beaten up and thrown by accused as if he were dead at Brahmpukhar in Bilaspur – On being taken to IGMC, Shimla, A dying there – FIR registered at Shimla – Charge sheet also filed in Court at Shimla – Accused disputing territorial jurisdiction of Sessions Judge, Shimla– Sessions Judge negating plea of accused - Revision against - Held, 'consequence' is result or effect and 'ensue' is what happens or occurs afterwards or as a result – Section 179 of code applicable when an act and its consequences both of which have to be proved to constitute offence, have taken place in two different local areas– Alleged offence may be tried either where it took place or where its consequences ensued – As beatings given at Bilaspur resulted into death at Shimla, Court at Shimla has jurisdiction to try case- Petition dismissed. (Paras- 25 and 27).

Cases referred:

Naresh Kavarchand Khatri vs. State of Gujarat & another, (2008) 8 SCC 300

Lee KunHee, President, Samsung Corporation, South Korea & others vs. State of Uttar Pradesh & others, (2012) 3 SCC 132
Mobarik Ali Ahmad vs. State of Bombay, AIR 1957 SC 857
Banwari Lal Jhunjhunwala& others vs. Union of India & another, AIR 1963 SC 1620
Purushottam Das Dalmia vs. State of West Bengal, AIR 1961 SC 1589
L.N.Mukherjee vs. State of Madras, AIR 1961 SC 1601
State of Punjab vs. Nohar Chand, (1984) 3 SCC 512
State of U.P. vs. Mandleshwar Singh, 1988 Supreme Court Cases (Cri.) 58
Vishwanath Gupta vs. State of Uttaranchal, (2007) 11 SCC 633
Sunita Kumari Kashyap vs. State of Bihar & another, (2011) 11 SCC 301
State of M.P. vs. Suresh Kaushal & another, (2003) 11 SCC 126
Babita Lila and another vs. Union of India, (2016) 9 SCC 647
M.N. Bhatia vs. State of U.P., 1968 Cri. L.J. 555.
Rekhabai vs. Dattatraya& another, 1986 Cri. L.J. 1797
S. Bangarappa vs. Ganesh Narayan Hegde & another, 1984 Cri. L.J. 1618
Shaukatali Ibrahim Rangrez& others vs. Mohommad Siraj & another, 1997 Cri. L.J. 1352
Manoj Kumar Sharma & others vs. State of Chhattisgarh & another, (2016) 9 SCC 1
Satvinder Kaur vs. State (Govt. of NCT of Delhi) & another, (1999) 8 SCC 728

For the Petitioners:	Mr. N.S. Chandel, Advocate, for the petitioners.
For the Respondent:	Mr. Ashok Sharma, Advocate General, with Mr.Adarsh Sharma, Addl. AG. &Ms.SvaneelJaswal, Dy.AG., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ

Interpretation of Section 179 of the Criminal Procedure Code (hereinafter referred to as the Code) arises for consideration in the present petition. What is the meaning of the words "an act is a reason of anything done" and "consequence" "which has ensued" contained in the said Section needs to be examined. To put it shortly if an act which is offence by reason of anything done in a place 'A' and the "consequence" which has ensued at a place 'B', then whether place 'B' would have jurisdiction to conduct the trial or not.

2. Chapter-XIII of the Code stipulates the jurisdiction of the Courts where inquiry or trial can take place. For the purposes of ready reference, relevant provisions are reproduced as under:-

> 179. Offence triable where act is done or consequence ensues.—When an act is an offence by "reason of anything which has been done" and of a "consequence which has ensued", the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

3. At the threshold, it sands clarified that remaining provisions from Sections 181 to 189 of the said Chapter are not relevant, in view of undisputed facts borne out from the record of the present petition.

4. On facts, record reveals that in relation to an offence falling under Section 302 of the Indian Penal Code, an FIR No.132, dated 25.05.2016 was registered at Police Station, Shimla (West), District Shimla, H.P. As per averments made in the FIR, in the night

intervening 24-25.05.2016, allegedly, petitioners herein, namely, Brij Lal, Ranveer Sankyan, Sanjeev Kumar @ Sanju and Mohinder Singh, gave beatings to deceased Ankush and Madan at Brahmpukhar-Ghaghas – a place falling within the territorial jurisdiction of Sessions Judge, Bilaspur - outside the territorial jurisdiction of Sessions Judge, Shimla. Thinking deceased Ankush to have died on the spot, the assailants went away. But however, it was not so and both the injured came to Shimla. For treatment of injuries, Ankush was admitted for medical treatment at the Government Hospital, IGMC, Shimla, where, he was declared dead. The postmortem was conducted in the said hospital and on the basis of complaint lodged by his relatives, aforesaid FIR came to be registered at Shimla. Brahmphukhar-Ghagas do not fall within the territorial jurisdiction of Police Station (West) District Shimla, H.P. Nor does the Sessions Judge has the same.

5. Since FIR was registered at Police Station (West), Shimla, falling within the jurisdiction of Sessions Judge, Shimla and investigation was carried out by the officers thereof, challan was presented for trial in the Court having competent jurisdiction at Shimla.

6. The jurisdictional issue raised by the petitioners stands rejected by the trial Court, vide order dated 27.11.2017, passed in Case No.2-S/7 of 17, titled as *State of H.P. vs. Brij Lal, etc.* and they stand charged for having committed offences punishable under the provisions of Sections 302, 382 and 323 read with Section 34 of IPC, to which they plead not guilty and claim trial. This was vide separate order of the very same date i.e. 27.11.2017.

7. This petition under Section 407 read with Section 482 of the Code of Criminal Procedure (for short 'Code') preferred by the petitioners is with a prayer to transfer the Sessions Trial No.2-S/7 of 2017, pending before the Court of Additional Sessions Judge-II, Shimla, H.P., to the Court of Learned Sessions Judge, Bilaspur, H.P.

8. Before this Court, it could not be disputed that the deceased travelled all the way from Brahmpukhar-Ghagas to Shimla where he succumbed to the injuries. It is in this factual backdrop, one appreciates the relevant provisions of the Statute.

9. Section 177 of the Code postulates that every offence shall ordinarily be inquired and tried by a Court in whose local jurisdiction the offence stands committed.

10. The Apex Court in *Naresh Kavarchand Khatri vs. State of Gujarat & another,* (2008) 8 SCC 300, has clarified that whether an Officer Incharge of a Police Station has the requisite jurisdiction to make investigation or not would depend upon large number of factors, including those contained in Sections 177, 178 and 181 of the Code.

11. As per the provisions of Section 178 of the Code, when an offence is a continuing one and continues to be committed in more than one local area, it may be inquired into or tried by a Court having jurisdiction over anyone of such local area(s). Undisputedly, it is nobody's case that the assailants followed the victims from Ghagas to Shimla or travelled outside the territorial limits of Bilaspur. Hence this Section is not applicable.

12. However, what needs to be considered is as to whether the case would fall under Section 179 of the Code or not. From the bare reading of the Section it is clear that for its invocation following ingredients must exist: (a) where an act is an offence by reason of anything which has been done; (b) and of a consequence which has ensued. With the fulfillment of these two essential ingredients, the offence may be tried by a Court within whose local jurisdiction such act stands committed or consequence ensued.

13. Thus, what needs to be considered is, as to what is the meaning of the word "consequence" which has "ensued" for there is no dispute about the act being an offence. Only whether consequences have ensued or not needs to be examined.

14. Oxford English Dictionary Indian Edition, defines the word "consequence" as:-

> '1 a result or effect. 2 importance or relevance. 3 (Consequences) a game in which a narrative is made up by the players in turn, each ignorant of what has already been contributed.
>
> — Phrases in consequence as a result. take (or bear) the consequences accept responsibility for negative results or effects.
>
> — Origin Me: via OFr. From L. *consequential,* from consequent-, *consequi*'follow closely'.'

and word "ensue" as:-

> '— happen or occur afterwards or as a result.
>
> — Origin Me: from Offr. *Ensivre,* from L. *insequi,* based on *sequi*'follow'. '

15. Further, Black's Law Dictionary, Tenth Edition, defines the word "Consequence" as:-

> 'Consequence.(14c) A result that follows as an effect of something that came before. See Effect.'

And word "ensue" as:-

> 'Ensue—Term that means to come later or to follow.'

16. The book Words and phrases (Permanent Edition 8A) defines the word "Consequence" as:-

> 'Consequence means that which follows something on which it depends; that which is produced by a cause or ensues from any form of necessary connection or from any set of condition; a natural or necessary result (Board of Fireman's Relief & Retirement Fund Trustees of Houston vs. Marks, Tax. Civ. App., 237 S.W.2d 420, 423.'

and Permanent Edition 14A Book defines word "ensue" as:-

> 'Ensue—the word "ensue" means to follow, to come afterwards, to follow as a consequence or in chronological succession, to result as an ensuing conclusion or effect or the year ensuing.'

17. Thus, grammatical expression and meaning is plain and simple. Consequence is a result or effect and ensue is what happens or occurs afterwards or as a result.

18. In *Lee KunHee, President, Samsung Corporation, South Korea & others vs. State of Uttar Pradesh & others,* (2012) 3 SCC 132, the Apex Court observed that in Section 179 aforesaid, two phrases need to be noticed: Firstly, "anything which has been done", with reference to the offence; and secondly, "consequence which has ensued", also with reference to the offence. Both the aforesaid phrases substantially enlarge and magnify the scope of jurisdiction contemplated under Section 179 aforesaid, so as to extend the same over areas contemplated by the two phrases. The Court was dealing with a case where pursuant to agreement dated 01.12.2001 executed outside the jurisdiction of the Courts at Ghaziabad, but goods were dispatched from there to a place outside its territorial limits and also payments were received in Ghaziabad, the Court observed that the words "anything which has been done", for the present controversy, would extend to anything which has been done in furtherance of the execution of the agreement dated 1.12.2001. The facts constituting the

performance of obligations by the complainant, actually constitute the foundational basis for the criminal accusation levelled against the accused (in refusing to honour the corresponding obligation). The instant foundational basis for establishing the commission of the offence, in my view, would fall within the ambit of the words "anything which has been done" sufficient to vest jurisdiction under Section 179 of the Code of Criminal Procedure, with a competent Court at Ghaziabad. It categorically held that:

> "35. Besides the aforesaid, under Section 179 of the Code of Criminal Procedure, even the place(s) wherein the consequence (of the criminal act) "ensues", would be relevant to determine the court of competent jurisdiction. Therefore, even the courts within whose local jurisdiction, the repercussion/effect of the criminal act occurs, would have jurisdiction in the matter."

19. Noticeably in the very same decision, the Court reiterated its earlier view taken in *Mobarik Ali Ahmad vs. State of Bombay,* AIR 1957 SC 857, wherein it was observed that:-

> "24. … …But as is seen above, the principles recognised in International Law in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and is really part of the general jurisprudence relating to criminal responsibility under municipal law. *No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences committed within the State by specific legislation. But the principle emerging therefrom is clear that once it is treated as committed within the State the fact that he is a foreigner corporeally present outside at the time of such commission is no objection to the exercise of municipal jurisdiction under the municipal law.* This emphasises the principle that exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as ambassadors, Princes etc.)"

20. In *Banwari Lal Jhunjhunwala& others vs. Union of India & another,* AIR 1963 SC 1620, the Apex Court reiterated its earlier view, rendered in *Purushottam Das Dalmia vs. State of West Bengal,* AIR 1961 SC 1589 and *L.N.Mukherjee vs. State of Madras,* AIR 1961 SC 1601, that a Court trying an accused for an offence of conspiracy is competent to try him for all the offences committed in pursuance of that conspiracy, irrespective of the fact that any or other all other offences were not committed within its territorial jurisdiction.

21. In a case where the product stood manufactured at a place other than the place where it was sold, in a prosecution launched under the Prevention of Food Adulteration Act, 1954, the Apex Court in *State of Punjab vs. Nohar Chand,* (1984) 3 SCC 512, held that the manufacturer could be sued alongwith the seller at the place where such product stood sold. [*State of U.P. vs. Mandleshwar Singh,* 1988 Supreme Court Cases (Cri.) 58].

22. In *Vishwanath Gupta vs. State of Uttaranchal,* (2007) 11 SCC 633, the Apex Court had an occasion to deal with a case where the victim was kidnapped from a place 'A', taken to a place 'B', from where demand for ransom was made and thereafter taken to yet another place 'C', where he was murdered. The Court observed that territorial jurisdiction to deal with the crime in its entirety would be at any one of the three places.

23. In a case of an offence arising out of matrimonial dispute, the Apex Court in *Sunita Kumari Kashyap vs. State of Bihar & another,* (2011) 11 SCC 301, observed that the place where the 'consequence' of the dowry "ensued", which was other than the place where

the marriage took place, being parental house of the lady, would have jurisdiction to conduct the trial. [*State of M.P. vs. Suresh Kaushal & another,* (2003) 11 SCC 126].

24. The Apex Court in *Babita Lila and another vs. Union of India,* (2016) 9 SCC 647, while dealing with a case where the premises of the assessee were searched at Bhopal and Aurangabad, observed that confining the jurisdiction within the territorial limits only to one Court, the principal place where the returns were filed by the assessee, would amount to impermissible and illogical truncation of the ambit and scope of Sections 178 & 179 of the Code. The Court further observed as under:-

> "75. Though the concept of "cause of action" identifiable with a civil action is not routinely relevant for the determination of territoriality of criminal courts as had been ruled by this Court in *Dashrath Rupsingh Rathod vs. State of Maharashtra,* (2014) 9 SCC 129, their Lordships however were cognizant of the word "ordinarily" used in Section 177 of the Code to acknowledge the exceptions contained in Section 178 thereof. Section 179 also did not elude notice."

25. Section 179 Cr.P.C. elucidates the meaning of the language used. The section is only applicable where the act and its consequence, both of which have to be proved to constitute the offence, have taken place in two different local areas. In such an event, the alleged offence may be tried either where the act took place or where its consequence ensued. It is also clear that the "consequence" here is part of the offence to be established. It is by virtue of the consequence that the act becomes a complete offence is also the issue taken by the Allahabad High Court in *M.N. Bhatia vs. State of U.P.,* 1968 Cri. L.J. 555.

26. In a case relating to an offence of defamation, it stands settled that both the Courts, from where the letter is written, posted and/or received and read, would have jurisdiction to try the offence. [*Rekhabai vs. Dattatraya& another,* 1986 Cri. L.J. 1797 (Bombay High Court); *S. Bangarappa vs. Ganesh Narayan Hegde & another,* 1984 Cri. L.J. 1618 (Karnataka High Court) &*Shaukatali Ibrahim Rangrez& others vs. Mohommad Siraj & another,* 1997 Cri. L.J. 1352 (Bombay High Court)].

27. Applying the aforesaid procedures to the given case, here the beatings given at Bilaspur, resulted into death at Shimla. Accepting the averments made in the FIR to be true, it cannot be disputed that the act of assault committed at Bilaspur is one of the ingredients of the Section and that the other ingredient stands fulfilled with a consequence which has ensued at Shimla.

28. In support of his contentions, Mr.N.S. Chandel, learned counsel, referred to and relied upon the decisions rendered by the Apex Court in *Manoj Kumar Sharma & others vs. State of Chhattisgarh & another,* (2016) 9 SCC 1 (Para.16); *Naresh Kavarchand Khatri vs. State of Gujarat & another,* (2008) 8 SCC 300 (Para.1); &*Satvinder Kaur vs. State (Govt. of NCT of Delhi) & another,* (1999) 8 SCC 728 (Para.8).

29. These decisions do not deal with the issues at all, for the issue in the said case(s) was transfer of investigation to an officer having competent jurisdiction. The Court cautioned that the jurisdictional fact, would emerge only during the course of investigation and it would not be prudent for the Court to transfer the investigation from one Police Station to another.

30. In view of the aforesaid discussion, it cannot be said that the Court of Sessions Judge, Shimla, has no jurisdiction to conduct the trial in Sessions Trial No.2-S/7 of 2017, titled as *State of H.P. vs. Brij Lal & others.* As such, present petition, devoid of any merit, is dismissed. Records be immediately sent back.

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

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

Chuni Lal Sharma ...Appellant/plaintiff.
Versus
Sh. Ashok Kumar ....Respondent/defendant.

RSA No. 375 of 2003.
Reserved on : 18th September, 2018.
Decided on : 20th September, 2018.

Hindu Law- Ancestral property- Alienation – Legal necessity – Proof- Held, Purchaser not leading any evidence of legal necessity compelling holder to dispose of ancestral land – Mere recitals in sale deed of existence of legal necessity not sufficient. (Para-12)

Hindu Law- Ancestral property- Held, suit land transmitted into hands of holder from his predecessor-in-interest is ancestral in his hands. (Para-12)

Hindu Succession Act, 1956- Section 30- Ancestral property – Alienation- Held, Section 30 of Act empowers a Hindu to make testamentary disposition of his property including his share in Mitakshara coparcenary – Notwithstanding any custom or usage to the contrary – Said provision has no applicability to non-testamentary dispositions like alienation by way of sale. (Paras- 14 and 15)

Cases referred:

Ratesh Kumar v. Basudev Singh Pathania, 1994 (Suppl.) Sim. L. C. 422
Kartari Devi and others vs. Tota Ram, 1992(1) Sim. L. C. 402

For the Appellant: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.
For the Respondent: Mr. Sunil M. Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for declaration besides for rendition of a decree for permanent prohibitory injunction, stood dismissed by the learned trial Court. In an appeal carried therefrom, before the learned First Appellate Court, by the aggrieved plaintiff, the latter Court dismissed his appeal besides obviously affirmed the trial Court's judgment and decree.

2. Briefly stated the facts of the case of the plaintiff are that the suit land was owned by his father defendant No.2 Dina Nath (stands deleted vide orders of 19.4.2000 of trial court). Defendant NO.2, through Shashi Parkash, his general power of attorney sold the suit land for an ostensible consideration of Rs.37,000/-, vide sale deed of 23.3.1991 in favour of defendant No.1. The sale deed is claimed the result of mis-representation, and fraud, played on defendant No.2, who is village simpleton. The suit land is claimed to be ancestral by the plaintiff qua the defendant No.2 and that defendant No.2 had no right, title

or interest to alienate the ancestral property without legal necessity. Defendant No.2 was a Brahimn, governed by agricultural custom in the matter of alienation and ancestral property could not have been alienated without legal necessity. So, the sale deed is also against the custom, result of fraud, and, mis-representation, would not affect reversionary rights of plaintiff. The defendant is liable to be prohibited to change the nature of the suit land.

3. Only defendant No.1 contested the suit, whereas, defendant No.2 was proceeded against ex-parte. Defendant No.1, in his written statement instituted before the learned trial Court, to the plaint, has taken preliminary objections of maintainability, cause of action, locus standi, estoppel etc. On merits, he denied the suit land to be ancestral in the hands of defendant No.2 qua the plaintiff. It was claimed that defendant No.2 validly sold the suit land, through his attorney Shashi Parkash, for, a valuable consideration. The averments on custom are also denied.

4. The plaintiff filed replication to the written statement of defendant No.1, 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 sale of the suit land is invalid being result of misrepresentation and fraud as alleged?OPP.

2. Whether the parties to the suit in question are governed by agriculture custom, if so, its effect? OPP.

3. Whether the suit is not maintainable in the present form?OPD.

4. Whether the plaintiff has no cause of action against the replying defendant, as alleged?OPD

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

6. Whether the plaintiff is estopped by is act and conduct to file the instant suit?OPD.

6A. Whether the land in dispute is ancestralqua the plaintiff and defendant No.2 and the defendant No.2 got no right to alienate the same without legal necessity, as alleged?OPP

7. Relief.

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

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 25.3.2004, 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 trial Court has acted in illegal manner and committed grave procedural illegality in clubbing Issue Nos. 1, 2 and 6-A together for disposal when the findings on Issue No.1 were not dependent on findings on other issues by ignoring the ratio of the judgment laid down by this Hon'ble Court in Division Bench Judgment titled Sh. Om Parkash Vs. State of Himachal Pradesh? Has not the Lower Appellate Court also

committed grave error of law in ignoring the pronouncements of this Hon'ble Court and upholding the judgment and decree of the trial Court without considering this aspect of the matter?

b) Whether both the courts below have rendered illegal, erroneous and perverse finding by holding that the Plaintiff-Appellant failed to plead and prove the custom, by ignoring the settled principles of law, when such custom finds mention in the Compilation of the Customary Law especially of L. Middleton and Sir W.H. Rattigan? Are not the findings of both the courts below illegal and perverse in holding that the plaintiff ought to have proved the custom by proving the instances of custom?

c) Whether both the courts below have misinterpreted and misread the documentary evidence specially Exhibits P-2 to P-14, which prove the fact that defendant No.2 held the property by way of inheritance for more than 3 generations? Are not the findings of both the courts below holding the property to be non-ancestral illegal, erroneous and perverse?

d) Whether the trial Court has further taken erroneous and perverse view of law by misapplying the provisions of Sections 4 and 30 of the Hindu Succession Act by holding that custom pleaded by the plaintiff assailing the sale as contrary to law stood superseded by wrongly applying the ratio of the judgment of this Hon'ble Court reported in 1992(1)SLC 402? Has not the Lower Appellate Court committed grave error of law in not considering this legal aspect upholding the findings of the trial Court by applying principles of Hindu Law, which were not applicable to the present case?

Substantial question of Law No.1:

8. Before proceeding to mete, an, answer to the other substantial question of law, this Court, would mete an answer to substantial question of law No.1, given recording, of, an affirmative decision thereon, may render redundant, the, meteing of answers, to, the other substantial question(s) of law.

9. The plaintiff reared a contention, in the plaint that (i) the apt sale deed borne in Ex.P1, being a sequel of fraud and misrepresentation, (a) given defendant No.2, not at the relevant time, being in, a, sound disposing state of mind, (b) its execution being without consideration, (c) and, it being executed without any legal necessity, (d) and one Shashi Prakash, the purported GPA of defendant No.2, not being, the, validly constituted power of attorney, for executing with defendant No.1, Ashok Kumar, the, registered deed of conveyance, borne in Ex.P1, (e) thereupon, the apposite sale deed being stained, with, a vice of pervasive fraud and mis-representation. Even though, the learned trial Court, rendered disaffirmative findings, upon, the issue appertaining tot he aforesaid pleadings, and, the findings rendered thereon, also, stood affirmed by the learned first appellate Court. Nonetheless, the learned counsel appearing, for the aggrieved plaintiff/appellant herein, has contended (f) that, the, clubbing of issues No.1, 2 and 6A, rather comprising an apparent legal misdemeanour, on the part of both the learned courts below, (g) given, there being no interconnectivity inter se issue No.1, with, the subsequent thereto purportedly connected issues, thereupon, the returning, of, common findings, upon, each, hence rather being not renderable. Even if, the aforesaid contention is accepted, yet it would hold the most tenacious solemnity, (h) upon, the learned trial Court visibly, not, alluding to the evidence apposite thereto, and, nor its proceeding to assign any reason, for accepting or discarding the apt evidence adduced thereon, by the contesting litigants. Contrarily, a reading of the

findings rendered, upon, issues Nos. 1, 2 and 6A, unfolds, that in paragraphs No.10, 11 and 12, the learned trial Court meteing reasons, vis-a-vis, the apt issue No.1. The effect thereof is qua despite lack, of, interconnectivity and inter dependence inter se issue No.1, with, the subsequent thereto purportedly connected issues, rather not befittingly equipping the learned counsel, for, the appellant, to, on the facet aforesaid hence square any clinching submission, that, thereupon, the impugned verdicts being reversable.

10. Be that as it may, yet this Court is empowered to adjudge, the, merit-worthiness of the reasons, assigned by the learned trial Judge, upon, issue No.1, (a) on anvil of his discarding, the, apt germane evidence thereto, (b) and, on anvil of his mis-appraising the evidence existing on record. Bearing in mind, the aforesaid para meters, initially this Court would allude to the reasons, assigned by the learned trial Court, for, concluding that the sale deed borne in Ex.P-1, rather embodying truthful recitals, qua, even if assumingly,(i) the suit property is ancestral coparcenary property, it, rather being alienated by defendant No.2, through, his general power of attorney, for evident legal necessity, (ii) also it is incumbent upon this Court, to determine whether the averment borne in the plaint qua the general power of attorney, not, being ably equipped to execute Ex.P-1, vis-a-vis, the suit property with defendant No.1, given his being unknown to defendant No.2, also hence, standing cogently proven. However, upon, this Court, on an incisive traversing of the evidence on record, makes unearthings, (iii) therefrom, qua the afore averment standing cogently proven, thereupon, it may be wholly unnecessary for this Court to proceed to either delve into or pronounce findings, vis-a-vis, the suit property, being, imbued with the traits, and, characteristics, of it, being construable to be ancestral coparcenary property, (iv) nor it would be imperative for this Court to determine the veracity, of, recitals borne in Ex.P-1, vis-a-vis, the apposite alienations, rather being made for legal necessity, (v) given hence, the factum, of, even, of, assumingly, the, suit property carries traits, characteristics, and, antecedents, if, ancestral coparcenary property, thereupon, the effects thereof being rather subsumed, upon, Ex.P-1 rather acquiring, a, vice of invalidity.

11. The learned trial Court, merely on anvil of defendant No.2, being proceeded against ex-parte, and, his not instituting, a, written statement to the plaint, hence recorded a conclusion (i) qua the averments borne in the plaint, with respect to the execution of sale deed, being, a, result of fraud, and, mis-representation, and, also the averment carried therein, qua one Shashi Prakash not holding any valid general power of attorney to execute Ex.P-1 with defendant No.1, rather per se standing falsified, (ii)especially when he constituted the best person to mete succor, to, the afore averments borne in the plaint, (iii) reiteratedly qua thereupon, hence disaffirmative findings being enjoined to be rendered upon issue No.1, appertaining to the sale deed, being, a, sequel of fraud and misrepresentation. However, for the reasons assigned hereinafter, the aforesaid conclusion(s), are, harboured, upon, a gross misreading, of, the evidence, besides are not grooved, in, apt appreciation, of, the evidence germane, to, apposite issue No.1, given (a) even if defendant No.2 was proceeded against ex-parte, yet it was incumbent upon defendant No.1 to prove (b) qua the purported GPA, as constituted, for the relevant purpose, by defendant No.2, rather in contemporaneity, vis-a-vis, the execution of Ex.P-1, also provenly holding the apt authorisation; (c) besides defendant No.1, was, also enjoined to make bespeaking qua his transferring, the, sale consideration to defendant No.2, through, one Shashi Prakash; (d) the imperativeness, of, adduction, of, evidence in respect, to, the aforesaid facets, by co-defendant No.1, arose from, his being, a, vendee in Ex.P-1, (e) and, obviously, for, his hence befittingly ripping apart the averments, borne in the plaint, qua the purported GPA, of co-defendant No.2, not, holding the apt authorization, dehors co-defendant No.2 being proceeded against ex-parte, nor hence his instituting any written statement to the plaint. A reading of the testification of DW-1, underscores, qua his rather

during the course of his examination-in-chief, not, making trite unfoldings therein (a) that at the time contemporaneous to the execution of Ex.P1 with the purported GPA of co-defendant No.2, his perusing the purported authorization, (b) nor he makes any bespeaking therein qua only after his ascertaining authenticity thereof, from defendant No.2, his, proceeding to execute Ex.P-1, with, the purported GPA, of co-defendant No.2. Furthermore, in his examination-in-chief, he makes disclosures qua his transferring a sum of Rs.37,000/- through cheque, to, the purported GPA of defendant No.2. However, he has neither placed on record, a, copy of the apt cheque nor he has placed on record, the, statements of accounts, as, maintained with his bank, (c) besides he omitted to make any testification qua his ascertaining whether the amount borne, in, the cheque hence being encashed by co-defendant No.2. The effect of the aforesaid omissions, is, (d) that the sale deed borne in Ex.P-1, being inferable to be made without any transfer, of, any consideration, to, defendant No.2, even through his GPA, further concomitant effect thereof, is, qua the purported legal necessity in the making, of, the alienation, rather remaining unproven, (e) nor the purported GPA holding the apt authorization, especially when defendant No.1, did not. elicit from the records maintained with the Registrar, of, Documents, a certified copy thereof, nor he cited the purported GPA, as a witness, for his hence stepping into the witness box, to, render a testification, qua defendant No.2, hence, volitionally executing, the apt GPA, in his favour, for the relevant purpose. The further effect of the aforesaid omission, is, that the conclusion rested by the learned trial Court, vis-a-vis, non furnishing of written statement by defendant No.2 to the plaint, per se, tantamounting qua the afore averments, cast in the plaint, rather being not proven, hence, obviously suffering, from, a gross mis-appraisal or non appraisal, of, the afore referred germane evidence, appertaining to issue No.1. Consequently, substantial question of law No.1, is, answered in favour of the appellant, and, against the respondent.

Substantial question of Law No.2, 3 and 4

12. In view, of, an affirmative answer being meted by this Court, to, substantial question of law No.1, hence, the meteing, of, any answer, vis-a-vis, other substantial questions of law, may be rendered redundant. Nonetheless, this Court in the larger interest of justice, (I) upon, a, perusal of pedegree table, borne in Ex.P-1, whereunder defendant No.2, is, shown to derive his lineage, from his immediately two preceding ancestors, namely, Lahanu (his father) and Bhagirath (his grand father), (ii) and with Ex.P4, P-5, P-6, P-7, P-11, P-13 also making candid underscorings qua the suit property rather standing transmitted into the hands of defendant No.2, from his prior thereto direct two predecessors-in-interest, (i) is hence thereupon, constrained to conclude, qua the suit property hence acquiring, the, traits and characteristics, of, ancestral coparcenary property, (ii) whereupon, this Court, concludes that the recitals borne in Ex.P-1, qua the suit property being sold for legal necessity, were enjoined to cogently proven, whereas, given the afore assigned reasons, the recital qua therewith rather being concluded, to, stand ingrained with a vice of falsity, thereupon, it is inevitable to conclude that the even if, assumingly Ex.P-1 was executed by the purported GPA of defendant No.2, (iii) rather hence when defendant No.2 was, for afore assigned reasons, unless for proven legal necessity, proof qua wherewith has not emerged, hence, encumbered, with, a disability to alienate, it, through any deed of alienation, thereupon, upon, the, afore score Ex.P-1, is, rendered construable to be vitiated or legally flawed.

13. The learned counsel appearing for the appellant has also contended with much vigour qua since the plaintiff, and, defendant No.2, are, Brahmin(s) by caste, and, they are governed by agriculture custom, in the matter, of, alienation, hence, the ancestral property, being unamenable for alienation, unless, for proven legal necessity, and, he further contends that, if, a custom has been repeatedly recognised, by Courts, it becomes

law of the land, and, Courts can take judicial notice, qua it without formal proof. In support of the aforesaid submission, he places reliance, upon, a judgment of this Court rendered in a case titled as ***Ratesh Kumar v. Basudev Singh Pathania***, reported in ***1994 (Suppl.) Sim. L. C. 422***, the relevant paragraph No. 9 whereof stands extracted hereinafter:-

> "9. It is correct that ordinary rule is that all customs, general or otherwise have to be proved as envisaged under Section 57 of the Evidence Act. But if a custom has been repeatedly recognized by Courts, it becomes law of the land and Court can take judicial notice of it without formal proof. (Please see Sri Rao Venkata MahipatiGangadara Rama Rao Bahadur v. Raja of Pittapur, AIR 1918 PC 81 and Ujagar Singh v. Mst. Jeo, AIR 1959 SC 1041). Applying this principle, the court can take judicial notice that Brahmins of district Kangra are governed by agricultural custom as held in Mr. Chinto and others v. Thebu and others, AIR 1934 Lah 985 and Tara Mani and others v. Mt. Kishen Devi, AIR 1940 Lah 33."

Consequently, in consonance therewith, any insistence made by the learned first Appellate Court, upon, plaintiff to prove the apt custom, propounded, in the Compilation of Customary Law of L. Middleton, and, in the Digest complied by Sir W.H. Rattigan, to adduce, proof qua therewith, and, in consonance with Section 57 of the Indian Evidence Act, was grossly improper, (a) rather it was incumbent upon the learned First Appellate Court, to mete credence to the afore custom borne in the afore compilation, (b)emphatically when it is uncontroverted qua the plaintiff, and, defendant No.2 being Brahamin(s) by caste, and, theirs residing in District Kangra, whereat the apt customary law(s), borne in the afore compilations, is, judicially pronounced, to be, squarely applicable.

14. Be that as it may, the learned counsel appearing for the respondent, has contended with much vigour, while placing reliance, upon, a judgment of this Court, rendered in a cast titled as ***Kartari Devi and others vs. Tota Ram,*** reported in ***1992(1) Sim. L. C. 402,*** to, in consonance therewith espouse (i) that the afore custom being contrary to law, hence, it holding no clout or sway, vis-a-vis, the suit property nor defendant No.2 being disempowered, to, even with respect to the ancestral coparcenary property, to, make any alienation, in respect thereof. However, the aforesaid submission is grossly misplaced (ii) as, in the judgment aforesaid, this Court was dealing, with the provisions borne in Section 4 of the Hindu Succession Act, provisions whereof stand extracted hereinafter:-

> "**4. Over-riding effect of Act.**—(1) Save as otherwise expressly provided in this Act,—
>
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.
>
> (2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

(iii) wherein unless provided to the contrary, the play of any text rule or interpretation of Hindu Law or custom or usage, is, subsumed, by the trite thereto applicable statutory provisions, and, on making an interpretation thereof, this Court had proceeded to allude,

vis-a-vis, Section 30, of the Hindu Succession Act, provisions whereof stand extracted hereinafter:-

> "**30 Testamentary succession**. —Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so [7] [disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.
>
> Explanation.— The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

(iv) provisions whereof appertain, to, the empowerment of a male Hindu, to make a testamentary disposition, of his property, and, the explanation existing thereunderneath also bestows the apt empowerment, in, a male Hindu, to, even with respect to his share, in, the Mitakshara coparcenary property, hence make a testamentary disposition, dehors any custom to the contrary.

15. The afore mentioned factual matrix, does, obviously underscore (i) qua it appertaining to empowerment, of, a male Hindu, to make, a, testamentary disposition, dehors custom or usage to the contrary, and, it being also permissible, to, the apposite executant, to, thereunder, hence, alienate, his, apt interest or share in the Mitakshara coparcenary property, (ii) and, obviously in Kartari Devi's case (supra), an interpretation stood meted, vis-a-vis, the statutory provisions, appertaining, to, an empowerment or ability of a male Hindu, to, make a bequest, even with respect to his interest/share, in the Mitakshara coparcenary property, dehors custom or usage making any contrary therewith preception, (iii) yet hereat the factual matrix is squarely distinct therefrom, given the extant lis rather appertaining to the validity, of an alienation, made through a sale. Consequently, the judgment rendered in Ratesh Kumar's case (supra), reported in 1994 (Suppl.) Sim. L. C. 422, paragraph No.9 whereof stands extracted hereinabove, rather vindicating, the applicability of the Kangra agricultural custom, as appertaining to Brahamins, and, with the factual matrix borne therein, pin pointedly, holding analogity, vis-a-vis, the factual matrix prevailing hereat, (iv) given alike therein, the extant alienation occurring through a sale, and, also comprising, the, apt res controversia, (v) thereupon, the mandate thereof, is squarely applicable hereat, rather than the mandate borne in Kartari Devi's case supra reported in 1992 (1) Sim. L. C. 402. Furthermore, in consonance with the mandate, borne in Ratesh Kumar's case (supra), the apt validating ingredients, vis-a-vis, the sale made through Ex.P-1 to defendant No.1, is rather comprised, in, evident proof, of it, being for legally necessity, and, when for all reasons aforestated, it stands concluded, that, proof in respect thereof being grossly amiss hereat, also hence invalidates Ex.P-1.

16. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court 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. Substantial questions of law No.2 to 4 are answered in favour of the appellant and against the respondent.

17. In view of above discussion, the instant appeal is allowed. Consequently, the impugned judgments and decrees rendered by both the learned Courts below are set

aside. In sequel, the plaintiff's suit is decreed and the sale deed of 23.3.1991 in respect of the suit land as referred in the heading of the plaint is declared to be invalid, incompetent, against agricultural custom, and, the result of misrepresentation and fraud, without consideration and without legal necessity. Furthermore, defendant No.1 is restrained from changing the nature of the suit land comprising Khata No.173 min, Khatauni No.496 min, Khasra No.1334, measuring 0-08-29 hectares, situated at MohalRodi, Mauza Khalet, Tehsil Palamp[ur, District Kangra, H.P. . Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

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

CrMP(M) No. 921 of 2018
Reserved on: 30.08.2018
Decided on: 20.09.2018

Code of Criminal Procedure, 1973- Section 439- Protection of Children from Sexual Offences Act, 2012-Sections 3, 4 and 29- Bail – Special Judge rejecting accused's payer for bail – Filing petition in High Court – Accused, truck driver, found to have given lift to one 'S', 'A' and victim in his truck and allowed 'S' to rape victim – Accused and 'A' kept lower inner wear and salwar of victim with them so as to compel her to have physical relations with them also – Victim jumping off from truck half naked and reaching police post in that condition – Police providing clothes to victim, a minor, Held, material prima facie shows involvement of accused in commission of said offences – Bail rejected. (Paras-7 to 12 and 17)

For the petitioner: Mr. Deepak Kaushal, Advocate.
For the respondent: Mr. Shiv Pal Manhans and Ms. RameetaKumari,Additional Advocate Generals, with Mr. Raju Ram Rahi, Deputy Advocate General.
Inspector Mamta, SHO Women Police Station Nahan, present in person alongwith record.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Petitioner has preferred this petition under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC') for grant of bail in case FIR No. 3 of 2018, dated 19th May, 2018, under Sections 376, 511, 201, 34, 177 of the Indian Penal Code (hereinafter referred to as 'IPC'), Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') and Section 3 (1) (w) (ii) of SC & ST Act, registered at Police Station Nahan, District Sirmaur, H.P.

2. For enlarging the petitioner on bail, it has been canvassed that the petitioner has been implicated falsely in present case without any allegation or evidence against him;

he has no role in commission of offence and there is change in version of the statement of the complainant with regard to manner in which alleged offence was committed. Further that even if prosecution case is considered to be true, there is nothing on record to infer that the petitioner has committed the alleged offence and it is a case of no evidence against the petitioner and, therefore, the rejection of bail by the learned Sessions Judge vide order, dated 12th July, 2018, is unwarranted, whereas, keeping in view the entire facts and circumstances of the case, particularly, the statement of prosecutrix, the petitioner deserves to be enlarged on bail.

3. Before dealing with the case in hand, it is apt to refer to the principles laid down and factors culled out by the apex Court, required to be taken into consideration at the time of consideration of bail applications by the Courts.

4. Some of the principles evolved in various pronouncements of the apex Court are as under:

1. Grant of bail is general rule and putting a person in jail or in a prison or in correction home during trial is an exception and presumption of innocence, i.e. person is believed to be innocent until found guilty is fundamental postulate of criminal jurisprudence. But, these principles are not applicable in cases where there is reverse onus and/or statutory presumption with regard to commission of offence. Such cases are to be dealt with differently keeping in view statutory presumption and reverse onus provided under the relevant statute. (See *Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22, para 1)*

2. While making a general statement of law that the accused is innocent, till proved guilty, the statutory provisions of relevant Act, like Section 29 of the POCSO Act, have to be taken into consideration which provides for presumption as to commission of any offence under Sections 3, 5, 7 and 9 of the Act. (See *State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 22)*

3. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the Court. The Court has only to opine as to whether there is *prima facie* case against the accused. The Court must not undertake meticulous examination of the evidence collected by the police and comment upon the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. (See *Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180)*

4. A bail application is not to be entertained on the basis of certain observations made in a different context. There has to be application of mind and appreciation of the factual score and understanding of the pronouncements in the field. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 14)*

5. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have

the evidence establishing the guilt of the accused beyond reasonable doubt. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 16; CBI versus Vijay Sai Reddy, (2013) 7 SCC 452)*

6. The Courts are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. [The] society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in the disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law. (See *Neeru Yadav versus State of U.P., (2014) 6 SCC 508, para 16; Rakesh Ranjan Yadav versus CBI, (2007) 1 SCC 70, para 16; Masroor versus State of U.P., (2009) 14 SCC 286, para 15; Ash Mohammad versus Shiv Raj Singh alias Lalla Babu and another, (2012) 9 SCC 446, paras 10 & 25; Chandrakeshwar Prasad alias Chandu Babu versus State of Bihar and another, (2016) 9 SCC 443 paras 10, 11)*

7. Detailed examination of evidence and elaborate documentation of merits of the case are to be avoided. (See *Puran versus Rambilas and another, (2001) 6 SCC 338, para 8; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528:* (SCC pp. 535-36, para 11); *Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389, para 13; Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 2.)* Consideration of details of the evidence is not a relevant consideration. While it is necessary to consider the *prima facie* case, an exhaustive exploration of the merits of the case should be avoided by refraining from considering the merits of material/evidence collected by the prosecution. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 15; and Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)*

8. It is not necessary to go into the correctness or otherwise of the allegations made against the accused as this is a subject matter to be

dealt with by the trial Judge. (See *Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22, para 16)*

9. Where *prima facie* involvement of the accused is apparent, material contradictions in the charge sheet are required to be tested at the time of trial and not at the time of consideration of grant of bail. (See *Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 28)*

10. Probability or improbability of the prosecution version has to be judged based on the material available to the court at the time when bail is considered and not on the basis of discrepancies. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 21)*

11. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course and reasons for grant of bail in cases involving serious offences should be given. (See *Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528:* (SCC pp. 535-36, para 11); *Dipak Shubhashchandra Mehta versus Central Bureau of Investigation and another, (2012) 4 SCC 134, para 32; Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389, para13; Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 29)*

12. At the time of assigning reasons in order to grant/refuse bail, there should not be discussion of merits and demerits of the evidence. (See *State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 15)*

13. Giving reasons is different from discussing evidence/merits and demerits. (See *Puran versus Rambilas and another, (2001) 6 SCC 338, para 8; State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 15)*

14. Under Section 439 CrPC, the Sessions Court and the High Court has concurrent jurisdiction to grant bail. Therefore, an application filed before the High Court under Section 439 CPC, after rejection of an application filed before Sessions Court under the said Section, is definitely a successive application and is not a revision or appeal against rejection of bail application by the Sessions Court.

15. An accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. (See *Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 30)*

16. The period of incarceration by itself would not entitle the accused to be enlarged on bail. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 24; GobarbhaiNaranbhaiSingala versus State of Gujarat (2008) 3 SCC 775, para 22 and Ram Govind Upadhyay versus Sudarshan Singh, (2002) 3 SCC 598, para 9)*

17. Filing of charge sheet establishes that after due investigation the investigating agency, having found materials, has placed the charge-sheet

for trial of the accused persons. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 12)*

5. The relevant factors to be kept in mind at the time of consideration of bail applications are as follows:

(1) Satisfaction of the Court in support of the charge as to whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(2) Nature and gravity of the accusation/ charge;

(3) Seriousness of the offence/crime and severity of the punishment in the event of conviction;

(4) Nature and character of supportive evidence;

(5) Character, conduct, behaviour, means, position and standing of the accused;

(6) The Courts must evaluate the entire available material against the accused very carefully; circumstances which are peculiar to the accused and the Court must also clearly comprehend the exact role of the accused in the case;

(7) 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;

(8) Position and status of accused with reference to the victim and witnesses to assess the impact that release of accused may make on the prosecution witnesses and reasonable apprehension of the witnesses being influenced or tampered with or apprehension of threat to the complainant/ witnesses and possibility of obstructing the course of justice;

(9) 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;

(10) likelihood and possibility of the accused's likelihood to repeat similar or the other offences;

(11) A reasonable possibility of the presence of the accused not being secured at the trial and danger of the accused absconding or fleeing from justice;

(12) Impact of grant of bail on the society and danger, of course, of justice being thwarted by grant of bail affecting the larger interest of the public or the State;

(13) 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;

(14) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(15) Whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(16) 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;

(17) No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court.

(See - *Gurcharan Singh v. State (Delhi Admn.) (1978) 1 SCC 118; Gurbaksh Singh Sibbia versus State of Punjab, (1980) 2 SCC 565; Prahlad Singh Bhati v. State (NCT of Delhi) (2001) 4 SCC 280; Puran v. Rambilas (2001) 6 SCC 338; Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598; Chaman Lal versus State of U.P. and another, (2004) 7 SCC 525; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528, para 11); Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13, para 16); State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21, para 18; Prashanta Kumar Sarkar versus Ashis Chatterjee and another, (2010) 14 SCC 496; SiddharamSatlingappaMhetre versus State of Maharashtra and others, (2011) 1 SCC 694; Prakash Kadam versus Ramprasad Vishwanath Gupta, (2011) 6 SCC 189; Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180; Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129; Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)*

6. In present case, FIR against the petitioner has been registered under Section 4 of POCSO Act. In Section 4 of POCSO Act, punishment for commission of offence under Section 3 of the said Act has been provided and with respect to commission of offence under Section 3, a presumption of guilt has been provided under Section 29 of the said Act, which reads as under:

> *"**29. Presumption as to certain offences.** - Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."*

7. Perusal of the status report filed and record produced by the prosecution reveals that prosecutrix has approached the Police Post Kachaa Tank, Nahan in the midnight between 18th-19th May, 2018, without lower inner wear and salwar, but, wearing shirt only and covering her lower body with dupatta (chunni) and narrated that after taking her examination at Paonta Sahib, before returning to Nahan, where she was residing in the house of a retired Principal as maid, her friend Sunil met her, who took her with one another boy on a bike and violated her person and was asking her to spent the whole night with him, but, on her refusal, he retained her salwar and bag and did not return the same despite repeated requests, compelling her to left the place without salwar covering her lower body with dupatta (chunni) and to start for Nahan on foot and she also signalled to stop the vehicles, but, no one stopped except a private bus in which she came to Kachaa Tank Police Chowki, Nahan.

8. As per prosecution case, she was provided clothes by the police and was taken to Women Police Station, Nahan, where FIR was registered on 19th May, 2018, whereafter, she was taken to the Magistrate on 20th May, 2018 and her statement under Section 164 CrPC was recorded wherein she further disclosed that she accompanied Sunil and another boy Ghodu on the bike and boarded the truck alongwith them where a third boy, namely Aman Sharma @ Ojas was also present and in the presence of Ghoru and Aman Sharma @ Ojas, Sunil had violated her and, thereafter, the two boys, i.e. Ghoru (second boy) and Aman Sharma @ Ojas (third boy) had also tried to violate her forcibly, who had also taken her lower inner wear and salwar to compel her to submit herself to their lust forcibly. However, with great difficulty, she jumped from the truck to save her, but, accused persons kept her clothes with them causing her to come to Nahan after covering her lower body with her dupatta, in a private bus and to approach Police Post Kachaa Tank at Nahan, where police had provided clothes to her and at that time, she was perplexed and under duress causing disclosure of place of occurrence as a forest near Shambhuwala whereas the occurrence had taken place in the truck.

9. In the meanwhile, police had also obtained CDR of telephone number of accused-Sunil supplied by the prosecutrix and on the basis of call details, two persons, namely Sachin and Aman @ Ojas were called by police for investigation where Aman @ Ojas has disclosed the incident in the same manner as has been disclosed by the prosecutrix in her statement recorded under Section 164 CrPC and also disclosed the registration number of the truck involved in the incident and name of its driver (second boy – Ghoru) as Deepak Singh, and Sachin, who has also been cited as a witness in the challan, a driver of another truck, has stated that on the day and at the time of incident, he was also going towards Khanna whereto petitioner-Deepak Singh had loaded his truck and on noticing petitioner-Deepak Singh, he had tried to contact the petitioner by signalling and calling him to stop. But, petitioner-Deepak Singh had not stopped the truck. From his statement, the version of the prosecution is, *prima facie,* corroborated.

10. Immediately after the incident, prosecutrix had approached the police whereupon FIR was registered on 19th May, 2018, and soon thereafter, on 20th May, 2018, statements of prosecutrix, under Sections 164 CrPC and 161 CrPC, were recorded. On the basis of CDR, police interrogated Aman @ Ojas and Sachinwhereafter Aman @ Ojas and Sachin were summoned and thereafter, petitioner was apprehended from Khanna and was brought to Nahan, where, after preliminary interrogation, he was arrested.

11. Plea of the learned counsel for the petitioner, that there is no allegation against the petitioner and it is a case of no evidence against him, is not in consonance with the material on record. Veracity of the statements and impact of disclosure of half truth by the prosecutrix, at the first instance, and revelation of the entire story before the Magistrate is yet to be considered by the trial Judge. However, *prima facie,* there is evidence on record connecting the petitioner with the alleged offence under Section 376 IPC and Section 4 of POCSO Act read with Section 34 IPC so as to facilitate the commission thereof and also with regard to an attempt on his part to commit the same offence.

12. As per birth certificate of prosecutrix on record, her date of birth is 25th October, 2001 and at the time of incident, she was 16½ years old. As evident from her statement, she accompanied Sunil and petitioner at her own, but, keeping in view the evidence on record with regard to her age, *prima facie,* it appears that her consent was immaterial. So far as the alleged role of the petitioner is concerned, he facilitated the violation of the person of the prosecutrix by Sunil and thereafter, tried to compel her to allow her violation by him and Aman @ Ojas also and for pressurizing her, they kept her lower apparels, including inner wear, with them and on refusal to accede to their demand, when

prosecutrix jumped out of the truck, even then, her clothes were not returned to her, rather, she was left on the road in the dark night. As per material on record, during investigation, at the instance of the petitioner, sandals/chappals of prosecutrix were recovered from the truck in which the alleged offence was committed and was being driven by the petitioner.

13. Prosecutrix, aged about sixteen years, without her lower apparels, was left alone on the Highway by the petitioner and his companions during dark night hours. Facing such a situation, the trauma suffered by the prosecutrix was more than sufficient to get perplexed to tell half truth to the police, at the first instance, as it was a case where she herself had opted to accompany her friend Sunil, without realizing the consequences thereof likely to be followed on account of the mind set of persons accompanied by her who consider her, being a female, an item for enjoyment, nothing more than that. Such mind set of petitioner and his co-accused, *prima facie,* is reflecting from their behaviour and manner in which they abandoned the prosecutrix on her refusal to accede to their demand of sexual favour perhaps thinking that in such circumstance, prosecutrix may not dare to report the matter.

14. Further, during investigation, on verification, name of the petitioner was found to be Rohan Singh and the name and address, disclosed by him during interrogation, were not found to be correct.

15. Nothing has been brought to the notice of the Court from the material on record or otherwise causing the prosecutrix to implicate the petitioner falsely in the present case. It is true that pre-trial imprisonment cannot be used as substitute to the punishment without scrutiny of the evidence by the trial Court, but, at the same time, in a case where a girl was abandoned in a situation, as discussed above, grant of bail to the petitioner, at this stage, may also have an adverse impact on the society. Petitioner has a right to liberty under Article 21 of the Constitution of India, but, the provision of reverse onus under Section 29 of the POCSO Act has also to be given due weightage. Balance has to be maintained between the personal and societal interest.

16. Further, challan is pending for consideration of charge before the trial Court and is stated to be listed on 24th September, 2018. Petitioner had also approached learned Sessions Judge for bail by way of application under Section 439 CrPC on 11th June, 2018, which was dismissed on 12th July, 2018 and immediately thereafter, present petition has been filed on 25th July, 2018. Learned Sessions Judge has considered the entire material on record and has declined to release the petitioner on bail by passing a reasoned order. I find no infirmity or perversity in the order passed by him. From the date of rejection of the bail of the petitioner by learned Sessions Judge till date, there is no change in circumstances and no fresh ground persuading this Court to take a view different from the view taken by the learned Sessions Judge has been pointed out.

17. In view of above, considering cumulative effect of entire facts and circumstances, without commenting upon the merits of the evidence and keeping in view the principles laid down by the apex Court and other factors, like nature of offence, manner in which it has been committed and its impact on the society, petitioner is not entitled for bail, at this stage. Hence, the petition is dismissed.

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

Dinesh Ranta& another ....Petitioners.
Versus
Pushpa Chauhan & others ....Respondents.

CMPMO No. 117 of 2016
Reserved on 14.9.2018
Decided on : 20.9.2018

Code of Civil Procedure, 1908- Order VI Rule 17- Amendment – Held, amendment which would enable and empower trial Court to clinch entire gamut of controversy inter se parties at contest, can be allowed – Order of Trial Court granting leave to amend plaint and thereby incorporate events subsequent to filing of suit and relevant to the controversy upheld. (Paras- 2, 6 & 7)

For the petitioner: Mr. V.S. Chauhan, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate, for respondent No.1.
Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur & Vikrant Chandel, Dy. A.Gs. for respondent No.2.
Mr. Anil Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

In the instant petition, a, challenge, is, cast upon the orders, rendered, by the learned Civil Judge (Junior Division) Court No. 3, Shimla, upon, RBT No. 161-1 of 15//2013, whereunder, the, plaintiffs' application, cast, under the provisions, of, Order 6 Rule 17, CPC, was allowed.

2. On an apt scanning of the plaint, it is discernable, qua the plaintiff, raising construction upon land bearing khasra No. 1154/1, and, the, construction being raised, strictly in consonance, with, the map sanctioned, by the competent authority, and, (i) hers leaving set backs from all the sides, (ii) however, the co-defendants No.1 and 2, while raising construction, upon, the adjoining khasra numbers, are, hence averred, to, raise construction rather by flouting the approved plan, non adherence whereof, is, espoused in theirs, not, leaving the apt set backs, (iii) theirs raising projections, hence, the latter encroaching the land, and, the set backs, left by the plaintiff upon her land. The defendants instituted written statement, and, therein rather denied the aforesaid averments, and, contrarily contended qua the plaintiff hence not leaving the apt set backs, in her raising construction, upon the land, owned and possessed by her.

3. During the pendency of the suit, before the learned trial Judge, an application, cast, under the provisions of Order 6 Rule 17, was, instituted therebefore, and, the apt leave of the Court was strived hence, for, incorporating, in the initially instituted plant, the, hereinafter extracted amendments:-

> "i The applicant may be allowed to add the following word "and for declaration" in the detail of the description of suit, after memo of parties, after the word "mandatory injunction" and before the word "as detailed in the body of the plaint".

ii. The applicant/plaintiff may be allowed to add the new para after para 14 as para 14 (a) as under:-

> "14(a). That the defendants No. 1 and 2 have submitted their revised building plan of one storey i.e. ground floor for the purpose of approval with the defendants No. 3 and 4. This revised plan/map is submitted by defendants No. 1 and 2 despite the fact that they have not only covered their entire set off are but they are also trying to encroach and to lay the over projection over the set off area and construction of the plaintiff. The defendant No. 3 and 4 without considering this aspect, so as to help the defendant No. 1 and 2 have approved/sanctioned the revised map of one storey i.e. ground floor of the defendants No.1 and and
>
> 2. This approval/sanction of the revised map/plan of the defendants No. 1 and 2, by the defendants No. 3 and 4 is against the procedure and against the H.P. Town and Country Planning Act and Rules framed thereunder and the building bye laws. This sanction/approval of one storey i.e. ground floor of map/plan of defendant No.1 and 2 by defendants No. 3 and 4 is wrong, illegal and against the procedure and is liable to be declared as null and void. The NOC issued by defendant No. 3 and 4 in favour of defendant No. 1 and 2 for installation of electricity and water connection deserves to be withdrawn. The same is result of misrepresentation of facts and the conclusiveness of the defendants."

iii. That similarly the applicant/plaintiff may be allowed to add new relief in the prayer clause after para (II) and before para (III) as para (II) (a) as under:-

> "(II)(a). That the sanction/approval of the revised map/plan of defendant No. 1 and 2 by defendant No. 3 and 4 is wrong and illegal and the sanction/approval of the revised map/plan of defendant No.1 and 2 is liable to be set aside and NOCs for meter and electricity connections deserve to be withdrawn."

4. As aforestated, the apt leave was granted to the plaintiff, and, co-defendants No. 1 and 2, being aggrieved therefrom, hence instituted the instant petition, before this Court.

5. The learned counsel for the petitioner, has, contended with much vigor before this Court, that, with an alternative statutory remedy being available to the plaintiff, for redressing her grievance, hence the leave, as accorded, by the learned trial Court, being stained with, a, vice, of, gross infirmity.

6. With the plaintiff, in the initially instituted plaint, rearing the afore averments, and, with the approval standing granted by co-defendants No. 3 and 4, to, the apt revised plan, instituted before them, by co-defendants No. 1 and 2, (a) thereupon the aforesaid approval, when, occurred subsequent to the prior thereto instituted plaint, hence also when the construction, as stood raised, by co-defendants No. 1 and 2, was earlier canvassed, to, on the, afore anvil, hence, infringe the mandate of law, (b) thereupon when, the, aforesaid purported encroachment, yet, not being meted an appropriate adjudication, rather, with its purportedly constituting, a, continuing invasion, upon the land of the plaintiff, (c) thereupon even the validity, of, approving, of, the revised plans, was, enjoined to

be incorporated in the pre-instituted plaint, and, the leave in respect thereof, as granted, was also permissible under law.

7. Even though, there, is, an apt statutory mechanism hence available, (a) for recourse by the plaintiff, for hers redressing her grievance, yet, with hence no mandate standing encapsulated, in, the H.P. Town & Country Planning Act, provisions whereof apply, vis-a-vis, the area whereat the apt construction exists, (b) thereupon for setting at rest, the afore competing contentions, raised, by the contesting litigants, the leave as granted is neither grossly illegal nor hence is stained with any vice of any impropriety. Contrarily, the apt leave would facilitate, the, striking of apt issue(s) in consonance therewith, and, also would enable the adduction, of, apt evidence thereon, and, rather would empower the learned trial Judge, to, clinch, the, entire gamut, of, the controversy, inter-se the parties at contest.

8. In view of the above observations, the instant petition stands dismissed, and, the impugned order is affirmed and maintained. All pending applications, if any, also stand disposed of.

9. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case, and, the learned trial Court shall decide the matter uninfluenced, by any observation made herein above.

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

Master Chaman Bahadur (minor), through his father Sh. Prem Kumar
....Appellant.

Versus

Shri Bhim Singh Panwar & another ....Respondents.

FAO No. 17 of 2018.
Reserved on : 13.09.2018.
Decided on : 20th September, 2018.

Motor Vehicles Act, 1988 - Section 166-Motor Accident- Claim application – Assessment - Future prospects – Medical evidence – Claimant filing appeal and praying for enhancement of compensation towards loss of future prospects contending that he suffered permanent disability in Motor Accident – Medical certificate requiring re-examination of injured after two years for assessing disability – No disability certificate after re-examination filed in evidence – Medical Officer not deposing that injuries permanent in nature – Held, Claimant not entitled for any enhancement of compensation on this ground. (Para-3).

Motor Vehicles Act, 1988- Section 166- Motor Accident- Claim application - Compensation - Future medical expenses – Assessment – Medical evidence – Medical Officer not deposing that claimant requires treatment for injuries in future also – Held, Claimant not entitled for compensation towards future medical expenses – Appeal dismissed. (Para-4)

For the Appellant: Mr. Sanjay Bhardwaj, Advocate vice to Mr. J.L. Bhardwaj, Advocate.

For Respondent No. 2: Mr. Dalip K. Sharma, Advocate.

For Respondent No. 3: Mr. Jagdish Thakur, Advocate.

Respondent No.1 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the claimant, namely, Master Chaman Bahdur, a minor, through his father Prem Kumar, wherethrough, he, casts a challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-III, Solan, District Solan, H.P., upon, M.A.C. Petition No.:- 17ADJ-II/2 of 2015, whereunder, compensation amount comprised, in, a sum of Rs.2,15,542/- along with costs, and, interest accrued thereon, at the rate of 9% per annum, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. The compensation assessed upon the claimant, is, stipulated in the hereafter heads:-

Pecuniary damages	
i) Loss of Future income:	Rs.33,600/-
ii) Medical Expenses:	Rs.16,942/-
iii) Transportation Charges:	Rs.10,000/-
iv) Attendant charges:	Rs.10,000/-
v) Special diet charges:	Rs.25,000/-
Non Pecuniary damages	
I) Pain and suffering:	Rs.20,000/-
ii) Future Loss of amenities:	Rs.1,00,000/-
Total	**Rs, 2,15,542/-.**

3. The learned counsel appearing for the claimants, has, contended with much vigour (i) that the apt computation by the learned tribunal, under, the head "Loss of Future income", and, comprised in a sum of Rs.36,000/-, being grossly minimal, and, in gross disconsonance, with the per centum of disability, entailed upon the claimant, and, as borne in disability certificate embodied in Ex.PW6/A. He contends (ii) that under the aforesaid head, given the claimant being a brilliant student, and, also his holding bright prospects, to, in future, rear, a, handsome income form, his prospective employment, and, whereas the entailment, of, disability in the aforesaid per centum, upon him, rather, hence deterring him, to, rear prospective gains, from, his prospective employment, (iii) thereupon an apt enhancement being made. However, the aforesaid contention, is, grossly mis-maneuvered and does not secure any approbation, from, either Ex.PW6/A, nor from the deposition, in proof whereof, rendered by its author, who stepped into the witness box, as PW6. The reason for making the afore conclusion, is, sparked (a) by Ex.PW6/A, detailing qua the apt crush injuries, as, entailed upon the relevant portion, of the body of the minor claimant, encumbering , a, 7% disability, upon, the minor. Furthermore, it is also detailed therein (b) that the afore per centum, of, disability hence likely to improve or ameliorate, and, a, review stands recommended after two years. The disability certificate, borne in Ex.PW6/A is prepared, much subsequent, to the accident, and, when PW-6 stepped into the witness box, in, proof of the findings borne therein, (c) he in his examination-in-chief, has not rendered any testification, vis-a-vis, the disability entailed, upon, the claimant being permanent in nature, nor he has made any echoings therein qua even after revision thereof, there being no possibility, of its improvement, and, amelioration, (d) whereas, the afore pronouncement were enjoined to be rendered by him, (e) therefore, want, of, occurrence, of, afore

pronouncement(s) in the deposition of PW-6, hence, constrains this Court, to, conclude that the per centum of disability entailed, upon, the minor claimant, being temporary in nature, and, there being likelihood, of, its improvement or amelioration. In aftermath, it is to be concluded, that, there being no concomitant permanent loss of income, if any, encumbered, upon, the claimant, from, his prospective employment. The further sequel thereof, is, that the quantification of compensation made vis-a-vis the claimant, under, the head "Loss of future income", and, borne in a sum of Rs.36,000/-, being both a just and proper assessment.

4. The learned counsel appearing for the minor claimant has also contended with much vigour before this Court (i) that the learned tribunal was enjoined to assess compensation, towards future medical expenses, vis-a-vis, the claimant, given the severity or enormity, of, the disability entailed upon him. However, the aforesaid contention, is rudderless, (b) given PW-6 in his testification rather being enjoined to make echoings, vis-a-vis the magnitude, severity or enormity of the disability besides the injuries entailed, upon, the person of the minor claimant, necessitating incurring of medical expenses in future also, whereas, the aforesaid testification remaining not rendered by PW-6, thereupon, no future medical expenses, were enjoined to assessed, vis-a-vis, the claimant.

5. The learned counsel, appearing for the claimant, has, further contended with much vigour (i) that the amounts awarded under the head, "pain and suffering", and, towards "future loss of amenities", being minimal, and, he has strived to secure, from, this Court rather appropriate enhancements thereof. However, even the afore striving, is, a mis-befitting endeavour, as, the quantum and magnitude besides enormity, of, the disability, entailed upon the person of the claimant, and, as proven by PW-6, make displays, qua his omitting, to, make any bespeaking qua it being neither mitigable nor reversible nor curable, (ii) and, rather with PW-6/A, making clear echoing, qua, the disability entailed, upon, the minor being amenable to improvement, and, when no evidence stands adduced, that, since the preparation of Ex.PW6/A, there being no improvement, though necessarily enjoined to be adduced, (iii) hence, the computation of compensation, under, the head "pain and suffering", comprised in a sum of Rs.20,000/-, and, further assessment of compensation, under, the head "future loss of amenities", comprised in a sum of Rs.1,00,000/-, is, in consonance with the pronouncement(s), borne in Ex.PW6/A.

6. For the foregoing reasons, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the award 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 SURESHWAR THAKUR, J.

National Insurance Company Ltd. ....Appellant.
Versus
Smt. Mamta Devi & others ....Respondents.

FAO No. 4124 of 2013.
Reserved on: 17th September, 2018.
Decided on : 20th September, 2018.

Motor Vehicles Act, 1988- Section 166- **Code of Civil Procedure, 1908-** Order XIV Rules 1 and 2- Non-framing of issues – Claims Tribunal allowing application of legal representatives of deceased and fastening liability on insurer – Appeal against – Insurance Company contending that despite pleadings, no issue qua composite negligence framed by Tribunal – Non-framing of issue prejudiced it as for want of issue, it could not lead evidence to prove factum of composite negligence - Held, order of Tribunal not framing issue of composite negligence not assailed by Insurer, nor cross-examination conducted on claimants' witnesses qua composite negligence - Evidence revealing that victim's vehicle was being driven on proper side of road and offending vehicle had gone to wrong side of road at time of accident - No prejudice proved to have been caused to insurer by non-framing of such issue – Appeal dismissed. (Paras- 3 to 5)

For the Appellant:	Mr. Lalit K. Sharma, Advocate.
For Respondent No. 1 to 6:	Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.
For Respondent No. 7:	Mr. Anup Rattan, Advocate.
For Respondent No. 8:	Mr. B.S. Attri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts a challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal(I), Kangra at Dharamshala, H.P., upon, MACP No. 10-J/II/2009, whereunder, compensation amount comprised, in, a sum of Rs.5,43,400/- along with costs, and, interest accrued thereon, at the rate of 9% per annum, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. Deceased Balbir Singh, at the relevant time, was, atop motor cycle bearing registration No. HP-38B 1697, motorcycle whereof, at the relevant time, stood driven by deceased Rajesh Kumar. In sequel, to, the rash and negligent driving, of, the offending maruti van, bearing registration No. HP-38A-8348, by its driver one Rohit Sharma, arrayed, as, respondent No.7 herein, an apt collision occurred inter se both, (i) in sequel thereto deceased Balbir Singh, as pronounced, by the apt postmortem report, borne in Ex.PW7/A, hence, suffered fatal injuries. The entailment, of, fatal injuries, upon, the deceased is not contested by the counsel for the insurer. Also the counsel for the insurer does not contest, the, validity of findings, rendered by the learned tribunal in its impugned award, except, the findings rendered, upon, the issue appertaining to deceased Balbir Singh, suffering, fatal injuries, in sequel to, the, rash and negligent manner of driving, of, the offending maruti van, by its driver. His contention, for, eroding the efficacy of the findings recorded thereon, stands rested, upon, despite, the insurer, in, its response/reply furnished to the claim petition, rather rearing, a contention therein (a) qua the ill-fated occurrence/mishap, being a sequel, of composite negligence, of, the driver of the offending maruti van, and, the rider of the afore motorcycle, yet, no apt issue being struck in respect thereof; (b) wherefrom, he contends, that, the omission on the part of the learned tribunal to strike a issue, upon, a vital *res controversia*, and, also its concomitant failure, to, return finding thereon, has, sequelled gross miscarriage of justice, and, also sequelled, the, further ill consequence, of, non arraying of the owner of the afore motorcycle, besides the non arraying of insurer thereof; (c) ultimately it has sequelled qua the entire apt indemnificatory liability, being

untenably fastened, upon, the insurer/appellant herein, (d) whereas, upon the afore omission(s), rather not occurring, thereupon the apt proportionate, hence, just apportionment(s) of liability, vis-a-vis, compensation amount, would stand fastened amongst the owner, and, the insurer, of, the afore motorcycle.

3. The afore contention, is, squarely rested, upon, contentions, in, consonance therewith, being reared, by the insurer/appellant herein, in its reply/response furnished, to the claim petition. However, a perusal, of, the order recorded on 1.4.2010, by the learned tribunal, makes, a disclosure that the learned tribunal, had, omitted to frame/strike, an issue in consonance therewith. The afore order remained unassailed, hence, it acquires conclusivity, thereupon, the insurer/appellant, is, barred to rear the aforesaid contention, vis-a-vis, the apt omission made by the learned tribunal. However, even if, the order pronounced on 1.4.2010, stands concluded to acquire an aura of conclusivity, (a) yet, the contention of the learned counsel appearing for the insurer/appellant qua the afore omission, still remaining alive, and, it vitiating the trial, and, also, the verdict pronounced by the learned tribunal, (b)importantly, when the aforesaid omission rather appertains to non striking of a vital issue, and, consequent therewith non adduction of evidence thereon, hence apparently, and, ex-facie prima facie prejudice hence palpably ensuing, vis-a-vis, the insurer/appellant herein. However, the omission, if any, on the part of the learned tribunal, to, strike the afore vital issue, cannot, per se be concluded to visit the insurer/appellant herein, with, any demonstrable prejudice, (c) nor per se it is inferable, that, the apt trial is vitiated nor it can be concluded that the impugned verdict, is, stained with any vice of gross illegality, (d) unless, a perusal of the entire records, displays, that the insurer/appellant herein, (a) was taken by surprise; (b) despite non striking of the vital issue, it failed to lead any formidable evidence, nor evidence on record, unveiling, of the claimants' witnesses hence remaining uncross-examined by the counsel, for the insurer, emphatically, with respect to the afore contentions reared by the insurer, in its reply, furnished to the claim petition.

4. Be that as it may, a perusal of the records reveals (i) that the apt FIR borne in Ex.PW5/A, embodying therein, hence, offences constituted under Sections 279, 337 and 304 of the IPC, hence, stood registered with Police Station, Nurpor. Even though, there is an ascription qua therein deceased Rajesh while driving the afore motorcycle, his rather breaching, the, terms and conditions of the insurance policy, (ii) breach whereof stands therein displayed, to, arise from, his permitting two persons, to be, astride along with him as pillion riders thereon, (iii) yet the afore breach, is, also enjoined to be proven to beget the sequel, of, hence the afore deceased Rajesh Kumar, omitting to adhere to the standards of due case and caution, hence, his negligence begetting, the, apt collision inter se, the, maruti van, and, the motor cycle, whereon, he was atop as its rider, (iv) and, obviously his, contributing, to the relevant collision, or in sequel to the composite negligence of Rajesh Kumar, and, the driver of the offending maruti van, deceased Balbir Singh being entailed, with, fatal injuries on his person. Contrarily, with an eye witness to the occurrence, who lodged the FIR, while stepping into the witness box as PW-2, rather in his examination-in-chief, hence, making disclosure(s) qua the afore motor cycle, being driven on the appropriate side of the road, (v) whereas, the offending maruti van being driven, on, the inappropriate side of the road, (vi) besides his also rendering an echoing therein that the offending van, being driven at a brazen excessive speed, (vii) thereupon, the collision, as, occurred inter se both, does garner an inference qua the contents embodied, in the FIR, borne in Ex.PW3/A rather being proven. PW2 was held to cross-examination by the counsel for the insurer, and, he meted suggestion, to him in support, of, the propagation(s) reared by the insurer in its reply, however, the aforesaid suggestion(s) rather stand denied by him. Consequently, the deposition qua the occurrence rendered by PW-2, and, occurring in his examination-in-

chief, acquires an aura of authenticity, and, hence enjoined meteing(s) of credence thereto. Even though, the insurer led into the witness box RW-1 and RW-2, yet with RW-2, being the driver of the offending vehicle, and, his not reporting the matter, to, the police, thereupon, his testification in support of the insurer's response to the claim petition, loses vigour. Consequently, the afore contention of the insurer is rejected.

5. For the foregoing reasons, there is no merit in the instant appeal and it is dismissed accordingly. The impugned award is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Sunder Lal .....Respondent.

Cr. Appeal No. 235 of 2007.
Reserved on: 19th September, 2018.
Date of Decision: 20thSeptember, 2018.

Indian Penal Code, 1860- Sections 380, 411, 457 and 201- Theft and receiving stolen property – Proof – Accused convicted by Trial Court for offences under Section 380 and 457 of Code by holding that he committed theft of ornaments and currency in house of complainant 'S' –But acquitted co-accused of receiving said stolen property for want of evidence – Case entirely based on disclosure statement of accused and recoveries effected thereon- In appeal, Addl. Sessions Judge acquitting accused also – Appeal by State – Held, evidence regarding recoveries allegedly made on basis of disclosure statement not worth credence – Acquittal did not suffer from any gross perversity or mis-appreciation of evidence – Appeal dismissed- Acquittal upheld. (Paras-9 to 13)

For the Appellant: Mr. Y. S. Thakur, Deputy Advocate General
For the Respondent: Mr. Nitin Thakur, Legal Aid counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State against the judgment rendered, on 4.4.2007, by the learned Additional Sessions Judge, Solan, H.P., upon, Criminal Appeal No. 7-S/10 of 2006, 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 the complainant Shanta Aggarwal alongwith husband and daughter residing at Kandaghat near PWD rest House. She has purchased some ornaments in connection with marriage of her daughter and has kept the said ornaments in steel almirah in her house. On 5.10.2000, when she and her daughter had gone to Dharampur after locking their house and she was informed by some unknown person telephonically that some one has broken the lock of her house and

has committed theft therefrom at which information was also given to the police. The police proceeded towards the spot and in the meantime Shanta Aggarwal also rushed towards her house and after checking her house and the articles kept therein, she found that gold ornaments alongwith currency note of Rs.1800/- have been stolen from her house by some unknown persons at which she got recorded her statement under Section 154, Cr.P.C. before the police. On the basis of which FIR was registered at police station, Kandaghat. The police took into possession a box in which ornaments were contained and which was lying at the spot. One kara of silver was also recovered from nearby house of Shanta Aggarwal, which was also seized in presence of the witnesses by the police vide separate memo. Accused was arrested and on 14.2.2001 he made a disclosure statement that he has committed theft of gold ornaments and currency notes from the house of the complainant and he has sold some of the gold ornaments to other co-accused namely Ashok Kumar, Ram Rattan, Jai Pal, Sandeep Kumar and Satish Kumar and in pursuance to such disclosure statement, on 15.2.2001, the accused got recovered some of the stolen ornaments from the shop of co-accused Ram Rattan situated at Kalka, which were stated to have been melted by the said co-accused and it were put in a parcel and sealed with seal impression A and same were taken into possession vide memo Ex.PW4/A in presence of Prem Chand and Naresh Kumar. The accused also got recovered some of stolen ornaments from the shop of co-accused Jai Pal which were put in a parcel and sealed with seal impression A and was seized vide memo Ex.PW4/B, in the presence of Prem Chand and Naresh Kumar and specimen of seal impression used was separately taken on a piece of cloth which Ex.P3 and spot map of recovery of Ex.PW12/B was prepared. The accused thereafter got identified the shop of co-accused Ashok Kumar at Pinjore vide memo Ex.PW8/B, regarding which spot map Ex.PW12/C was prepared in the presence of Abhishek Sharma. The accused also identified the shop of co-accused Sandeep Kumar. On 17.2.2001, the accused identified the shop of co-accused Satish Kumar at Chandigarh and go recovered some of the stolen ornaments which have been melted by the said co-accused and which were seized after putting in a parcel and sealed with seal impression B. On 17.2.2001 accused also identified the shop of co-accused Sandeep Kumar at Pinjore and also got recovered some stolen ornaments from his shop in a melted form which were taken into possession and sealed with seal impression H and said co-accused also produced receipt vide which he has purchased the ornaments from accused Sunder Lal for Rs.18,000/- whereas, co-accused Jai Pal also produced receipt Ex.P9 vide which he has purchased ornaments from accused for Rs.22,000/-. The spot map Ex.PW12/K was also prepared during investigation by Bishamber the then ASI Police Station, Kandaghat, who had died prior to his examination in the Court and statements of the witnesses were recorded by said ASI and Inspector Shamsher Singh as per their versions.

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 Sections 457 and 380 of the IPC, whereas, the other accused stood charged hence for theirs committing offences punishable under Sections 411 and 201 of the IPC. In proof of the prosecution case, the prosecution examined 14 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, they 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 hence offences punishable under Sections 380 and 451 of the IPC, however, it acquitted the other

co-accused, for, charges framed under Section 411 and 201 of the IPC. In an appeal preferred therefrom, by the accused/respondent herein, before, the learned Addl. Sessions Judge concerned, the latter reversed the apposite findings of conviction, and, sentence recorded, upon, him, in the judgment, pronounced, by the learned trial Court.

6. The State of H.P., stands aggrieved, by the findings recorded by the learned Addl. 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 Addl. 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 Addl. Sessions Judge, rather standing based on a mature and balanced appreciation, by him, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The prosecution would succeed in proving the charge against the accused/respondent, upon, unflinching proof emanating qua, in pursuance, to, the disclosure statement, borne in Ex.PW6/A, hence the purportedly stolen property, by the accused/respondent herein, being recovered, from, the persons/commercial establishments, as, named therein. In the prosecution proving the aforesaid factum, it had depended, upon, the statement rendered by the Investigating Officer, who, stepped into the witness box, as PW-12, and, tendered into evidence, memo borne in Ex.PW4/A, with, disclosures therein qua the property detailed therein being recovered, from, the shop of co-accused one Ram Rattan, whereto whom, the accused had allegedly sold, two karas of gold weighing 2 tola, and, one gold chain weighing 3 tolas. Ex.PW4/A was prepared in the presence of one Naresh Kumar, and, one Prem Kumar, who appended their respective signatures thereon, as witnesses thereto. A further dependence, is, made upon Ex.P-4, exhibit whereof embodies, a, receipt comprised, in, a sum of Rs.22,000/-, issued by afore Ram Rattan, vis-a-vis, the accused/respondent herein. However, the memo borne in Ex.PW4/A, and, receipt borne, in, Ex.P-4, (i) are not amenable for meteing of any credence thereto, (ii) given PW-4 Naresh Kumar not making any testification, vis-a-vis, in pursuance to Ex.PW6/A, and, through Ex.PW4/A, the items detailed therein, hence, standing recovered, from, co-accused Ram Rattan, and, at the instance of the accused/respondent herein, (iii) also given his reneging from his previous statement recorded in writing. Likewise PW-5 Prem Chand, a witness, to Ex.PW4/A, rendered a testification in his cross-examination, that, Ram Rattan, rather delivering items recovered, through Ex.PW4/A, to the police, at, the Police Station, (iv) wherefrom an inference is bolstered qua his belying the factum, of, recoveries, of, the items, borne in Ex.PW4/A, being effectuated from the premises of one Ram Rattan, and, at the instance of the accused. (v) Both aforesaid, PW-4 and PW-5, omitting to make testifications qua Ram Rattan, at the time of preparation of Ex.PW4/A also handing over receipt, borne in Ex.P-4, with recitals borne therein qua Rs.22,000/-, standing liquidated by him, vis-a-vis, the accused/respondent. Consequently, it is to be concluded, that, Ex.PW4/A, and, the receipt borne in Ex.P-4, remaining unconnected, rather with the disclosure statement, borne in Ex.P6/A. Moreover, with the scribings borne in Ex.P-4, also, remaining not efficaciously

proven to be scribed by accused/respondent or by Ram Rattan, thereupon, also no credence is to be meted thereto.

10. Furthermore, the items detailed in Ex.PW4/B, are alleged, to be recovered, thereunder, at the instance of the accused, from, the shop of one Jai Pal at Gandhi Chowk, Kalka, shop whereof stood purportedly identified by the accused. The witnesses thereto are one Naresh Kumar, PW-4, and, one Prem Kumar, PW-5. However, PW-4 apart, from his testifying qua, upon, Ex.PW4/B, his signatures occurring thereon, he has omitted to corroborate, the recitals borne therein qua the items detailed therein, also standing recovered from the premises of one Jai Pal, and, at the instance of the accused. PW-5, contrarily, has deposed that the aforesaid Jai Pal, not in the manner as disclosed in Ex.PW4/B, purveying, the, items detailed therein, to the Investigating Officer concerned, rahter his handing over the items detailed therein, to the Police at the Police station. Consequently, PW-4, and, PW-5 also abysmally failed to connect the apt disclosure statement, borne in Ex.PW6/A, and, Ex.PW4/B. Be that as it may, the preparation, of, Ex.P-9 also remains unproven on record, given both PW-4 and PW-5, omitting to make any testification qua the afore receipt, standing issued to accused Sunder Lal, at the time of sale, of, ornaments, to, co-accused Jai Pal. Furthermore, also when the scribings occurring therein are efficaciously not proven to be authored by Jai Pal, hence, no capital can be gained therefrom, by the prosecution.

11. Through Ex.PW8/B five gold rings, weighing 3 tolas, hence stood recovered from the premises co-accused Ashok Kumar, located at Pinjore. However, a closest perusal, of, the testification rendered by PW-8 and of PW-12, omits, to make any underlinings therein qua the recovery of items, detailed therein, being effectuated, in their respective presence, and, at the instance of the accused, and, from, the premises of Ashok Kumar at Pinjore. The effect thereof qua, the, mere identification, purportedly, by the accused, of, the aforesaid premises, of Ashok Kumar, located at Pinjore, not, constituting the best evidence, hence, for proving the effectuation(s), of recovery of stolen items, detailed in Ex.PW8/B. Furthermore, through Ex.PW8/A, eight gold rings and silver necklace along with four nose pins, stood purportedly recovered at the instance of the accused, from, the shop of Sandeep Kumar, shop whereof, purportedly stood, identified by the accused/respondent. However, no efficacious proof in respect thereof, stands adduced, (i) given both PW-12 and PW-8 omitting to make any be speakings, in their respectively rendered testifications qua recoveries thereof standing effectuated in their presence, from, the premises of the aforesaid. Even receipt Ex.P-10 purportedly issued, to the accused, at the time of sale of ornaments, to Sandeep Kumar, fails to connect the accused, vis-a-vis, the disclosure statement borne in Ex.PW6/A, (ii) given all the scribings therein not standing proven, to be scribed either by Sandeep Kumar or by the accused/respondent. Even though, the prosecution further placed reliance, upon, memo Ex.PW9/A, and, the receipt borne in Ex.PW9/C, detailing therein, the items recovered thereunder, from the premises of co-accused Satish Kumar, located at Chandigarh, at the purported instance of the accused, yet no reliance is amenable to be placed thereon, as, PW-9 omits to make bespeakings, in consonance, with the recitals borne therein, also, with PW-9/C being not proven to be scribed either by the accused/respondent or by co-accused Satish Kumar. Preeminently, with other co-accused standing acquitted, and, the State not challenging their acquittal also hence constrained this Court, to, uphold the verdict of acquittal.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned Addl. 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 Addl. Sessions Judge concerned does not suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. 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 SANDEEP SHARMA, J.

Gopal Singh .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No.1195 of 2018
Decided on: 24.9.2018.

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 20, 29 and 37- Default bail- Computation of period – Police apprehending applicant and one 'S' -Recovering 862 grams charas from him and 1 kg 23 grams charas from 'S'- Applicant filing application for default bail on not filing chargesheet within 90 days – Special Judge rejecting bail on ground that applicant and 'S' apprehended together at one place, and recovery being of commercial quantity limitation in filing charge sheet was 180 days – Petition against – High Court found that at time of filing of application for default bail, Section 29 of Act was not invoked and recoveries from applicant and 'S' shown separate –Recovery from applicant falls in category of less than commercial quantity – However interregnum, chargesheet filed by investigating agency – Matter remanded to Special Judge with direction to decide application afresh in view of allegations alleged in chargesheet. (Paras-8 to 11).

For the Petitioner : M/s Vishwaraj Chauhan and Ashok K. Tyagi, Advocates.
For the Respondent : Mr. S.C. Sharma and Mr. Dinesh Thakur, Additional Advocate Generals with Mr. Amit Kumar Dhumal Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Gopal Singh, who is behind bars for the last six months, has approached this Court by way of instant bail petition filed under Section 439 of Cr.PC, praying therein for grant of regular bail in FIR No. 33/18 dated 19.3.2018, under Section 20 of Narcotic Drugs and Psychotropic Substances, Act (in short "the Act"), registered at police station Barotiwala, District Solan, H.P.

2. Sequel to order dated 12.9.2018, ASI Gopal Singh, I.O., P.S. Barotiwala, District Solan, H.P., has come present alongwith 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. Perusal of report/record reveals that on 18.3.2018, bail petitioner along with other co-accused namely Sohan Singh came to be apprehended by patrolling party at a place near Sikka Hotel, BaddiBarotiwala Road. Allegedly, police recovered 1kg 23 grams of charas from the co-accused Sohan Singh, whereas 862 grams of charas was recovered from the possession of the bail petitioner. Police registered FIR as detailed herein above, against the

bail petitioner as well as other-co-accused under Section 20 of the Act. At the time of the presentation of the challan, Section 29 was not incorporated, because police was unable to find conspiracy, if any, among both the accused.

4. Bail petitioner had earlier approached this Court by way of CrmP No. 483 of 2018, seeking therein his bail, however same was withdrawn with liberty to file afresh at appropriate stage vide order dated 1.6.2018. Subsequently, on 1.8.2018, bail petitioner again moved an application under Section 167 (2) of the Cr.PC, before the learned Special Judge, praying therein for default bail on account of delay in filing the charge sheet. Applicant claimed before the learned trial Court/ learned Special Judge that since prosecution failed to file charge sheet within a period of 90 days, he is entitled for default bail, however, learned court below rejected the prayer on the ground that since commercial quantity came to be recovered from the conscious possession of the bail petitioner and co-accused, time for filing charge sheet was 180 days and as such, he is not entitled for default bail in terms of Section 167 (2) of Cr.PC.

5. Mr. Viishwaraj Chauhan, learned counsel representing the bail petitioner, states that present bail petition before this Court has been filed in the changed circumstances because now charge sheet stands filed in the court and prayer having been made by the bail petitioner for default bail in terms of Section 167 (2) Cr.PC, has been rejected by the court below. While inviting attention of this Court to the record/status report, learned counsel contends that since no case under Section 29 Cr.PC, stands registered against the bail petitioner, finding returned by the court below, to the extent that since commercial quantity of contraband was recovered, time for filing charge sheet was 180 days not 90 days, is not in accordance with law and as such, order passed by the learned trial Court needs to be quashed and set-aside.

6. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly acknowledging that Section 29 of the Act is not mentioned in the FIR and as per investigation, two separate recoveries were effected from the conscious possession of the bail petitioner as well as other co-accused, contends that on 19.3.2018, bail petitioner and co-accused were apprehended by the police at the same place carrying 1 kg 885 grams of charas i.e. commercial quantity and as such, prosecution could file charge sheet within a period of 180 days and as such, there is no error committed by the court below while rejecting the default bail filed on behalf of the present bail petitioner.

7. I have heard the learned counsel for the parties as well gone through the record of the case.

8. Undisputedly, record/status report reveals that 19.3.2018, bail petitioner as well as other co-accused Sohan Singh, were apprehended with Charas weighing 1 kg 885 grams at a place near Sikka Hotel BaddiBarotiwala road, but it is admitted case of the Investigating Agency that two separate recoveries were effected from the bail petitioner and co-accused. As per investigation, 862 grams of charas was recovered from the conscious possession of the bail petitioner, whereas 1kg 23 grams of charas was recovered from the co-accused Sohan Singh. It is also not in dispute that application for bail in default under Section 167 (2) came to be filed on behalf of the present bail petitioner before filing of the charge sheet, however, perusal of order dated 9.8.2018, passed by the learned Special Judge-II, Solan, District Solan, (Camp at Nalagarh) suggests that Investigating Agency in its report had disclosed that during the personal search , co–accused Sohan Singh was found in possession of 1kg 23 grams of charas, whereas present bail petitioner Gopal Singh was found in possession of 862 grams of Charas. Learned Court below while rejecting the bail petition having been filed by the petitioner though specifically recorded that case was registered under Section 20 of Act, against the bail petitioner-accused as well as accomplice

namely Sohan Singh at PS Barotiwala District Solan, H.P., but taking note of the contention raised by the Public Prosecutor that bail petitioner along with his co-accused was apprehended carrying contraband i.e. 1kg 885 grams Charas, i.e. commercial quantity, returned finding that period of presentation of challan in the court in case of the accused carrying contraband of commercial quantity is 180 days and not 90 days and as such, petitioner is not entitled to default bail.

9. Having carefully examined aforesaid finding returned by the learned court below while dealing with the application for default bail under Section 167 (2) Cr.PC., this Court finds considerable force in the argument of learned counsel for the petitioner that court below has not appreciated the factual aspect of the matter to the extent that on the date of alleged incident, two separate and distinct recoveries were effected from the persons of the petitioner as well as other co-accused. No doubt, on the date of alleged incident, police had apprehended present bail petitioner along with co-accused Sohan Singh carrying contraband i.e. 1 kg 885 grams, but as has been noticed herein above, two distinct recoveries were effected, wherein only 862 grams of charas, which is less than the commercial quantity, was recovered from the conscious possession of the bail petitioner.

10. Since at the time of consideration of the aforesaid application, charge sheet was not before the court below, this Court has reason to believe that court below had no occasion to deal with the aforesaid aspect of the matter and as such, it would be in the interest of justice, in case learned court below is directed to decide the matter afresh taking note of the charge sheet having been filed by the Investigating Agency.

11. Consequently, in view of above, present petition is disposed of and matter is remanded back to the court below to decide afresh taking note of the charge sheet having been filed by the Investigating Agency. It is clarified that this Court has not expressed any opinion on the merits of the case and any observation made herein above shall remain confined to the present proceedings only and court below shall decide the matter afresh in accordance with law. It is further clarified that court below while deciding the application at hand afresh, shall not be influenced by the fact that charge sheet now stands filed because admittedly application under Section 167 (2) praying therein for default bail on behalf of the petitioner came to be filed, prior to the filing of the charge sheet.

12. Now let the matter be listed before the court below on **5.10.2018**, for consideration, on which date parties shall remain present before the Court. Learned counsel for the petitioner undertakes that on the next date of hearing, bail petitioner shall be represented by some counsel in the court below so that petition is disposed of at an early date.

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

Ujagar Singh ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

CrMP(M) No. 856 of 2018
Reserved on: 30.08.2018
Decided on: 24.09.2018

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 37, 42(2) and 50- Bail- Commercial quantity – Accused seeking bail on ground that alleged recovery effected from shop on basis of prior information yet provisions of Section 42(2) and 50 not complied with – Provisions being mandatory and violation thereof evident on record – On facts, police having sent information in writing to Authorized Officer just after receiving secret information – Consent memo given to accused – Recovery effected from counter of shop and not from person of accused – Allegations ex-facie not unbelievable – Bail rejected. (Paras-7, 8 & 20)

Cases referred:

State of Himachal Pradesh versus Bishan Dutt, 2016 (2) Shim. L.C. 1160

Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129

GobarbhaiNaranbhaiSingala versus State of Gujarat (2008) 3 SCC 775

Ram Govind Upadhyay versus Sudarshan Singh, (2002) 3 SCC 598

For the petitioner:	Mr. Sunil Chauhan, Advocate.
For the respondent:	Mr. Shiv Pal Manhans and Ms. Rameeta Kumari, Additional Advocate Generals, with Mr. Raju Ram Rahi, Deputy Advocate General. SI/SHO Balwant Singh, P.S. Rajgarh, District Sirmaur, H.P. 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 bail in case FIR No. 86 of 2017, dated 30th October, 2017, under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act'), registered at Police Station Rajgarh, District Sirmaur, H.P.

2. Brief facts of the case are that the petitioner was arrested on 29th November, 2017 for having found in possession of charas, weighing 1.007 kg, during search of hotel/shop run by him at Khairi in District Sirmaur, on the basis of secret information received by the police.

3. Learned counsel for the petitioner has pleaded that there is no compliance of Section 42 (2)of the NDPS Act. There is non-compliance/violation of Section 50 of the NDPS Act as joint consent memo has been prepared by the raiding police party of two accused persons and as has been held in case titled **State of Himachal Pradesh versus Bishan Dutt,** reported in **2016 (2) Shim. L.C. 1160,** there must be individual communication with respect to search of each and every person and as the provisions of the NDPS Act are stringent in nature providing severe punishment, strict compliance of procedure and process, instead of substantial compliance, is must to be followed and as the memo of consent prepared under Section 50 of the NDPS Act is defective, there is every likelihood of failure of prosecution case and the petitioner is in jail since ten months, he is entitled for bail as rigours of Section 37 of NDPS Act will not be applicable in present case for peculiar circumstances and failure of prosecution in complying with the mandatory provisions of the said Act.

4. On the other hand, learned Additional Advocate General has opposed the bail application keeping in view the commercial quantity of the contraband recovered from the conscious possession of the petitioner coupled with the provisions of Section 37 of NDPS

Act. It has further been submitted that the petitioner has been found running a business of supplying charas from his dhaba and, thus, his enlargement on bail would definitely result into continuation of the same business by the petitioner.

5. Some of the principles evolved in various pronouncements of the apex Court, which have to be kept in mind at the time of consideration of bail applications by the Courts, are as under:

1. Grant of bail is general rule and putting a person in jail or in a prison or in correction home during trial is an exception and presumption of innocence, i.e. person is believed to be innocent until found guilty is fundamental postulate of criminal jurisprudence. But, these principles are not applicable in cases where there is reverse onus and/or statutory presumption with regard to commission of offence. Such cases are to be dealt with differently keeping in view statutory presumption and reverse onus provided under the relevant statute. (See *Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22, para 1)*
2. While making a general statement of law that the accused is innocent, till proved guilty, the statutory provisions of relevant Act, like Section 29 of the POCSO Act, have to be taken into consideration which provides for presumption as to commission of any offence under Sections 3, 5, 7 and 9 of the Act. (See *State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 22)*
3. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the Court. The Court has only to opine as to whether there is *prima facie* case against the accused. The Court must not undertake meticulous examination of the evidence collected by the police and comment upon the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. (See *Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180)*
4. A bail application is not to be entertained on the basis of certain observations made in a different context. There has to be application of mind and appreciation of the factual score and understanding of the pronouncements in the field. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 14)*
5. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 16; CBI versus Vijay Sai Reddy, (2013) 7 SCC 452)*
6. The Courts are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life.

No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. [The] society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in the disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law. (See *Neeru Yadav versus State of U.P., (2014) 6 SCC 508, para 16; Rakesh Ranjan Yadav versus CBI, (2007) 1 SCC 70, para 16; Masroor versus State of U.P., (2009) 14 SCC 286, para 15; Ash Mohammad versus Shiv Raj Singh alias Lalla Babu and another, (2012) 9 SCC 446, paras 10 & 25; Chandrakeshwar Prasad alias Chandu Babu versus State of Bihar and another, (2016) 9 SCC 443 paras 10, 11)*

7. Detailed examination of evidence and elaborate documentation of merits of the case are to be avoided. (See *Puran versus Rambilas and another, (2001) 6 SCC 338, para 8; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528:* (SCC pp. 535-36, para 11); *Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389, para 13; Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 2.)* Consideration of details of the evidence is not a relevant consideration. While it is necessary to consider the *prima facie* case, an exhaustive exploration of the merits of the case should be avoided by refraining from considering the merits of material/evidence collected by the prosecution. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 15; and Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)*

8. It is not necessary to go into the correctness or otherwise of the allegations made against the accused as this is a subject matter to be dealt with by the trial Judge. (See *Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22, para 16)*

9. Where *prima facie* involvement of the accused is apparent, material contradictions in the charge sheet are required to be tested at the time of trial and not at the time of consideration of grant of bail. (See *Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 28)*

10. Probability or improbability of the prosecution version has to be judged based on the material available to the court at the time when bail is considered and not on the basis of discrepancies. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 21)*

11. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course and reasons for grant of bail in cases involving serious offences should be given. (See *Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528:* (SCC pp. 535-36, para 11); *Dipak Shubhashchandra Mehta versus Central Bureau of Investigation and another, (2012) 4 SCC 134, para 32; Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389, para13; Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 29)*

12. At the time of assigning reasons in order to grant/refuse bail, there should not be discussion of merits and demerits of the evidence. (See *State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 15)*

13. Giving reasons is different from discussing evidence/merits and demerits. (See *Puran versus Rambilas and another, (2001) 6 SCC 338, para 8; State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 15)*

14. Under Section 439 CrPC, the Sessions Court and the High Court has concurrent jurisdiction to grant bail. Therefore, an application filed before the High Court under Section 439 CPC, after rejection of an application filed before Sessions Court under the said Section, is definitely a successive application and is not a revision or appeal against rejection of bail application by the Sessions Court.

15. An accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. (See *Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 30)*

16. The period of incarceration by itself would not entitle the accused to be enlarged on bail. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 24; GobarbhaiNaranbhaiSingala versus State of Gujarat (2008) 3 SCC 775, para 22 and Ram Govind Upadhyay versus Sudarshan Singh, (2002) 3 SCC 598, para 9)*

17. Filing of charge sheet establishes that after due investigation the investigating agency, having found materials, has placed the charge-sheet for trial of the accused persons. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 12)*

6. The relevant factors, as culled out by the apex Court in various pronouncements, to be kept in mind at the time of consideration of bail applications are as follows:

(1) Satisfaction of the Court in support of the charge as to whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(2) Nature and gravity of the accusation/ charge;

(3) Seriousness of the offence/crime and severity of the punishment in the event of conviction;

(4) Nature and character of supportive evidence;

(5) Character, conduct, behaviour, means, position and standing of the accused;

(6) The Courts must evaluate the entire available material against the accused very carefully; circumstances which are peculiar to the accused and the Court must also clearly comprehend the exact role of the accused in the case;

(7) 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;

(8) Position and status of accused with reference to the victim and witnesses to assess the impact that release of accused may make on the prosecution witnesses and reasonable apprehension of the witnesses being influenced or tampered with or apprehension of threat to the complainant/ witnesses and possibility of obstructing the course of justice;

(9) 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;

(10) likelihood and possibility of the accused's likelihood to repeat similar or the other offences;

(11) A reasonable possibility of the presence of the accused not being secured at the trial and danger of the accused absconding or fleeing from justice;

(12) Impact of grant of bail on the society and danger, of course, of justice being thwarted by grant of bail affecting the larger interest of the public or the State;

(13) 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;

(14) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(15) Whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(16) 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;

(17) No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its

own merits. The matter always calls for judicious exercise of discretion by the Court.

(See - *Gurcharan Singh v. State (Delhi Admn.) (1978) 1 SCC 118; Gurbaksh Singh Sibbia versus State of Punjab, (1980) 2 SCC 565; Prahlad Singh Bhati v. State (NCT of Delhi) (2001) 4 SCC 280; Puran v. Rambilas (2001) 6 SCC 338; Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598; Chaman Lal versus State of U.P. and another, (2004) 7 SCC 525; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528, para 11); Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13, para 16); State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21, para 18; Prashanta Kumar Sarkar versus Ashis Chatterjee and another, (2010) 14 SCC 496; SiddharamSatlingappaMhetre versus State of Maharashtra and others, (2011) 1 SCC 694; Prakash Kadam versus Ramprasad Vishwanath Gupta, (2011) 6 SCC 189; Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180; Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129; Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)*

1. 7. Perusal of the status report filed and record produced by the prosecution indicates that immediately after receiving the secret information, the same was reduced into writing by the Investigating Officer at 5.15 p.m. on 30th October, 2017, by addressing a letter to Sub Divisional Police Officer, Rajgarh, which was sent through HHC Deepak (No. 235), who had delivered the same to Sub Divisional Police Officer, Rajgarh at 6.30 p.m. on 30th October, 2017.

8. On reaching on the shop, though, consent memo under Section 50 of NDPS Act was also prepared by the Investigating Officer, however, the contraband was recovered from the counter of the shop run by the petitioner and relevance and effect of non-compliance/violation of the provisions of Section 50 of NDPS Act, if any, and effect thereof on merits of the case, are yet to be considered by the trial Court. Moreover, as discussed supra, at the time of grant of bail, merit of evidence is not be considered by the Court considering the application for grant of bail.

9. As has been held by the apex Court in **Lt. Col. Prasad Shrikant Purohit's case (supra),** material contradictions, if any, in the charge sheet are required to be tested at the time of trial and not at the time of consideration of grant of bail where *prima facie* involvement of the accused is apparent.

10. In view of the ratio laid down by the apex Court, plea raised on behalf of the petitioner with respect to non-compliance/violation of provisions of Sections 42 (2) and 50 of the NDPS Act is to be considered by the trial Court at the time of consideration of charge and in case charge has been framed, during the trial. It is also settled law that considerations at the time of framing the charge and at the time of granting the bail are altogether different.

11. Undoubtedly, the quantity of the contraband recovered from the petitioner is commercial in nature. Therefore, rigours of Section 37 of NDPS Act are applicable in present case.

12. Section 37 of NDPS Act provides that notwithstanding anything contained in CrPC, no person, accused on an offence punishable for offence involving commercial quantity, where the Public Prosecutor opposes the application, shall be released on bail or on his own bond, unless the Court, despite opposition of the Public Prosecutor, 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. Apart from the provisions of Section 37 of NDPS Act, relevant factors supra, as referred by the apex Court, are also necessary to be considered.

13. In Section 37(1)(b)(i) of NDPS Act, opportunity has been provided to the Public Prosecutor to oppose the application for release of the accused on bail and in Section 37(1)(b)(ii) of the said Act, it has been provided that despite opposition of the Public Prosecutor, the Court can grant bail, if 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.

14. In present case, no material has been brought to the notice of the Court so as to infer that the prosecution story with respect to recovery of contraband is ex-facie unbelievable and the petitioner is not guilty of having possession of commercial quantity of charas.

15. Keeping in view the provisions of reverse onus, as provided in Sections 35 and 54 of the NDPS Act and the quantity of contraband recovered from the petitioner, the plea that the petitioner is behind the bars for the last ten months is also not a valid ground for enlargement of the petitioner on bail. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 24; GobarbhaiNaranbhaiSingala versus State of Gujarat (2008) 3 SCC 775, para 22 and Ram Govind Upadhyay versus Sudarshan Singh, (2002) 3 SCC 598, para 9)*

16. Further, challan is pending for consideration of charge before the trial Court and stated to be listed on 3rd October, 2018. Petitioner had also approached learned Sessions Judge by filing an application under Section 439 CPC for grant of bail on 15th March, 2018, which was dismissed on 29th March, 2018 by passing a detailed order.

17. No doubt, petitioner has a right to make successive applications for grant of bail, but, at the time of considering successive applications, reasons and grounds considered in earlier bail applications are also to be taken into consideration and the fresh grounds for taking a different view therefrom must be recorded, as observed by the apex Court in **Lt. Col. Prasad Shrikant Purohit's case (supra).**

18. Learned Sessions Judge, at the time of considering the bail application, has taken into consideration cumulative effect of various circumstances, the relevant facts, evidence on record and provisions of law and has declined to release the petitioner on bail. No fresh grounds have been brought to the notice of this Court so as to differ from the opinion of the learned Sessions Judge, at this stage.

19. It is apt to record herein that the petitioner, earlier had approached this Court by filing a similar application under Section 439 CrPC, which was dismissed as withdrawn, no details whereof have either been given in the petition or disclosed during the course of arguments except giving a passing reference of filing and withdrawal of such application in para 10 of the petition wherein it has been stated that petitioner had filed the application under Section 439 CrPC which had been withdrawn.

20. In view of above, without commenting upon the merits of the evidence and keeping in view the principles laid down by the apex Court, nature and gravity of offence and its impact on societal interests, petitioner is not entitled for bail. Hence, the petition is dismissed.

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

Smt. Usha Rani Sood ...Petitioner

Versus

Bhola Ram and others ...Respondents

CrMMO No. 80 of 2018

Decided on: September 24, 2018

Code of Criminal Procedure, 1973- Section 145- Applicability – Requirements – Held, Before initiation of proceedings, Magistrate should be satisfied that dispute regarding immovable property exists and it is likely to cause breach of peace – If he is satisfied of aforesaid two conditions, he shall proceed to pass preliminary order under Section 145(1) of Code, followed by inquiry and passing of final order under Section 145(6) of Code. (Para-15)

Code of Criminal Procedure, 1973- Section 145- Civil dispute – Effect of – Held, Sub Divisional Magistrate can take note of fact while forming an opinion that dispute though of civil nature, may result in breach of peace in locality. (Para-24)

Code of Criminal Procedure, 1973- Section 145- Land dispute – Apprehension of breach of peace – Existence of – Held, at time of initiation of proceedings under Section 145 of Code, Magistrate should be satisfied that there is likelihood of breach of peace on account of dispute between parties – Continuation of such apprehension till passing of final order, not necessary. (Para-9)

Code of Criminal Procedure, 1973- Section 145- Land dispute – Apprehension of breach of peace –Existence of - Sub Divisional Magistrate (SDM) after inquiry holding complainant to be in actual possession of land (khokha), granting police assistance in protecting her possession – Revision – Sessions Judge allowing revision by holding that SDM nowhere held that land dispute was likely to cause breach of peace – Petition against – On facts, SDM in his preliminary order while issuing notices to parties, specifically recorded finding regarding apprehension of breach of peace on account of land dispute – Both parties laying claim of possession over disputed land - Apprehension of breach of peace can be presumed to continue to exist till final order is passed – SDM not required to repeat what he had said in preliminary order unless there is clear evidence that dispute ceased to exist so as to bring case within ambit of Section 145(5) of Code – Order of Sessions Judge set aside and of SDM restored. (Paras-8 to 14 & 27)

Code of Criminal Procedure, 1973- Section 145- Land dispute – Nature of proceedings – Held, inquiry under Section 145 of Code is limited to question as who was in actual possession on date of passing of preliminary order, irrespective of rights of parties – Court exercising revisionary powers cannot go into question of sufficiency of material considered by Magistrate for basing his satisfaction. (Para-15).

Cases referred:

Rajpati v. Bachan AIR 1981 SC 18

Indira v. Vasantha 1991 Crl. L.J. 1798

For the Petitioner	:	Mr. Satyen Vaidya, Senior Advocate with Mr.Vivek Sharma, Advocate.
For the Respondents	:	Mr. G.R. Palsra, Advocate, for respondents No.1 and 2. Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG, for respondent No. 3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Instant petition under Section 482 CrPC is directed against order dated 21.11.2017, passed by the learned Sessions Judge, Kullu, Himachal Pradesh in Criminal Revision No. 08 of 2017, setting aside order dated 29.4.2017 passed by Sub Divisional Magistrate, Kullu, Himachal Pradesh in Case No. 114 of 2015, whereby complaint under Section 145 CrPC having been filed by the petitioner-complainant (hereinafter, 'complainant') was allowed.

2. For having a bird's eye view, briefly stated the facts of the case, as emerge from the record, are that pursuant to a complaint filed by the complainant, Usha Rani Sood daughter of Shri Pran Nath Sood, police presented *Kallandra* under Section 145 CrPC before the learned Sub Divisional Magistrate, Kullu, District Kullu, Himachal Pradesh. Complainant in her complaint alleged that the respondents forcibly entered into *Khokha* situated over Khasra No. 1929 in PhatiDhalpur, Kothi Maharaja, Tehsil and District, Kullu, Himachal Pradesh. Complainant further alleged that respondents No. 1 and 2 were foricibly dispossessing the complainant from her land. On 13.6.2015, at about 4.00 pm, when complainant went to her land situated at BeasaMour, Akhara Bazaar, Kullu, then she found that one of the planks of the *Khokha* was broken and some persons namely Tikam Ram, Yugal Kishore and Bhagat Ram were laying the floor of the *Khokha* and they had also removed the partition wall. As per complainant, when she inquired from Tikam Ram, he told that his father, Bhola Ram had engaged the labour for executing the work. It is also alleged that they broke the locks of both the shutters and put new locks on them. It is further alleged by the complainant that on 14.6.2015, when complainant and Shri A.N. Vidyarthi, went to the spot, then work was going on and when they asked Tikam Ram and 2-3 labourers to stop the work, they entered into verbal duel with them. Police party went to the spot on the information received from A.N. Vidyarthi, at about 3 pm and thereafter entered *Rapat* No. 19 at about 8.30 pm, after recording statement of complainant-Usha Rani Sood.

3. On the basis of report, *Kallandra* was presented before Sub Divisional Magistrate, Kullu, on 20.6.2015, who, after going through the statement of the witnesses, recorded by the police, summoned the parties to the court in person or through their pleaders on 26.6.2015 and asked them to file their written statements regarding their respective claims. On 26.6.2015, respondents No. 1 and 2 came in person in the court and they were supplied with the copies of *Kallandra*, with further direction to file their replies/written statements, if any. Record further reveals that respondents filed reply to the notice under Section 145 CrPC, on 22.7.2015, whereafter on 4.8.2015, Sub Divisional Magistrate sent the file to the Tehsildar, Kullu to obtain 5-point spot report on the prescribed format, regarding actual/physical possession over the disputed land/structure. On 26.8.2015,, court below received spot report from the office of Tehsildar, Kullu, but since same was not found to be in accordance with law, matter was again sent to the Tehsildar Kullu, for proper spot inquiry on 5-points. Court also directed that the parties be associated during said inquiry. Court below, after having received spot report from Tehsildar, Kullu, fixed the matter for consideration on 8.12.2015, whereafter, matter came to be listed for recoding the statements of PW's.

4. Close scrutiny of record nowhere reveals that prayer, if any, was ever made by either of the parties to file objections, if any, to the spot report furnished by the Tehsildar, Kullu. Subsequently, the Sub Divisional Magistrate, vide order dated 29.4.2017, held that claim of actual possession made by the complainant, Usha Rani, is true at this stage and

accordingly she was declared to be owner-in-possession of the said *Khokha* and held entitled to retain spot possession until ousted in due course of law.

5. Learned Sub Divisional Magistrate, also directed SHO, Police Station, Kullu, to assist in restoring possession to the complainant i.e. Smt. Usha Rani Sood. Being aggrieved and dissatisfied with the order passed by Sub Divisional Magistrate, Kullu, respondents No.1 and 2 filed Criminal Revision Petition in the court of learned Sessions Judge, Kullu, Himachal Pradesh, who vide order dated 21.11.2017, while allowing revision petition, set aside order dated 29.4.2017, passed by trial court, as a consequence of which, *Kallandra* filed by the police on the complaint of complainant, Usha Rani, under Section 145 CrPC, came to be cancelled/dismissed.

6. In the aforesaid background, complainant has approached this Court, in the instant proceedings, praying therein for restoration of order dated 29.4.207 passed by the Sub Divisional Magistrate, Kullu, in Case No. 114/2015, after setting aside order dated 21.11.2017, passed by learned Sessions Judge, Kullu, in Cr. Revision No. 08 of 2017.

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

8. Having heard the learned counsel representing the parties and perused the material available on record vis-à-vis impugned order passed by the learned Sessions Judge, this court is persuaded to agree with the contention of Mr. Satyen Vaidya, learned Senior Advocate that the learned Sessions Judge, has not properly appreciated the provisions contained in Section 145 CrPC, which provides as under:

> "whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute".

9. Careful perusal of aforesaid provision of law clearly suggests that essential ingredient for invoking provisions of S. 145 CrPC is that there is apprehension of breach of peace due to dispute over any land or water or the boundaries thereof. It is quite apparent from the bare reading of aforesaid provision of law that Magistrate, while exercising aforesaid power, should be satisfied that there is likelihood of breach of peace. Apprehension of breach of peace must exist at the time of initiation of proceedings under sub-section (1) of S. 145 CrPC. True it is, that a Magistrate can not make initial order under sub-section (1) of S. 145 on apprehension that breach of peace may happen at future point in time, rather, Magistrate, at the time of initiation of proceedings under S. 145 CrPC should be satisfied that there is likelihood of breach of peace on account of dispute between the parties. Similarly, it is not necessary that at the time of passing of final order, apprehension of breach of peace should continue or exist.

10. Learned Sessions Judge, while reversing the finding recorded by the Sub Divisional Magistrate, has observed that trial court in detailed order has only mentioned about previous instances regarding disputed land and *Khokha* and it has not mentioned anywhere that alleged dispute, for which *Kallandra* has been presented before him, is likely to cause breach of peace at the time of presentation of *Kallandra* or when verbal duel took place between complainant and respondents No.1 and 2. After having perused record, this court finds that the aforesaid finding returned by the learned Sessions Judge is totally

contradictory to the record. Bare perusal of the order dated 20.6.2015, passed by the Sub Divisional Magistrate, clearly reveals that police presented *Kallandra* before Sub Divisional Magistrate pursuant to complaint dated 16.6.2015 having been filed by the complainant. Sub Divisional Magistrate, after having perused the information contained in *Kallandra* as well as statements of witnesses recorded by the police arrived at a definite conclusion that there is dispute between the parties pertaining to land comprised in Khasra No. 1929, situate at BeasaMour, Akhara Bazaar, Kullu and same is likely to cause breach of peace, where both the parties are claiming physical possession of the disputed land. Sub Divisional Magistrate, having been satisfied that there are sufficient grounds to proceed under S. 145, issued summons to both the parties to attend his court in person or through their pleaders and to file written statements of their respective claims in respect of actual/physical possession or subject of dispute.

11. Order dated 20.6.2015 passed by the Sub Divisional Magistrate, clearly reveals that notice in terms of S. 145 came to be issued by the Sub Divisional Magistrate to both the parties for 26.6.2015, whereafter, complainant and respondents No.1 and 2, both presented themselves before the Sub Divisional Magistrate, who subsequently, decided the *Kallandra*, on the basis of evidence adduced on record by both the parties. In the aforesaid order, learned Sub Divisional Magistrate has specifically recorded that he having perused record, was of the opinion that dispute between the parties is likely to cause breach of peace and as such, finding returned by the learned Sessions Judge, in this regard, is totally contradictory to record and can not be allowed to sustain.

12. In preliminary order dated 20.6.2015 passed by Sub Divisional Magistrate, there is clear cut finding recorded by him that apprehension of breach of peace did exist, which in the opinion of this court, was sufficient to give jurisdiction to the Magistrate to initiate proceedings. There is nothing on record suggestive of the fact that either of the parties, being aggrieved of aforesaid order, laid challenge, if any, to the same in superior court of law. Moreover, when parties filed their written statements, they did not state that no dispute between the parties existed at the time of passing of order dated 20.6.2015, rather, respondents No.1 and 2 by way of filing written statement claimed themselves to be in possession of the property in question.

13. Since, stand taken by the parties was contradictory to each other, it can be presumed or taken for granted that apprehension of breach of peace continued to exist and it was not a case where it could be said that no dispute existed as contemplated under S. 145. Learned Sessions Judge, while setting aside the order passed by Sub Divisional Magistrate, has observed that it has not been mentioned anywhere in the order that by the act of respondents, there is likelihood of breach of peace in the locality, but this court, having carefully perused provisions of law contained under S. 145 has no hesitation to conclude that once Magistrate had given finding on this aspect of the matter at the time of taking cognizance or issuing notices under S. 145 (1) CrPC, specifically recording therein that he having perused record was of the opinion that dispute between the parties is likely to cause breach of peace, he was not required to repeat what he had said in the preliminary order dated 20.6.2015, in the final order also. In this regard, reliance is placed upon **Rajpati**v. **Bachan** AIR 1981 SC 18, wherein Hon'ble Apex Court has held as under:

> "6. It is, therefore, manifest that a finding of existence of breach of the peace is not necessary at the time when a final order is passed nor is there any provision in the Code of Criminal Procedure requiring such a finding in the final order. Once a preliminary order drawn up by the Magistrate sets out the reasons for holding that a breach of the peace exists, it is not necessary that the breach of peace should continue at every stage of the proceedings unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of sub-

section (5) of s. 145 of the Code of Criminal Procedure. Unless such a contingency arises the proceedings have to be carried to their logical end culminating in the final order under sub- s. (6) of s. 145. As already indicated the contradictory stands taken by the parties clearly show that there was no question of the dispute having ended so as to lead to cancellation of the order under sub-section (5) of s. 145 nor was such a case set up by any party before the Magistrate or before the High Court. Further, it is well settled that under s. 145 it is for the Magistrate to be satisfied regarding the existence of a breach of the peace and once he records his satisfaction in the preliminary order, the High Court in revision cannot go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. In R. H. Bhutani v. Miss Mani J. Desai &Ors.(1), this Court pointed out as follows:

> "The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied on these two conditions the section requires him to pass a preliminary order under sub-s. (1) and thereafter to make an enquiry under sub-s. (4) and pass a final order under sub-s. (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or exist. The enquiry under s. 145 is limited to the question to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties... The High Court, in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material which has satisfied the Magistrate." **(Emphasis ours)**

7. In Hari Ram &Ors. v. Banwari Lal &Ors.(1) it was held that once a Magistrate finds that there is a breach of peace it is not necessary that the dispute should continue to exist at other stages of the proceedings also. In this connection, the High Court observed as follows:

> "Of course, Magistrate can under sub-section (1) of s. 145, Criminal Procedure Code, assume jurisdiction only if he is satisfied that at the time of passing the preliminary order a dispute likely to cause a breach of the peace exists concerning any land etc. Once that is done the Magistrate is thereafter expected to call upon the parties concerned in such dispute to attend his court in person or by pleader and put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. The enquiry, therefore, after the initial satisfaction of the Magistrate and after the assumption of jurisdiction by him, has to be directed only as respects the fact of actual possession. At that time he has not to record a finding again about the existence of a dispute likely to cause a breach of the peace." **(Emphasis ours)**

8.. To the same effect is a decision of the Hyderabad High Court in Ramarao v. Shivram&Ors.(2) where Srinivasachari J. observed as follows:-

> "As regards this contention I am of opinion that once the Magistrate has given a finding to the effect that there is apprehension of breach of peace and that he has jurisdiction to take proceedings under s. 145, Cr.P.C., he can continue the proceedings. It is not necessary that at each stage he should be satisfied that there exists an imminent apprehension of breach of peace." (**Emphasis ours**)

9. We find ourselves in complete agreement with the observations made by the Punjab and Hyderabad High Courts, extracted above, which lay down the correct law on the subject.

10. Assuming, however, that there was an omission on the part of the Magistrate to mention in his final order that there was breach of the peace, that being an error of procedure would clearly fall within the domain of a curable irregularity which is not sufficient to vitiate the order passed by the Magistrate, particularly when there is nothing to show in the instant case that any prejudice was caused to any of the parties who had the full opportunity to produce their evidence before the Court. It was therefore not correct on the part of the High Court to have interfered with the order of the Magistrate on a purely technical ground when the aggrieved party had a clear remedy in the Civil Court.

11. For these reasons therefore, we are satisfied that the order passed by the High Court is legally erroneous and cannot be allowed to stand. The appeal is accordingly allowed. The order of the High Court is set aside and the order of the Magistrate is confirmed."

14. It is quite apparent from the aforesaid law laid down by the Hon'ble Apex Court that finding with regard to the existence of breach of peace at the time when final order was passed, is not required to be returned, especially, once a preliminary order drawn up by the Magistrate sets out the reasons for holding that a breach of the peace exists. It is not necessary that the breach of peace should continue at every stage of the proceedings unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of sub-section (5) of s. 145 of the Code of Criminal Procedure. Once the Magistrate records his/her satisfaction in the preliminary order, High Court or Sessions Court, while exercising revisionary powers can not go into sufficiency of the material, which satisfied the Magistrate.

15. S. 145 CrPC clearly provides that Magistrate before initiating proceedings, should be satisfied that dispute regarding immovable property exists and such dispute is likely to cause breach of peace, and once he/she is satisfied of aforesaid two conditions, he/she shall proceed to pass preliminary order under sub-section (1) of S. 145 and thereafter make inquiry under sub-section (4) and pass final order under sub-section (6) and it is absolutely not necessary at the time of passing of final order for him/her to record that apprehension of breach of peace continues or exists. In the aforesaid judgment, Hon'ble Apex Court has held that inquiry under S. 145 is limited to the question as to who was in actual possession on the date of passing of preliminary order, irrespective of rights of the parties and High Court or Sessions Court, while exercising revisionary powers, can not go into question of sufficiency of the material relied upon by the Magistrate to base his/her satisfaction.

16. Learned Sessions Judge, while reversing findings returned by Sub Divisional Magistrate, has also observed that dispute mentioned in the *Kallandra* was simple private dispute between two persons, which did not disturb law and order or cause breach of peace in the locality and as such, forum for getting relief is/was Civil Court of competent jurisdiction. Learned Sessions Judge has further held that dispute*inter se* parties is of civil nature and not new one or originated on that date when complainant moved application to SHO or when *Kallandra* was presented before the trial court, as such, only a Civil Court is/was competent to give relief to the parties/complainant. However, this court having carefully perused the provisions contained under S. 145 CrPC, is in total disagreement with the aforesaid finding returned by the learned Sessions Judge, which otherwise is not tenable, especially in view of law laid down by the Hon'ble Apex Court in **Rajpati**v.

Bachan(supra), wherein Hon'ble Apex Court has specifically held that High Court or any other court exercising revisionary jurisdiction, would not go into the sufficiency of the material, which satisfied the Magistrate.

17. True it is, that object of S. 145 is not to provide the parties with an opportunity of bringing their civil disputes before a Criminal Court, or maneuvering for possession for the purpose of subsequent civil litigation and the real object of this provision is to arm the Magistrate with an additional weapon for maintaining peace within his/her area

18. S. 145 casts a duty on the Magistrate to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court. Aforesaid provision empowers a Magistrate to proceed under S. 145 CrPC, if in his/her opinion, dispute, if any, *inter se*, parties qua the immovable property is likely to cause breach of peace, either on the report of a police officer or upon other information and his/her satisfaction must reflect in the order passed by him/her, specifically mentioning therein grounds for his satisfaction.

19. S. 145 (4) CrPC enable parties to adduce oral and documentary evidence and Magistrate is not only bound to receive such evidence as may be produced but he/she is competent to take such further evidence, if any, as he/she finds necessary for the proper adjudication of the dispute *inter se* parties.

20. If S. 145 CrPC is read in its entirety, it provides for different steps/stages to be followed by the Magistrate concerned, while adjudicating upon the *Kallandra* placed before him/her or any other information received by him/her to the effect that a dispute exists concerning any land, water or boundaries thereof, within his local jurisdiction, which is likely to cause breach of peace. Sub-section (1) thereof enjoins a duty upon the Magistrate to make an order in writing stating grounds of his being so satisfied that breach of peace exists on account of dispute between the parties concerning any land or water or boundaries thereof, after having received *Kallandra*/report or from any other source. While passing order under Sub-section (1) of S. 145, Magistrate is required to specifically record findings that dispute *inter se* parties is likely to cause breach of peace.

21. Similarly, Sub-section (3) casts a duty upon the Magistrate to cause service of summons on the parties concerned, after his/her having taken cognizance under Sub-section (1) of S. 145 CrPC. Sub-section (4) enables both the parties to adduce oral and documentary evidence and Magistrate is not only bound to receive all such evidence as may be adduced, but Sub-section (4) also empowers him/her to take such further evidence, if any, as he/she thinks necessary. Sub-section (5) of S. 145 CrPC provides that in case, one of the parties to the dispute is able to persuade the Magistrate that no dispute exists, the Magistrate shall cancel the preliminary order passed by him/her under Sub-section (1) and also stay further proceedings subject to such cancellation but order of the Magistrate passed under Sub-section (1) of S. 145 CrPC shall be final.

22. Sub-section (6)(a) of S. 145 CrPC empowers the Magistrate to pass an order declaring one party to be entitled to possession on the basis of evidence adduced on record by the respective parties, in terms of Sub-section (4) of S. 145 CrPC. Sub-section (6)(a) of S. 145 CrPCclearly provides that Magistrate can pass an order declaring a party to be entitled to possession thereof, until evicted therefrom in due course of law. Provisions contained under Sub-section (6)(a), further empower the Magistrate to restore the possession to a party entitled to same.

23. Having carefully perused the material annexed with the *Kallandra* filed by police before Sub Divisional Magistrate, this court has no hesitation to conclude that finding

returned by the learned Sessions Judge, to the effect that dispute mentioned in *Kallandra* was simple private dispute between two persons, which did not disturb law and order or occasion in breach of peace in the locality, is not based upon proper appreciation of the material available on record.

24. Similarly, this court is of the view that dispute of civil nature can also be taken note by Sub Divisional Magistrate, while exercising powers under S. 145, if he/she is satisfied and is of the opinion that the dispute *inter se* parties, though it may be civil in nature, may result in breach of peace in the locality. Provisions of S. 145 (4) CrPC enable a Magistrate to decide the question of possession on the basis of evidence adduced on record by the respective parties. In this regard, reliance is placed upon a judgment rendered by the Madras High Court in **Indira** v. **Vasantha**1991 Crl. L.J. 1798, wherein it has been held as under:

> "9. The jurisdiction conferred upon an Executive Magistrate under S. 145 of the Code of Criminal Procedure is an exceptional one and the provisions of the section should have to be strictly followed while taking action under it. The object of the section is not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manoeuvring for possession for the purpose of the subsequent civil litigation, but to arm the Magistrate concerned with power to maintain peace within his local area. Therefore, a duty is cast on the Magistrates, to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court. The very jurisdiction of the Magistrate to proceed under this section, arises out of his satisfaction, of a dispute likely to cause breach of peace either on a report of a Police Officer or upon other information, which satisfaction must be reflected in the order which he should make in writing, stating the grounds of his satisfaction. This order which is the sine qua non of the proceedings, initiated under S. 145, Cr.P.C., must require the parties concerned in such dispute, to attend his Court in person or by pleader on a specified date and time, and to put in written statements of the irrespective claims as respects the facts of actual possession of the subject of dispute. After the passing of the preliminary order, a copy of the order shall be served in the manner provided for service of summons by the Criminal Procedure Code, upon such person or persons as may be directed by the said Magistrate and at least one copy should be affixed at some conspicuous place at or near the subject of dispute. This service of the copy of the order is provided under S. 145(1) and (3) together, it is apparent that the service of a separate summons is not contemplated and the preliminary order itself shall have to be served in the same pattern as service of summons. This Court on more than one occasion, had held, that under S. 145(1), Cr.P.C., a Magistrate having jurisdiction, shall make an order in writing that he was satisfied either from a police report or other information that a dispute likely to cause breach of peace existed, and the grounds of his satisfaction should be stated clearly to indicate the application of the mind of the Magistrate in passing the preliminary order. The provision of making the order in writing after initial satisfaction and stating the grounds of his satisfaction have been held to be mandatory. Though the Magi rate was not obliged to elaborately set out the entire details of the information received by him, the preliminary order, on the face of it, should set out the grounds of the Magistrate being so satisfied or at least employ language to similar effect so as to indicate that he had applied his judicial mind to the information, in coming to the conclusion that there was inexistence a dispute, which dispute was likely to cause breach of peace, necessitating initiation of proceedings under S. 145, Cr.P.C. If there was absolutely nothing in the preliminary

order showing expressly the grounds of his being so satisfied, which are in the nature of conclusions arrived at by him, on the report or information placed before him, it would be impossible for the parties called upon to put in their claims before him, to predicate as to what had led the Magistrate to pass such an order and to make their effective representations before him. This legal position is apparent from the decisions of this Court in Nagammal v. Mani (1966 LW (Cri) 101), PeriaMannadhaGounder v. MarappaGounder (1968 LW Cri 179), ManikyarajaBallal v. K. Jayarajaballal (1981) LW Crl 10) and Janaki Ramachandran v. State, 1988 LW Cri 147 : 1989 Cri LJ 590. On facts, has already been noticed, that except summons and memo dated 4-7-1989 and 20-7-1989 there is no material on record, to indicate the promulgation of a preliminary order as contemplated under S. 145(1), Cr.P.C., which as stated earlier, is the foundation, for the exercise of jurisdiction by the Executive Magistrate."

10. The learned counsel for the respondents relied upon the judgment of the Full Bench of the Allahabad High Court in Kapoor Chand v. Suraj Prasad, AIR 1933 All 264 : (34 Cri LJ 414) for the proposition that non-compliance with strict letter of law in formulating the order under S. 145(1), Cr.P.C., would not prevent the Magistrate from exercising jurisdiction to proceed with the case and that any defect in the procedure whether of illegality or irregularity was cured by S. 537, Cr.P.C. (new S. 465, Cr.P.C.) if there was no prejudice. As stated earlier, it is his submission that reference in the summons and memo dated 4-7-1989 and 20-7-1989 to the dispute regarding house No. 7/ 16 and proceedings having been initiated under S. 145, Cr.P.C., would be sufficient to presume, not only application of mind by the Magistrate to the facts placed before him, but also his satisfaction arrived at on the materials so placed. The law laid own by the same High Court Parmatma v. State, and, Narain Singh v. Mst. Suraj Kishore Devi, , the view of the Patna High Court in Wazir Mahton v. Badri Mahton, , the dictum of the Rangoon High Court and the view of the Judicial Commissioner, Peshawar enunciated in MG. PO. LON. v. MG. BA ON (26 Cri LJ 324) and Municipal Committee, Kohat v. Piari (48 Cri LJ 159) respectively are to the same effect. In all these cases the Courts were considering the effect of the lack of a preliminary order or defects in the said order and held that they were only irregularities curable under S. 537, Cr.P.C. (new S. 465, Cr.P.C.) on the ground that no prejudice had been caused to the parties in each one of those cases. This Court in Janaki Ramachandran v. State (1988 LW Crl 147) held that requirements for passing a preliminary order under S. 145(1), Cr.P.C., was the satisfaction of the Executive Magistrate about the information with regard to breach of peace which grounds ought to be apparent on the face of the order itself and non-compliance with those legal requirements constituted an illegality affecting the very jurisdiction of the Magistrate, which could not be cured as an irregularity under S. 465, Cr.P.C. The difference between illegality and irregularity need not have to be gone into, though S. 465, Cr.P.C. takes within its fold only irregularity for two reasons, one is that I would prefer to follow the law laid down by this Court and the other is, in any event, the prejudice to the petitioners, leading to the failure of justice is apparent in these proceedings, in view of non recording of evidence and consideration of the same as provided under S. 145(4), Cr.P.C.

11. A reference was also made to the decision of the Privy Council in Abdul Rahman v. King Emperor, AIR 1927 PC 44 : (28 Cri LJ 259) to justify the approach of the Allahabad High Court and some other High Courts, holding that S. 537, Cr.P.C. would cure irregularities, if any, in the passing of the preliminary order. The Privy Council was concerned with a criminal trial. It was held therein that no serious defect in the mode of conduct of a criminal trial could be justified or cured by the

consent of the Advocate of the accused. While dealing with the provisions of S. 360, Cr.P.C., as it then existed, relating to reading over of the depositions to witnesses to obtain an accurate record and to provide an opportunity to the witness to correct the words which occurred or the clerk had taken down and not to enable the accused or his counsel to suggest corrections, the Privy Council held that a more non-compliance of the provisions of S. 360, Cr.P.C., was not enough to quash the conviction, unless it was accompanied by occasioning of any failure of justice. In that context S. 537, Cr.P.C., was referred to.

12. The Privy Council in SubramaniaIyer v. Emperor (25 Madras 61) observed as follows:

> "The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity."

The view of the Privy Council in both aforementioned cases would be sufficient to steer clear of a "curable irregularity", since not only illegality is patent, but also prejudice to the petitioners is apparent.

13. The impugned order of the Sub-Divisional Magistrate does not disclose the documents placed before him by either party or his consideration of the same, to arrive at a conclusion. List of documents has not been appended to the order and the order does not also indicate any marking given to the documents produced by the respondents. Section 145(4), Cr.P.C., enables both the parties to adduce oral and documentary evidence and the Magistrate is bound not only to receive all such evidence as may be produced, but also is empowered to take such further evidence, if any, as he thinks necessary. The Magistrate under the 1974 Code cannot dispose of a proceeding on the basis of affidavits and, therefore, the evidence of witnesses will be essential for deciding the question of possession. The evidence contemplated includes both oral and documentary. In order to enable parties to adduce evidence, reasonable opportunity has to be given to produce documents and witnesses and the Magistrate will also have a duty to summon such witnesses as may be required by either party. This procedure prescribed under sub-sec. (4) must be followed, for it is mandatory and the oral evidence adduced will have to be recorded and the documents properly proved according to rules of evidence. After the production of the oral and documentary evidence, the Magistrate will have to decide the question of possession on the evidence placed before him, which necessarily implies discussion of evidence placed before him.

25. In the case at hand, as is evident from the material available on record, learned Sub Divisional Magistrate, after having passed order dated 20.6.2015, wherein he recorded his satisfaction that dispute *inter se* parties is likely to cause breach of peace, not only issued notice to the respective parties, rather afforded an opportunity to them to lead evidence in support of their claims. Another finding returned by learned Sessions Judge that since the complainant did not depose regarding breach of peace in the locality rather she merely claimed her title and possession over the *Khokha* (kiosk) in land in question adjoining to it and as such, there was no occasion for the Sub Divisional Magistrate to proceed under S. 145, is also not tenable because bare perusal of S. 145, nowhere suggests that the complainant in the complaint, on the basis of which *Kallandra* comes to be presented before Sub Divisional Magistrate, is required to specifically state that on account of dispute *inter se* parties, there is likelihood of breach of peace, rather, it is the

investigating agency, which, after having received complaint, investigates the matter, is required to file *Kallandra* under Section 145, specifically stating therein that in view of dispute *inter se* parties, there is possibility of breach of peace and law and order.

26. In the case at hand, perusal of *Kallandra* filed under S. 145 clearly reveals that In-charge, Police Post, Akhara Bazaar, Kullu, after having concluded investigation, presented *Kallandra,* specifically stating therein that on account of dispute *inter se* parties, there is possibility of breach of peace. Leaving it aside, perusal of S. 145(1) CrPC clearly suggests that it is incumbent upon the Magistrate, after having received *Kallandra* under S. 145, to specifically record in his/her order that he/she in view of dispute *inter se* parties, is of the opinion that there is likelihood of breach of peace.

27. At the cost of repetition, it may be observed that High Court or any court exercising revisional jurisdiction, is not entitled to go into question of sufficiency of material, which satisfied the Magistrate, while exercising extraordinary power granted to him/her under S. 145 CrPC, however, in the case at hand, it is not understood that on what basis, learned Sessions Judge has come to the conclusion that dispute *inter se* parties is of civil nature and only Civil Court has jurisdiction to decide the right, title or interest qua the disputed property. True it is that in proceedings under S. 145, Sub Divisional Magistrate does not have jurisdiction to decide right, title or interest over the suit property, but, definitely, he/she having taken note of the evidence can return finding with regard to possession of the property in question.

28. By now, it is well settled that a Magistrate, while exercising power under S. 145 is only required to see possession of a particular party on the date of preliminary order or prior to two months from the date of preliminary order and as such, main object of S. 145 is to decide that who was in physical possession over the land in dispute and not legal possession supported by the title.

29. Record clearly reveals that as per Jamabandi for the year 2001-02, Usha Rani and Indra Kumari are owner-in-possession of Khasra No. 1929, Khata No. 1054, and alleged *Khokha* is constructed over the same. Similarly, perusal of Ext. P-1 i.e. compromise arrived *inter se* parties on 16.1.2014 reveals that disputed *Khokha* was handed over to complainant, Usha Rani in the presence of three witnesses. Respondent No.1, in his cross-examination, admitted his signatures upon the compromise, as such, Sub Divisional Magistrate rightly arrived at a conclusion that from the date of handing over the possession to the date of dispute, i.e. land alongwith built up structure/kiosk was in the ownership as well as physical possession of the complainant. Tehsildar Kullu, in his report, has also stated that some part of said *Khokha* stands constructed upon Khasra No. 1929 and other on 1055 and issue is still pending adjudication before Assistant Collector 1st Grade, Kullu.

30. Though, respondents No.1 and 2 had handed over possession of *Khokha* on 16.1.2014 pursuant to compromise *inter se* parties, but they again made an attempt to dispossess the complainant from the *Khokha* by breaking open locks, as such, Sub Divisional Magistrate rightly returned finding that respondents No. 1 and 2 with a view to grab possession of the kiosk/*Khokha* built upon Khasra No. 1929 belonging to complainant, made an attempt to dispossess her.

31. In the case at hand, police, while filing *Kallandra* under Section 145, specifically expressed apprehension with regard to possibility of quarrel *inter se* parties resulting into breach of peace, whereafter, Sub Divisional Magistrate having perused material adduced on record alongwith*Kallandra* formed specific opinion that there is likelihood of breach of peace and as such, finding returned by learned Sessions Judge to the

effect that danger of breach of peace was not established before trial court at the time of initiation of proceedings under S. 145, can not be allowed to sustain.

32. Consequently, in view of the aforesaid, order dated 21.11.2017 passed by the learned Sessions Judge, Kullu, Himachal Pradesh in Criminal Revision No. 08 of 2017 is set aside. Order dated 29.4.2017 passed by Sub Divisional Magistrate, Kullu, Himachal Pradesh in Case No. 114 of 2015 is restored.

33. Petition stands disposed of in the aforesaid terms. Pending applications, if any, stand disposed of.

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

Sh. Parkash Kumar and others ...Petitioners.

Versus

Rajiv Shankar and others ...Respondents.

CMPMO No. 291 of 2018.
Decided on: 27.9.2018.

Administrative Law – Quasi-judicial functions – Discharge of – Requirement of giving reasons – Held, when quasi judicial authority or Court of law decides application and grants interim relief, then it has to satisfy that prima facie case and balance of convenience exist in favour of party- And in case interim protection not granted, party shall suffer irreparable loss - Satisfaction is to be reflected by way of reasoned order by referring to material on record – Order of Divisional Commissioner granting stay till disposal of appeal, without assigning any reason whatsoever, set aside – Petition allowed – Matter remanded. (Paras-2 & 6)

For the petitioners. Mr. N.K.Thakur, Sr. Advocate withMr. Divya Raj Singh, Advocate.

For respondents. Mr. Desh Raj Thaur, Additional Advocate General for respondent No.1.
Mr. Devender K. Sharma, Advocate for remaining respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.*(Oral)*

By way of this petition, petitioners have prayed for the following relief:-

"It is therefore, most respectfully prayed that petition may very kindly be allowed and Annexure P-8 may very kindly be quashed and set aside in view of the submission made herein above or any other or further order which this Hon'ble Court may deems fit and proper may be passed in the interest of justice."

2. Grievance of the petitioners is that along with a revision petition preferred by the private respondent against order dated26.12.2015 passed by learned Sub Divisional Collector Amb, District Una in case No. 29/A/2015, an application for grant of stay was filed by the said private respondent in the Court of learned Divisional Commissioner, Kangra

Division at Dharamshala. This application has been allowed vide impugned order which finds mention at page 28 of the paper book by passing the following order "stay granted till disposal of appeal", which is a cryptic and non speaking order.

3. Learned Senior Counsel appearing for the petitioners has argued that the impugned order on the face of it is perverse and is liable to be quashed and set aside, as the same can neither be said to be a reasoned order nor a speaking order. He has further argued that any authority, be it quasi judicial or an administrative, while performing the duties, quasi judicial in nature, cannot pass such a cryptic order while deciding the rights of the parties.

4. At this stage, learned Additional Advocate General as also learned counsel for the private respondents submit that in all probabilities initially on 19.6.2018 a short order was passed by the learned Divisional Commissioner which might have been followed by a reasoned and speaking order.

5. Be that at it may, in my considered view, even if that procedure or process has been followed by the learned Divisional Commissioner, then also the same is bad in law and cannot be sustained, as an authority cannot pass two orders i.e., one non speaking order followed with a speaking order in order to justify the non speaking order.

6. Besides this, it is settled law that when either a quasi judicial authority or a Court of law decides an interim application and grants interim relief in favour of a party, then it has to be satisfied that a prima facie case exists in favour of the party, balance of convenience is also in favour of the party and in case interim protection is not granted, then the party shall suffer irreparable loss. Said satisfaction has to be reflected in the order by way of reasoning by referring to the material on record on the basis of which said satisfaction has been arrived at by the authority. This important aspect of the matter has been ignored by the learned Divisional Commissioner while passing the impugned order. Simply because an authority has the power to grant interim relief, the same does not imply that the power so conferred upon the authority has to be exercised in an arbitrary manner, as apparently has been done in the present case.

In these circumstances, this petition is allowed and order of grant of stay till disposal of appeal passed vide Annexure P-8 is quashed and set aside. The Divisional Commissioner, Kangra at Dharamshala is directed to decide the stay application afresh after hearing both the parties by passing a reasoned and speaking order. Liberty is granted to learned counsel for the parties to move a proper application apprising the learned Divisional Commissioner of the order so passed by this Court and for early hearing of the application.

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

Sunita Devi and another ....Petitioners.

Versus

Makhan Lal ... Respondent.

Cr.MMO No. 236 of 2018
Reserved on 29.8.2018
Decided on: 27.9.2018.

Indian Evidence Act, 1872- Section 45- **Code of Criminal Procedure, 1973-** Section 125- Expert opinion – Paternity dispute – Direction for giving blood samples for DNA tests – Justification – Wife and son filing maintenance proceedings against respondent – Respondent disputing paternity of child and alleging that one 'D' was biological father of son – Court allowing his application and directing parties to give blood samples for conducting DNA tests to determine paternity of son – Petition against – Held, when there is apparent conflict between right to privacy of person and duty of Court to reach truth, Court must exercise its discretion only after balancing interests of parties and on due consideration whether for just decision DNA test is eminently needed – Further held, intention of respondent not to establish illegitimacy of child but to demonstrate infidelity of wife - Prayer made in application for conducting DNA tests of parties aimed at alleged adulterous behaviour of wife though in determination of said fact, factum of legitimacy of child would also be incidentally involved – Petition disposed of without interfering impugned order by giving liberty to petitioners either to comply order and go for DNA tests or disregard it, enabling Court in that eventuality to draw presumption contemplated under Section 114 of Act. (Paras-9, 11 & 12)

Cases referred:

Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 Supreme Court Cases Cases 633

Dipanwita Roy Vs. Ronobroto Roy, AIR 2015 Supreme Court 418

For the petitioners.	Mr. Sanjeev Bhushan, Sr. Advocatewith Ms. AbhilashaKaundal, and Mr. Rajesh Kumar, Advocate.
For respondent	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this petition filed under Section 482 of the Code of Criminal Procedure, petitioners have prayed for quashing of order dated 4th October, 2017, passed by the Court of learned Chief Judicial Magistrate, Kinnaur at RckongPeo, on an application filed under Section 45 of the Indian Evidence Act by the present respondent allowing his request for directing the parties to give their blood samples for DNA test to ascertain the factum of the paternity of petitioner No.2 (Master Arvind).

2. Brief facts necessary for adjudication of the present petition are as under. In proceedings filed by the petitioners against respondent under Section 125 of the Cr.P.C. seeking grant of maintenance, an application was filed under Section 45 of the Indian Evidence Act by the present respondent for ordering the DNA test of the parties for fortifying the parentage of petitioner No.2 (Master Arvind). As per averments made in the application, the applicant therein denied any access to petitioner No.1 after the year 2010 and on these basis his contention was that petitioner No.2, who was born during the pendency of the petition filed under Section 125 of the Cr.P.C. was not his son. It was further mentioned in the application that in the course of recording of evidence in proceedings under Section 125 of Cr.P.C. it came in knowledge that petitioner No.1 was having physical relationship with one Shri Dharam Singh and that petitioner No.2 was in fact son of Dharam Singh. It was thus prayed in the application that the said fact as to whether petitioner No.2 was the son of the applicant-respondent or not could only be determined by conducting a DNA test of the parties to the *lis*.

3. This application was contested by present petitioners on the ground that false and bald allegations stood leveled against petitioner No.1 about her allegedly having relations with one Shri Dharam Singh, whose identity even was not disclosed in the application. Averments made in the application were denied in totality in the reply.

4. Vide order dated 4.10.2017 which stands impugned before this Court, the application has been allowed by the Court of learned Chief Judicial Magistrate, Kinnaur at ReckongPeo. While allowing the application, it has been held by learned court below that it has been the case of the applicant therein that he was not having any access to petitioner No.1 since the year 2010 and during the course of cross examination of petitioner No.1, a specific question was put to her qua her relationship with Shri Dharam Singh, who hailed from her village. Learned court below further held that as the matter in hand only pertained to claim of maintenance, therefore, there was no necessity of impleading Shri Dharam Singh as party. It further held that paternity of petitioner No.2 could only be ascertained if DNA test was ordered and thereafter relying upon the judgment of Hon'ble Supreme Court of India in Dipanwita Roy Vs. Ronobroto Roy, AIR 2015 Supreme Court 418, learned court below allowed the application.

5. Learned Senior Counsel appearing for the petitioners has argued that the order impugned was a perverse order, as learned court below has erred in not appreciating that no Court would force a minor to give his blood sample for the purpose of DNA test. He has further argued that the filing of the application was a tactic deployed by the present respondent to avoid payment of maintenance and this very important aspect of the matter was ignored by the learned court below.

6. On the other hand learned Senior Counsel appearing for the respondent had argued that there was no illegality or perversity with the order impugned because there was no bar in law that a Court could not order the DNA test of a minor. Learned Senior Counsel has further argued that the very fact that petitioner No.1 was vehemently opposing DNA test itself was suggestive of the fact that petitioner No.2 was not the son of the respondent. As per learned Senior Counsel the technical pleas raised on behalf of the petitioners were just to ensure that truth did not come out. On these bases, he prayed that as there was no merit in the petition, the same be dismissed.

7. I have heard learned Senior Counsel for the petitioners as well as learned Senior Counsel for the respondent and have also gone through the records of the case.

8. According to the respondent, as petitioner No.2 is not his son, therefore, he is not liable to pay maintenance. It is further his case that petitioner No.2 is the child of petitioner No.1 and one Shri Dharam Singh, with whom petitioner No.1 allegedly has physical relations. According to him, he has had no access to petitioner No.1 since the year 2010. It is not in dispute that the date of birth of petitioner No.2 is 21.11.2013. This is evident from the averments made in the present petition itself.

9. Hon'ble Supreme Court of India in Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and another, ***(2010) 8 Supreme Court Cases Cases 633*** has held that in a matter where paternity of a child is in issue before the Court, the use of DNA test is an extremely delicate and sensitive aspect. It further held that when there is apparent conflict between the right to privacy of a person not to force himself to medical examination and duty of the Court to reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. Hon'ble Supreme Court has further held that DNA test in a matter relating to paternity of a child should not be directed by the Court as a matter of course or in a routine manner, and the Court has to consider

diverse aspects including presumption under Section 112 of the Indian Evidence Act, as also the pros and cons of such order and the test of "eminent need", whether it is not possible for the Court to reach the truth without use of such test.

10. In Dipanwita Roy Vs. Ronobroto Roy, **AIR 2015 Supreme Court 418**, Hon'ble Supreme Court has held as under:-

> *"9. All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behaviour of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play.*
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> *x x xx xx xx x x xx xx*
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> *10. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena (supra), and NandlalWasudeoBadwaik (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.*
>
> *11. The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had*

not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.

12. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

"114. Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

11. Coming to the facts of this case, herein also, by way of averments made in the application filed by respondent under Section 45 of the Indian Evidence Act, the intent of the applicant is not to establish the illegitimacy of the child i.e., petitioner No.2, but endeavour is to demonstrate the infidelity of petitioner No.1. In my considered view, the prayer made in the application for conducting DNA test of the parties was aimed at the alleged adulterous behaviour of petitioner No.1, though in the determination of the said fact, undoubtedly the factum of legitimacy of petitioner No.2 will also be incidentally involved as has been held by Hon'ble Apex Court.

12. Accordingly, in these circumstances, without interfering with the order impugned, this petition is disposed of with the direction that petitioner No.1 shall be at liberty to comply with or disregard the order passed by the learned court below requiring the holding of DNA test both qua her and petitioner No.2. It is further made clear that in case she complies with the direction passed by the learned court below, the DNA test will determine the veracity of the accusation leveled against her by the present respondent and if she declines to comply with the directions, then obviously the allegations would be determined by the Court by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act in terms of the law declared by the Hon'ble Supreme Court in Dipanwita Roy's case, Supra.

Petition stands disposed of in the above terms. No order as to costs.

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

Anil Chauhan and another .....Petitioners

Versus

State of H.P. .....Respondent

Cr. MMO No. 353 of 2018
Reserved on: 11.09.2018
Decided on: 17.09.2018

Code of Criminal Procedure, 1973- Section 482- Inherent Powers- Exercise of- Quashing of FIR pursuant to compromise- Held- In appropriate cases to meet out ends of justice, High Court in exercise of inherent jurisdiction may order quashing of FIR- On facts, FIR registered for offences under Sections 279, 337 & 338 Indian Penal Code, 1860, ordered to be quashed.(Para 11)

Cases referred:

B.S. Joshi and othersvs. State of Haryana and another, (2003) 4 SCC 675

Preeti Gupta and anothervs. State of Jharkhand and another, (2010) 7 SCC 667

Jitendra Raghuvanshi and othersvs. Babita Raghuvanshi and another,(2013) 4 SCC 58

ParbatbhaiAahir alias ParbatbhaiBhimsinhbhaiKarmur and othersvs.State of Gujarat and another, (2017) 9 Supreme Court Cases 641

For the petitioners: Mr. K.B. Khajuria, Advocate.

For the respondent: Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code"), is maintained by the petitioner for quashing of F.I.R No. 152/2017, dated 26.06.2017, under Sections 279, 337 and 338 of the Indian Penal Code, registered at Police Station Hamirpur, District Hamirpur, H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2. Briefly stating the facts, giving rise to the present petition are that on 26.06.2017, Jagdish Chand/complainant (hereinafter to be called as "the complainant"), was standing upon the roof of the house of Joginder Singh near Hot Spice Restaurant. At about 7:00 a.m., he saw that one motorcycle, coming from Dosadka side hit by a car coming from Hamirpur side. On investigation, it was found that motorcycle was being driven by Ajay Kumar (petitioner No. 2) and car being driven by Anil Kumar (petitioner No. 1). As per the complainant, the accident took place due to rash and negligent driving of the car driver, Anil Kumar. Accordingly, FIR, No. 152/2017, dated 26.06.2017, under Sections 279, 337 and 338 of the Indian Penal Code, came to be registered against petitioner No. 1. However, now the parties have entered into a compromise **(Annexure P-3)** and they do not want to pursue the case against each other. Hence the present petition.

3. Learned counsel for the petitioners has argued that as the parties have compromised the matter, vide Compromise Deed **(Annexure P-3)**, no purpose will be served by keeping the proceedings alive, hence the FIR, alongwith consequent proceedings, arising out of the same, pending before the learned trial Court may be quashed and set aside.

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

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

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

> **[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the**

relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

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

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

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

8. Their Lordships of the Hon'ble Supreme Court in **Jitendra Raghuvanshi and others**vs. **Babita Raghuvanshi and another,**(2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to

matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

> **[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.**
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> **[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.**
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> **[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.**
>
> **[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts**

to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

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

9. Similarly, Hon'ble Supreme Court in **ParbatbhaiAahir alias ParbatbhaiBhimsinhbhaiKarmur and others***vs.***State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

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

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

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

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

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

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

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

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

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

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice would be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise **(Annexure P-3)**, placed on record.

11. Accordingly, looking into all attending facts and circumstances, this Court finds that present is a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and, therefore, the present petition is allowed and F.I.R No. 152/2017, dated 26.06.2017, under Sections 279, 337 and 338 of the Indian Penal Code, registered at Police Station Hamirpur, District Hamirpur, H.P., is ordered to be quashed. Since F.I.R No. 152/2017, dated 26.06.2017, under the aforesaid Sections has been quashed, consequent proceedings, arising out of the said F.I.R., pending before the learned trial Court are thereby rendered infructuous.

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

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

Anil Kumar Budhiraja .....Petitioner.

Versus

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

Cr.MMO No. 423 of 2018

Decided on : 18.9.2018

Code of Criminal Procedure, 1973- Sections 82 & 482- Inherent power- Exercise of –Trial Court declaring accused as proclaimed offender- Accused Challenging order before High Court on ground that his address not correctly mentionted in charge sheet and non-bailable warrants remained un-executed- On facts, accused found having appeared before trial Court earlier in the said case- Held, order of trial Court does not suffer from any infirmity- Petition disposed of. (Para 4)

For the petitioner : Mr. N.S. Chandel & Mr. Dheeraj K. Vashishat, Advocates.
For the respondents : Mr. Hemant Vaid, Addl. A.G., for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition is directed, against, the orders pronounced, on, 28.8.2018, by the learned Chief Judicial Magistrate, Solan, in, Case No. 272/3 of 2016, whereunder the petitioners' application for seeking exemption, from his personal appearance, stood rejected, and, also therein, he stood declared, a, proclaimed offender.

2. The reasons' assigned in the petition, for, the petitioner, not, recording his personal appearance before the learned trial Magistrate concerned,are, (a) anchored upon his address mentioned in the complaint, not, bearing compatibility with his address reflected, alongwith his name, in, the instant petition, whereas, the latter address being his correct address, (b) his suffering judicial custody, in respect of, an offence constituted, under, Section 304-B, of, the Indian Penal Code, (c) wherefrom, a, contention is, reared, that in the NBWs hence remaining un-executed upon him, rather, the petitioner, not, intentionally avoiding, in, ensuring their execution, upon, him.

3. However, the aforesaid contention is per-se flimsy, as earlier thereto, the petitioner herein had recorded his appearance, before the learned trial Magistrate,(i) despite issuance of a valid proclamation, yet, the petitioner herein omitting, to record his personal appearance before the learned trial magistrate. In aftermath the impugned order does not suffer from any perversity or absurdity, and, hence the impugned order is maintained.

4. Nonetheless, when the petitioner, has, recorded his personal appearance before this Court, and, has rendered a statement on oath, duly reduced into writing and signatured by him, with disclosures therein, qua, his undertaking to record his personal appearance, before the learned trial Magistrate concerned, and, also with a disclosure occurring therein, qua, his thereafter, continuously recording his personal appearance, therebefore, unless, severe personal constraints, rather preclude him, to, make his personal appearance therebefore. Consequently, hence in the interest of justice, this Court, is constrained, to, direct the petitioner to record his personal appearance, before the learned trial Magistrate, on 28.9.2018. Also, in the interest of justice, the learned trial Magistrate concerned, is, directed, to, upto then not direct, for, issuance of any coercive process, for, ensuring the personal appearance of the petitioner, before her.

In view of above, the present petition stands disposed of, so also pending applications, if any. The parties are directed to appear before the learned Magistrate concerned, on **28.9.2018**. However, liberty reserved to the learned Magistrate concerned, to, upon the petitioner' breaching, the, undertaking furnished, before this Court, to, hence thereafter proceed, in accordance with law, against him.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE, SANDEEP SHARMA, J.

Court on its own motion ...Petitioner
Versus
State of Himachal Pradesh & others ...Respondents

CMP No.8004 of 2018 in
CWPIL No. 88 of 2017
Order Reserved on:14.09.2018
Date of Decision : September 20, 2018

Constituion fo India, 1950- Article 226-Public Interest Litigation- High Court taking suo moto cognizance on news item regarding rape and murder of school going girl- One of accused dying in lock up during investigation by SIT of State Police- High Court then entrusting investigation to CBI and directing police officials of SIT to file their personal affidavits in sealed covers- CBI filing application before High Court and praying for release of said affidavits to them- Police Officers of SIT objecting release on ground of being violative of their Constitutional right against self incrimination –Held, said police officers at no point of time remained accused nor affidavits filed by them in contemplation of any investigation- To bring statement within provisions of Article 20(3) of Constitution, person must have stood in character of an accused at time he made such statement - It is not enough that subsequent to such statement he becomes an accused- There is no violation of right against self incrimination-Copies of affidavits ordered to be released. (Para 28)

Constituion of India, 1950- Article 215 & 226- Nature of Powers- High Court being Court of Record has wide extraordinary writ jurisdiction – Such powers are to be exercised to advance cause of justice. (Para 37)

Cases referred:

Supreme Court Bar Association vs. Union of India & another, (1998) 4 SCC 409
Balasaheb alias Ramesh Laxman Deshmukh vs. State of Maharashtra and another, (2011) 1 SCC 364
State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808
Raja NarayanlalBansilal vs. ManeckPheroz Mistry, AIR 1961 SC 29
M.P. Sharma vs. Satish Chandra, AIR 1954 SC 300
Naresh Shridhar Mirajkar& others vs. State of Maharashtra & another, AIR 1967 SC 1
Sahara India Real Estate Corporation Limited & others vs. Securities & Exchange Board of India & another, (2012) 10 SCC 603
Delhi Judicial Service Association, Tis Hazari Court, Delhi vs. State of Gujarat and others, (1991) 4 SCC 406
Vitusah Oberoi and others vs. Court on its own motion, (2017) 2 SCC 314
Commissioner of Customs and Central Excise vs. Hongo India Private Limited & another, (2009) 5 SCC 791
R.Dineshkumar alias Deena vs. State represented by Inspector of Police & others, (2015) 7 SCC 497
Dalip Singh vs. State of Uttar Pradesh and others, (2010) 2 SCC 114
Dalmia Cement (Bharat) Ltd. & another vs. Union of India & others, (1996) 10 SCC 104
Union of India & others vs. Ex-GNR Ajeet Singh, (2013) 4 SCC 186

B.P.Achala Anand vs. S. Appi Reddy & another, (2005) 3 SCC 313
Kartar Singh vs. State of Punjab, (1994) 3 SCC 569
Maria Margarida Sequeira Fernandes vs. Erasmo Jack De Sequeira (Dead) through LRs, (2012) 5 SCC 370
Zahira Habibullah Sheikh (5) & another vs. State of Gujarat & others, (2006) 3 SCC 374

For the petitioner	:	Court on its own motion.
For the respondent	:	Mr.Ashok Sharma, Advocate General, with Mr. J.K.Verma, Mr.Adarsh Sharma, Ms.Rita Goswami &Mr.Nand Lal Thakur, Addl. AG., for the respondents-State. Mr. Nikhil Goel, Mr. Anshul Bansal &Mr.AnsulAttri, Advocates, for the CBI-respondent No.7/applicant. Mr.Rajesh Sharma, Assistant Solicitor General of India, for respondent No.8. Mr.Mr.AnkushDassSood, Sr.Advocate with Ms.ShwetaJoolka&Mr.Ishan, Advocates, for respondent No.9. Mr.Satyen Vaidya, Sr.Advocate, with Mr.Vivek Sharma, Advocate, for respondents No.10 & 11.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

In terms of the present application [CMP No.8004 of 2018], applicant Central Bureau of Investigation (CBI), prays for release of the personal affidavits filed in a sealed cover by private respondents No.10 to 17 before this Court on 24.08.2017. The purpose being, if need be, to confront the deponents during trial pending in R.C. No.8(S)/2017/CBI/SC-I/New Delhi and R.C. No.9(S)/2017/CBI/SC-I/New Delhi or other proceedings arising therefrom or in relation thereto.

2. Undisputedly no response to the application stands filed by any one of the respondents.

3. Firstly, we give a background leading to the passing of order dated 18.08.2017 and the said respondents filing their affidavits on 24.08.2017.

Background

4. In July, 2017, allegedly a 16 years old school going girl child was raped and brutally murdered. This perhaps was sometime between 4th and 6th of July, 2017 at a place falling in District Shimla. The incident shook the entire State and the whole society was clamouring for justice. With the recovery of the dead body of the child from the jungle on 06.07.2017, same day, FIR No.97 of 2017, was registered at Police Station, Kotkhai, District Shimla, H.P.

5. There was huge outcry about the incident and the matter was extensively reported in both the print and electronic media. Taking *suo motu* cognizance of one such news item reported in the Tribune dated 09.07.2017, this Court on 12.07.2017, issued notice to the State when the learned Advocate General was asked to obtain instructions and the matter adjourned for 02.08.2017.

6. In the meanwhile on 17.07.2017, the State moved an application [CMP No.5715 of 2017], praying that the matter be referred to the CBI, in terms of request already made both by Hon'ble the Chief Minister, State of Himachal Pradesh and the Principal

Secretary (Home) to the Government of Himachal Pradesh, vide their respective communications dated 15.07.2017 and 14.07.2017.

7. On 19.07.2017, after impleading the CBI as a party, the Court issued notice which was accepted by the learned standing counsel. Further the Chief Secretary to the Government of H.P., was directed to file his personal affidavit stating the events which led to the issuance of communication dated 14.07.2017 [request made to the CBI by Principal Secretary (Home)]. Same day, the Chief Secretary filed his affidavit, which reads as under:-

> "I, Vidya ChanderPharka s/o Late Shri Z.R. Negi, aged 57 years, at present posted as Chief Secretary to the Govt. Himachal Pradesh, Shimla do hereby solemnly affirm and state as under:-
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> 2. That the origin of the present incident emerges from case FIR No.97/2017 dated 6.7.2017 u/s 302, 376 IPC and Section 4 of POCSO Act registered at Police Station, Kotkhai, District Shimla.
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> 3. That on 12.7.2017 one Sh.Ashish Chauhan was arrested and five days police remand was obtained from the Ld. Court. That the Director General of Police, Himachal Pradesh on 12.7.2017 had constituted a SIT headed by the Inspector General of Police, Southern Range, Shimla. The SIT started investigation and arrested five accused and obtained their seven days police remand upto 20.7.2017.
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> 4. That on the basis of physical/biologically, digital and circumstantial evidence collected, during course of investigation five accused were arrested by Shimla police on 12th July, 2017. They were produced before the court on 13th July, 2017 and were remanded to police custody until 20th July, 2017. Meanwhile, word spread through social media that the main accused who were influential people of the area have been saved by the police and the innocent persons have been framed. This, resulted in a number of protests including violent ones at a number of places within and outside the State. Accordingly, five FIRs have been registered in this regard at Police Station. Theog=1, Kotkhai=3, New Shimla=1 and copy of FIRs are collectively annexed as annexure R-1(Colly).
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> 5. That there was a persistent demand from various quarters to hand over the case CBI. Keeping in view the sensitivity of the matter, the Director General of Police, H.P., wrote to Home Department of HP Govt. to transfer the investigation to CBI. Accordingly, Hon'ble Chief Minister, H.P. and Principal Secretary (Home) H.P. have taken up the matter with the Govt. of India to transfer the case to the CBI.
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> 6. That on 12.7.2017 the Hon'ble High Court of H.P. took suo-moto cognizance of the mater and listed the case for 2.8.2017. However, Superintendent of Police, Shimla filed an application before this Hon'ble Court on 17.7.2017 for early hearing of the case.
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> 7. That meanwhile the protest by certain groups continued. The police exercised utmost restraint despite serious provocation. It is further submitted that on the night intervening 18th& 19th July, 2017, one of the accused namely Suraj died in-side the lockup in Police Station, Kotkhai. In this regard, a case FIR No.101/2017 u/s 302 IPC dated 19.7.2017 has been registered in Police Station Kotkhai. The SHO of Police Station, Kotkhai and sentry on duty have been suspended for dereliction of duty. Entire staff of Police Station, Kotkhai has been transferred.

In view of the foregoing situation, it will be in the best interest of the Govt. and other stakeholders that directions are passed to transfer the case to CBI in an expeditious manner, in order to address public sentiments and upheld Rule of Law in the State." (Emphasis supplied)

8. Accounting for all the attending circumstances, including the fact that one of the accused had died in a police custody; there was huge public outcry; one of the Police Stations stood ransacked; public property was damaged; seriousness of the allegations; enormity of the crime and the ugly resultant incidents, this Court vide separate order dated 19.07.2017 allowed the said application (No.5715 of 2017), by passing a detailed order, issuing the following directions:-

"28. Therefore, deeming it as our duty, in exercise of our writ jurisdiction, we interfere and direct as under:-

(i) We entrust the investigation of FIR No.97 of 2017, dated 6.7.2017, under Sections 302, 376 of the Indian Penal Code and Section 4 of the POCSO Act; FIR No.101 of 2017, dated 19.7.2017, under Section 302 of the Indian Penal Code, both registered at Police Station, Kotkhai, District Shimla, Himachal Pradesh, as also role played by the officers/officials/ functionaries of the State, in connection thereto, to the Central Bureau of Investigation. (ii) Direct the Director CBI to forthwith constitute a Special Investigation Team (SIT) of not less than three Officers, headed by the Superintendent of Police with two other Officers not below the rank of Deputy Superintendent of Police and immediately start the investigation.

(iii) Record pertaining to the investigation conducted thus far by the SIT, so constituted by the State be handed over to the SIT of the CBI.

(iv) The State shall ensure that the entire evidence is preserved, protected and not tampered with. The Director General of Police, Himachal Pradesh, who is present in the Court, assures of such fact.

(v) The Director General of Police, Himachal Pradesh, assures that all assistance shall be rendered to the SIT for conducting an expeditious, fair, impartial investigation. Infrastructure, in the shape of vehicles, accommodation, shall be made available.

(vi) The Chief Secretary to the Government of Himachal Pradesh shall ensure that appropriate action is taken against the erring officials/officers/functionaries of the State, in accordance with law. Within a period of two weeks from today, he shall independently examine the matter and take appropriate action.

(vii) The Director General of Police, Himachal Pradesh shall ensure maintenance of law and order.

(viii) Affidavit of the Chief Secretary and status report by the SIT be filed not later than two weeks.

(ix) Liberty reserved to any person aggrieved or either of the parties to approach this Court. (x) Response by the parties be filed within two weeks."

9. It is a matter of record that in compliance of this order, Chief Secretary to the Government of H.P., filed his personal affidavit dated 31.07.2017, *inter* alia, stating that the case files/record of cases were handed over to the CBI under proper receipt on 23.07.2017; The Malkhana of the Police Station, Kotkhai was ransacked and burnt by the

mob on 19.7.2017 and a case FIR No. 123/2017 in this matter stands registered in Police Station, Theog. However, videography of the scene of crime committed in the lock up and post mortem report and related evidence were preserved; Three key officials namely the sentry, the station house clerk and the SHO Police Station, Kotkhai were suspended following the death of accused Suraj in the Police lock up. Also the Inspector General of Police, Southern Range, Shimla, Superintendent of Police Shimla and Addl. Superintendent of Police, Shimla, stand transferred and that the State is making every possible effort to maintain law and order and the situation has remained satisfactory and is under control.

10. Vide order dated 17.08.2017, this Court observed that the investigation of the case was entrusted to the CBI only on 23.07.2017. Thus, in effect, from 06.07.2017 till 23.07.2017, investigation of the FIRs was conducted by different officers of the State, about which fact they also briefed the media, which fact was taken note by us in the following terms:-

> "11. Having perused the reports, we are of the considered view that certain police officials of the State, who conducted the investigation with the registration of FIR No.97 of 2017, dated 6.7.2017, need to be impleaded as parties, by name, for ascertaining as to what transpired between 6.7.2017 and 19.7.2017 or for that matter upto 23.7.2017.
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> 12. We are informed by the learned Advocate General that with the registration of FIR, dated 6.7.2017 (FIR No.97 of 2017), investigation was initially conducted by ASI Deep Chand, Police Station Kotkhai; Shri Manoj Joshi, Dy.SP, Theog; and SI Rajinder Singh,Incharge of Police Station Kotkhai, who joined lateron.
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> 13. On 10.7.2017, an SIT, comprising of police Officers/officials came to be constituted, headed by Shri Zahoor Zaidi, Inspector General of Police, comprising of members Shri Bhajan Dev Negi, Additional Superintendent of Police; Shri Manoj Joshi,Dy.S.P., Theog; and Shri Rajinder Singh, SHO, Police Station Kotkhai. Thereafter, on 12.7.2017, constitution of the SIT was expanded with inclusion of Shri Rattan Singh Negi, Dy.S.P.; Shri Dharam Sen Negi, Sub Inspector; and Shri Rajiv Kumar, ASI as members.
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> 14. With the arrest of one accused on 12.7.2017 and other five accused persons on 13.7.2017, a Press Conference, pointing out progress of the investigation, was held by Shri Somesh Goel, Director General of Police, Himachal Pradesh, in the presence of Shri Zahoor Zaidi, the Officer heading the SIT. Thereafter, SIT continued with the formal investigation till the passing of order dated 19.7.2017, on which date, this Court was informed that Co-accused Suraj Kumar had died in police custody."
> (Emphasis supplied)

11. Noticeably, we impleaded all the officers, who at some point in time had dealt with the issue in hand, as parties to the petition and issued notice to them.

12. We may observe that prior thereto, on 02.08.2017, CBI, had filed its first report in a sealed cover, which was taken on record.

13. It is in this backdrop we directed the newly added respondents, namely, Sh.Somesh Goel, DGP, H.P., Shimla (respondent No.9), Sh.Zahoor Zaidi, IG, H.P., Shimla (respondent No.10), Sh.Deep Chand, ASI, P.S. Kotkhai (respondent No.11), Sh.Manoj Joshi, Dy.SP. Theog (respondent No.12), Sh.Rajinder Singh, S.I. (respondent No.13), Sh.Bhajan Dev Negi, Addl.S.P. (respondent No.14), Sh.Rattan Singh Negi, Dy.S.P (respondent No.15),

Sh.Dharam Sen, S.I. (respondent No.16) and Sh.Rajiv Kumar, ASI (respondent No.17), to file their personal affidavits in the following terms:-

> "We direct respondents No.9 to 17 to file their personal affidavits, narrating the facts which came to their knowledge during the course of investigation so conducted by them or in any manner while dealing with FIR No.97 of 2017 and FIR No.101 of 2017 so registered at Police Station, Kotkhai, District Shimla, H.P. They shall also disclose such facts which have otherwise come to their knowledge in connection with the crime in question. Also the basis which led to the conclusion of the alleged complicity of all the accused, including the one who died in police custody.
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> We direct that such affidavits be filed in the Registry of this Court in a sealed cover, with an accompanying affidavit stating that the contents of the affidavit placed in the sealed cover is sworn by them and that contents thereof, are true and correct to their personal knowledge and belief as also nothing material stands concealed by them. Needful shall positively be done before the next date." (Emphasis supplied)

14. On 24.08.2017, these affidavits filed in a sealed envelope were sealed by the Court and kept in the safe custody of the Register General of this Court. It is a matter of record that save and except for affidavit filed by Zahoor Zaidi, I.G., Shimla (respondent No.10) which was seen by one of us in a bail application, neither the seals of the envelopes were ever opened nor have the contents of the affidavits read till date. The reason being that the CBI was to independently investigate the matter, uninfluenced of any stand taken by any person. The officers were to truthfully join the investigation. It is only the deponents and perhaps their learned counsel, who are aware of the contents thereof.

15. On 30.08.2017 CBI moved a similar application being CMP No.7410 of 2017, praying for release of such affidavits which was subsequently withdrawn on 25.10.2017.

16. It is a matter of record that subsequently this Court passed several orders, including that on 06.09.2017, 11.10.2017, 25.10.2017, 20.12.2017, 28.03.2018 and 25.04.2018, directing the CBI to complete its investigation at the earliest.

17. Pursuant thereto, challan, in relation to rape and murder of a child being FIR No.97 of 2017 re-registered as R.C. No.8(S)/2017/CBI/SC-I/New Delhi, stands presented in the Court of competent jurisdiction on 29.05.2018 and trial is in progress. Insofar as culpability of the accused is concerned, there is a divergent opinion. On this count, CBI differed with the investigation conducted by the State Police and all the accused arrested (five in number) by the latter were released except for one of them - who died in custody, for nothing incriminatory was found against them. Another person who was later on arrested by the CBI is now facing trial as the sole accused.

18. Challan in relation to the custodial death (of one such accused earlier arrested by the State Police) being FIR No.101 of 2017 re-registered as R.C. No.9(S)/2017/CBI/SC-I/New Delhi, stands presented in the Court having competent jurisdiction on 24.11.2017 and the case is at the stage of arguments on framing of charges. Significantly all the members of the SIT – nine police officers – stand arrested and are facing trial.

19. It is also a matter of record that till date, our orders dated 18.08.2017 and 24.08.2017, stand accepted and none of the private respondents have filed any other affidavit or placed on record any other material in support of their defence or in opposition to any of the averments made by the CBI in its various applications or the affidavits dated 19.07.2017 and 31.07.2017, filed by the Chief Secretary to the Government of H.P.

Contentions of the learned counsel

20. Seeking reliance upon *Supreme Court Bar Association vs. Union of India & another,* (1998) 4 SCC 409 (Five Judges) (Paras 11 and 12), Mr.Nikhil Goel, learned counsel, for the applicant contends that the High court being a court of record, by virtue of provisions of sub-section 5 of Section 164; Section 283; Section 295 of the Code of Criminal Procedure (hereinafter referred to as the Code) and Chapter-XIII of the Himachal Pradesh High Court Rules, affidavits filed by the deponents are statements given on oath and as such, be released in favour of CBI to be used at an appropriate stage, if so required, either during trial or in the proceedings initiated before another Foras, including the Hon'ble Supreme Court of India, where bail application of one of the co-accused police official is pending consideration.

21. Opposing such contentions, inviting attention to the provisions of Article 20 of the Constitution of India, both Mr.Satyen Vaidya &Mr.AnkushDassSood, learned Senior Advocates, argue that handing over of the affidavit to the CBI would be violative of the constitutional protection granted to the deponents.

Article 20(3) of the Constitution

22. Let us first examine as to whether the defence of constitutional immunity, by virtue of Clause (3) of Article 20 of the Constitution, is legally permissible, much less sustainable or not?

23. The said Article reads as under:-

> "20. Protection in respect of conviction for offences.—(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
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> (2) No person shall be prosecuted and punished for the same offence more than once.
>
> (3) No person accused of any offence shall be compelled to be a witness against himself."

24. We are of the considered view that the deponents cannot seek protection or take shield of the said Article, for Clause (3) thereof, is neither applicable nor relevant in these proceedings. In fact, such contention in defence is totally misconceived.

25. This issue is no longer *res integra* and stands addressed and answered in *Balasaheb alias Ramesh Laxman Deshmukh vs. State of Maharashtra and another,* (2011) 1 SCC 364 (Two Judges), where the Apex Court was dealing with an identical issue. The facts being that a person though not an accused in police case, in which he was asked to depose as a witness, figured as an accused in a complaint case filed later in relation to the very same incident. By referring to its earlier decisions in *State of Bombay vs. Kathi Kalu Oghad,* AIR 1961 SC 1808 (Eleven Judges) and *Raja NarayanlalBansilal vs. ManeckPheroz Mistry,* AIR 1961 SC 29 (Five Judges), the Court in para-10 of the said report, observed that in order to bring the testimony of an accused within the prohibition of constitutional protection, it must be of such a character, that by itself, tends to incriminate the accused. The Court observed that the person was not an accused in the Police case and in fact a witness, whose statement was recorded under Section 161 of the Criminal Procedure Code, hence not entitled to the blanket protection. It specifically observed that:

> "16. As observed earlier the appellant is not an accused in the Police case and in fact a witness whose statement was recorded during the course of investigation under Section 161 of the Code of Criminal Procedure. In the

Police case he utmost can be asked to support the case of the prosecution but no question intended to incriminate him can be asked and in case it is done the protection under Article 20(3) of the Constitution shall spring into action. What question shall be put to this appellant when he appears as a witness is a matter of guess and on that basis he does not deserve the blanket protection under Article 20(3) of the Constitution. Even at the cost of the repetition we may observe that in the Police case when he appears and is asked to answer question, the answer whereof tends to incriminate him, he can refuse to answer the same, pleading protection under Article 20(3) of the Constitution. In such eventuality the Court would decide the same. Therefore, at this stage the blanket protection sought by the appellant is not fit to be granted."

26. Further in *Kathi Kalu Oghad*(supra), while considering the question as to whether by simply obtaining specimen of the handwritings/ signatures/thumb impression, could the accused be said to be 'a witness against himself' within the meaning of Art.20(3) of the Constitution - infringing the constitutional immunity, if any - by clarifying its earlier decision rendered in *M.P. Sharma vs. Satish Chandra,* AIR 1954 SC 300 (Eight Judges), the Apex Court culled out the following principles:

"16. In view of these considerations, we have come to the following conclusions:-

1. An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

2. The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

3. 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

4. Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showings parts of the body by way of identification are not included in the expression 'to be a witness'.

5. 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

6. 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

> 7. To bring the statement in question within the prohibition of Art. 20 (3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made." (Emphasis supplied)

27. Where a person was called to furnish information under the Companies Act, pertaining to certain irregularities committed in managing the affairs of the Company, the Constitution Bench (Five Judges) in *Raja NarayanlalBansilal vs. ManeckPheroz Mistry,* AIR 1961 SC 29, held such person not entitled to the protection of Clause (3) of Article 20 of the Constitution.

28. Now in the instant case, the deponents at the time of filing of affidavits were not the accused persons. Also they had not filed their affidavits in contemplation of any investigation against them, which fact, in any event, would have no bearing. Significantly not all of the deponents are now arrayed as accused. In any event one doesn't know as to in which of the trial(s) perhaps, contents of the affidavits are likely to be used, if at all, against them. In these proceedings, guilt of the accused cannot be determined. Investigation which is just, fair and proper is all that we are concerned with. In our considered view, the stage as to whether averments made in the documents would tend to incriminate anyone of the deponents or not, has not arisen. This issue is left best to be determined and decided by the trial Court. The deponents are not called upon by this court to answer the question. Whether the question put during trial would be incriminating or not or otherwise has to be considered at the time it is so put. In any event, in *Kathi Kalu Oghad*(supra) it already stands clarified that voluntary statement which may turn out to be incriminatory is not compulsion and to put a question to a witness is not equivalent to furnishing evidence. Further to bring the statement within the prohibition of Article 20(3) of the Constitution, present accused must have stood in the character of an accused at the time they made such a statement, for it would not be enough that subsequently they become an accused. In view of the same, we are of the considered view that case of the deponents, be it the accused or the witnesses, with respect to the present proceedings, does not fall within the constitutional prohibition.

Court of record

29. Undisputedly the High Court of Himachal Pradesh is a court of record. The affidavits stand filed in writ proceedings initiated by this court in exercise of its extra ordinary writ jurisdiction. Now let us examine as to what really is the meaning of the word "court of record".

30. The expression court of record is nowhere defined in the Constitution of India, but finds mentioned in both the Articles 129 and 215. For our purpose, the latter is relevant, which we reproduce as under:-

> "215. High Courts to be courts of record.—Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

31. Though in the context of a contempt jurisdiction, the Constitution Bench (Five Judges) of the Apex Court in *Supreme Court Bar Association* (supra), clarified the term 'court of record' in the following terms:-

> "12. A Court of Record is a Court, the records of which are admitted to be of evidentiary value and are not to be questioned when produced before any Court. The power that Courts of Record enjoy to punish for contempt is a part of their inherent jurisdiction and is essential to enable the Courts to

administer justice according to law in a regular, orderly and effective manner and to uphold the majesty of law and prevent interference in the due administration of justice."

(Emphasis provided)

32. However earlier in *Naresh Shridhar Mirajkar& others vs. State of Maharashtra & another,* AIR 1967 SC 1 (Nine Judges), it stood observed that:-

"60. There is yet another aspect of this matter to which it is necessary to refer. The High Court is a superior Court of Record and under Art. 215 shall have all powers of such a Court of record including the power to punish contempt of itself. One distinguishing characteristic of such superior Courts is that they are entitled to consider questions of their jurisdiction raised before them. This question fell to be considered by this Court in Special Reference No. 1 of 1964, 1965-1 SCR 413 at p 499. In that case it was urged before this Court that in granting bail to Keshav Singh, the High Court had exceeded its jurisdiction and as such, the order was a nullity. Rejecting this argument this Court observed that in the case of a superior Court of Record, it is for the Court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. That is why this Court did not accede to the proposition that in passing the order for interim bail, the High Court can be said to have exceeded its jurisdiction with the result that the order in question was null and void. In support of this view, this Court cited a passage from Halsbury's Laws of England where it is observed that

> "Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court".

If the decision of a superior Court on a question of its jurisdiction is erroneous, it can, of course, be corrected by appeal or revision as may be permissible under the law; but until the adjudication by a superior Court on such a point is set aside by adopting the appropriate course, it would not be open to be corrected by the exercise of the writ jurisdiction of this Court."

(Emphasis provided)

33. The Constitution Bench (Five Judges) of the Apex Court in *Sahara India Real Estate Corporation Limited & others vs. Securities & Exchange Board of India & another,* (2012) 10 SCC 603, while dealing with the power of the Court in restricting the media from publishing an article, required for better administration of justice, observed that:-

"33. ... ... Thus, Courts of Record under Article 129/Article 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness. ... ...

... ...In Mirajkar, this Court referred to the principles governing Courts of Record under Article 215 [see para 60]. It was held that the High Court is a Superior Court of Record and that under Article 215 it has all the powers of such a court including the power to punish contempt of itself. At this stage, the word "including" in Article 129/Article 215 is to be noted. It may be noted that each of the Articles is in two parts. The first part declares

that the Supreme Court or the High Court "shall be a Court of Record and shall have all the powers of such a court". The second part says "includes the powers to punish for contempt". These Articles save the pre-existing powers of the Courts as courts of record and that the power includes the power to punish for contempt [see Delhi Judicial Service Association v. State of Gujarat, 1991 4 SCC 406 and Supreme Court Bar Association v. Union of India, 1998 4 SCC 409. As such a declaration has been made in the Constitution that the said powers cannot be taken away by any law made by the Parliament except to the limited extent mentioned in Article 142(2) in the matter of investigation or punishment of any contempt of itself. If one reads Article 19(2) which refers to law in relation to Contempt of Court with the first part of Article 129 and Article 215, it becomes clear that the power is conferred on the High Court and the Supreme Court to see that "the administration of justice is not perverted, prejudiced, obstructed or interfered with"." ... ... (Emphasis provided)

34. The issues stands further elaborated in *Delhi Judicial Service Association, Tis Hazari Court, Delhi vs. State of Gujarat and others,* (1991) 4 SCC 406 (Three Judges), in the following terms:-

"19. ... . The Constitution does not define "Court of Record". This expression is well recognised in jurisdiction world. In Jowitt 's Dictionary of English Law, "Court of Record" is defined as:

> "A Court whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, and which has power to fine and imprison for contempt of its authority."

In Wharton's Law Lexicon, Court of Record is defined as :

> "Courts are either of record where their acts and judicial proceedings are enrolled for a perpetual memorial and testimony and they have power to fine and imprison; or not of record being Courts of inferior dignity, and in a less proper sense the King's Courts- and these are not entrusted by law with any power to fine or imprison the subject of the realm, unless by the express provision of some Act of Parliament. These proceedings are not enrolled or recorded."

In Words and Phrases (Permanent Edition), Vol. 10, page 429, 'Court of Record' is defined as under :

> "Court of Record is a Court where acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the "record" of the Court, and are of such high and supereminent authority that their truth is not to be questioned."

Halsbury's Laws of England, 4thEdn. Vol. 10, para 709, page 319, states:

> "Another manner of division is into Courts of record and Courts not of record. Certain Courts are expressly declared by statute to be Courts of record. In the case of Courts not expressly declared to be Courts of record, the answer to the question whether a Court is a Court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences; if it has such power, it seems that it is a Court of record ... The proceedings of a Court of record

> preserved in its archievs are called records, and are conclusive evidence of that which is recorded therein."
>
> ... ...
>
> "29. Article 129 declares the Supreme Court a Court of record and it further provides that the Supreme Court shall have all the powers of such a Court including the power to punish for contempt of itself (emphasis supplied). The expression used in Art. 129 is not restrictive instead it is extensive in nature. If the Framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity for inserting the expression 'including the powers to punish for contempt of itself'. The Article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression 'including'. The expression 'including' has been interpreted by Courts, to extend and widen the scope of power. The plain language of article clearly indicates that this Court as a Court record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of Court of record. In interpreting the Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The Courts ought not accept any such construction. While construing Art. 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since, the Supreme Court was designed by the Constitution as a Court of record and as the Founding Fathers were aware that a superior Court of record had inherent power to indict a person for the contempt of itself as well as of Courts inferior to it the expression 'including' was deliberately inserted in the Article. Article 129 recognised the existing inherent power of a Court of record in its full plenitude including the power to punish for the contempt of inferior Courts. If Art. 129 is susceptible to two interpretations, we would prefer to accept the interpretation which would preserve the inherent jurisdiction of this Court being the superior Court of record, to safeguard and protect the subordinate judiciary, which forms the very backbone of administration of justice. The subordinate Courts administer justice at the grassroot level, their protection is necessary to preserve the confidence of people in the efficacy of Courts and to ensure unsullied flow of justice as its base level."
> (Emphasis provided)

35. The view stands re-iterated in *Vitusah Oberoi and others vs. Court on its own motion,* (2017) 2 SCC 314 (Two Judges).

36. While dealing with the issue as to whether the court of record has power to correct its own record, the Apex Court in *Commissioner of Customs and Central Excise vs. Hongo India Private Limited & another,* (2009) 5 SCC 791 (Three Judges), held that:-

> "28. The other decision relied on is M.M. Thomas v. State of Kerala and Anr, (2000) 1 SCC 666. This case arose out of the vesting of all private forests in the State of Kerala on the appointed day (10.05.1971) under the Kerala Private Forests (Vesting and Assignment) Act, 1971. It is true that in para 14 it was held that:
>
> > "14. The High Court as a court of record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A court of record envelops all such powers whose acts and

> proceedings are to be enrolled in a perpetual memorial and testimony. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law."
>
> Hence, the High Court has not only power, but a duty to correct any apparent error in respect of any order passed by it. This is the plenary power of the High Court.
>
> 29. In para 17 of the abovementioned decision, it was held: (M.M. Thomas case)
>
> > "17. If such power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of the record."
>
> There is no doubt that the High Court possess all powers in order to correct the errors apparent on the face of record. While accepting the above proposition, in the light of the scheme of the Act, we are of the view that the said decision is also not helpful to the stand taken by the appellant."
>
> (Emphasis provided)

37. Thus power of the High Court as a court of record and by way of an Extra Ordinary Writ Jurisdiction are extensive. Necessarily and dutifully they are required to be exercised and applied only to advance the cause of justice. Conscious of such fact, we had directed the deponents to place on record the affidavits.

38. The next question which arises for consideration is as to whether we should accede to the request made by the CBI for handing over such affidavits in a sealed cover or not. But before that we must deal with relevant provisions of the Code of Criminal Procedure.

Provisions of Code of Criminal Procedure

39. Chapter-XII of the Code deals with the information to the police and their power to investigate. The police officer by virtue of Section 161 has power to examine a witness supposed to be acquainted with the facts and circumstances of the case and Section 164 *inter alia* prescribes any Metropolitan/Judicial Magistrate to record confession or statement so made in the course of investigation under the said Chapter.

40. Chapter-XXIII of the Code deals with evidence in inquires and trial. Primarily it lays down the procedure to be followed. Section 283 empowers the High Court to frame Rules, prescribing the manner in which evidence of the witness and the examination of the accused shall be taken down in a case coming before it.

41. Conjoint reading of the provisions of both Chapters-XII and XXIII, to our mind, deal with the matters with regard to the conduct of investigation and evidence in inquiries and trial. The affidavits filed before this Court were pursuant to the proceedings initiated in the extra ordinary writ jurisdiction of this Court and not the provisions of the code. In fact, when the affidavits were filed, none of the deponents were named as an accused or witness. They did not file their affidavits by way of a confession.

42. Whether the affidavits of the deponents would really constitute a statement under Section 164 of Cr.P.C. and as such can be read in evidence or as to whether the

witness can take shelter of proviso to Section 132 of the Evidence Act, is an issue, which we do not deem it appropriate to dwell upon, at this point in time, in view of the course of action we choose to adopt, save and except, notice the decision rendered by the Apex Court in *R.Dineshkumar alias Deena vs. State represented by Inspector of Police & others,* (2015) 7 SCC 497 (Two Judges) on this issue.

43. What is a court of record already stands discussed by us. In view of the law laid down in *Kathi Kalu Oghad*(supra), this Court was well within its right to choose any procedure vital for just and proper dispensation of justice, asking the party-respondents to file their affidavits, for after all, the case, at that time was only at a nascent stage and the inquiry/investigation was in progress.

44. Prudently we pondered, contemplated and debated as to what further course should be adopted in the matter. We have noticed that challans already stand filed.

45. The foundation of judicial system lies on unearthing the truth and dispensing justice. What is the meaning of words "justice" and "truth" and what is the purpose and object of the Courts, now stands well settled.

Justice & Truth

46. In *Dalip Singh vs. State of Uttar Pradesh and others,* (2010) 2 SCC 114 (Two Judges), the Apex Court reminded that Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life.

47. Preamble of the Constitution refers to the term justice. Elaborating thereupon, Supreme Court in *Dalmia Cement (Bharat) Ltd. & another vs. Union of India & others,* (1996) 10 SCC 104 (Three Judges), observed that:-

> "11. The Preamble of the Constitution is the epitome of the basic structure built in the Constitution guaranteeing justice - social, economic and political - equality of status and of opportunity with dignity of person and fraternity. To establish an egalitarian social order, the trinity, the Preamble, the Fundamental Rights in Part III and Directive Principles of State Policy (for short, 'directives') in Ch. IV of the Constitution delineated the socio-economic justice. The word 'justice' envisioned in the Preamble is used in a broad spectrum to harmonise individual right with the general welfare of the society. The Constitution is the supreme law. The purpose of law is realisation of justice whose content and scope vary depending upon the prevailing social environment. Every social and economic change causes change in the law. In a democracy governed by rule of law, it is not possible to change the legal basis of socio-economic life of the community without bringing about any corresponding change in the law. In interpretation of the Constitution and the law, endeavour needs to be made to harmonise the individual interest with the paramount interest of the community keeping pace with the realities of ever-changing social and economic life of the community envisaged in the Constitution. Justice in the Preamble implies equality consistent with the competing demands between distributive justice with those of cumulative justice. Justice aims to promote the general well-being of the community as well as individual's excellence. The principal end of society is to protect the enjoyment of the rights of the individuals subject to social order, well-being and morality. Establishment of priorities of liberties is a political judgment." (Emphasis supplied)

48. However in the context of adjudicatory mechanism, in *Union of India & others vs. Ex-GNR Ajeet Singh,* (2013) 4 SCC 186 (Two Judges), the Apex Court observed that justice is a virtue which transcends all barriers. Neither the rules of procedure, nor the technicalities of law can stand in its way. Even the law bends before justice. The order of the court should not be prejudicial to anyone. Justice means justice between both the parties. The interests of justice equally demand that the "guilty should be punished" and that technicalities and irregularities, which do not occasion the "failure of justice"; are not allowed to defeat the ends of justice. They cannot be perverted to achieve the very opposite end as this would be counter-productive. "Courts exist to dispense justice, not to dispense with justice. And, the justice to be dispensed, is not palm-tree justice or idiosyncratic justice". Law is not an escape route for law breakers. If so allowed, it would lead to greater injustice than upholding the rule of law. The guilty man, therefore, should be punished, and in case substantial justice has been done, it should not be defeated when pitted against technicalities.

49. Further in *B.P.Achala Anand vs. S. Appi Reddy & another,* (2005) 3 SCC 313 (Three Judges), the Apex Court held that:-

> "Unusual fact situation posing issue? for resolution is an opportunity for innovation. Law, as administered by courts, transforms into justice.
>
> > "The definition of justice mentioned in Justinian's Corpus Juris Civilis (adopted from the Roman jurist ulpian) states 'justice is constant and perpetual will to render to everyone that to which he is entitled. Similarly, Cicero described justice as 'the disposition of the human mind to render everyone his due'.
>
> The law does not remain static. It does not operate in a vacuum. As social norms and values change, laws too have to be reinterpreted, and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment, human relations by elimination of social tensions and conflicts. Lord denning once said:
>
> > "Law does not standstill; it moves continuously. Once this is recognized, then the task of a judge is put on a higher plain. He must consciously seek to mould the law so as to serve the needs of the time."
>
> (Emphasis supplied)

50. Further, in *Kartar Singh vs. State of Punjab,* (1994) 3 SCC 569 (Constitution Bench - Five Judges), the Court cautioned that failure of justice would have serious consequences, for it would shatter the faith of people in the system. It further observed that:-

> "399. ... ...It was further held that the faith of the people is the saviour and succour of justice. Any weakening link would rip apart the edifice of law. The principle of justice is ingrained in our conscience and though ours is a nanscent democracy it has now taken deep roots in our ethos of adjudication, judicial process, be it judicial, quasi-judicial or administrative in hallmark. Respect for law is one of the essential principles for an effective operation of popular Government. It is the courts and not the legislature that our citizens primarily feel with keen abiding faith for redress, the cutting edge of the law. If they have respect for the working of their courts, their respect for law will survive the short-comings of every other branch of the Government. If they lose their respect for the work of the courts, their

respect for law and order will vanish with it to the great detriment of the society." (Emphasis supplied)

Truth and the object of the Courts is to unearth the same

51. In *Maria Margarida Sequeira Fernandes vs. Erasmo Jack De Sequeira (Dead) through LRs,* (2012) 5 SCC 370 (Three Judges), the Supreme Court held that:-

"33. The truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

34. In Mohanlal ShamjiSoni v. Union of India, 1991 Supp 1 SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

36. In Ritesh Tewari and Another v. State of U.P. and Others, (2010) 10 SCC 677 this Court reproduced often quoted quotation which reads as under:

"37.... ...*Every trial is voyage of discovery in which truth is the quest*"

(Emphasis in original)

This Court observed that the

"Power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth."

37. Lord Denning, in the case of Jones v. National Coal Board, 1957 2 QB 55 has observed that:

".. ...In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."

38. Certainly, the above, is not true of the Indian Judicial system. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the

quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

39. Lord Denning further observed in the said case of Jones that:

> "... ...It's all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth "

... ...

"52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth."

(Emphasis supplied)

52. The Apex Court in *Zahira Habibullah Sheikh (5) & another vs. State of Gujarat & others,* (2006) 3 SCC 374 (Two Judges) has held that:-

"1. The case at hand immediately brings into mind two stanzas (14 and 18) of the eighth chapter of *Manu Samhita* dealing with role of witnesses. They read as follows :

Stanza 14

"Jatrodharmohyadharmena Satyam Yatranrutena cha

HanyatepreksHamananamHastastatrasabhasadah"

(Where in the presence of Judge "dharma" is overcome by "adharma" and "truth" by "unfounded falsehood", at that place they (the Judges) are destroyed by sin.)

Stanza 18

"PadoadharmasyakartaramPadahsakshinomruchhati

PadahsabhasadahsarvanPadorajanmruchhati"."

(In the adharma flowing from wrong decision in a Court of law, one-fourth each is attributed to the person committing the adharma, witness, the Judges and the ruler.)"

... ...

"35 This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that Acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to

> be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trail evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators."
>
> (Emphasis supplied)

Conclusion

53. Applying all the aforesaid principles, discussed thus far, we are of the considered view, about which we see no harm or prejudice caused to anyone of the parties, in fact it would be only in the spirit of furthering the cause and interest of justice, that the sealed covers be opened and the affidavits made available to all and be read as part of record of the present petition and made available to the parties to the litigation. The said document, in our considered view, does not fall within any one of the exceptions carved out under Section 172 of the Code. In fact, affidavits in the instant petition, stand filed with a totally different purpose, the intent being, to let the officers know that this Court was serious in unearthing the truth and as such whatever was known to them they must truthfully disclose for, *inter alia*, just adjudication of the *lis.*

54. At no point in time, it was held out to the parties that these affidavits would not be opened or read as part of record of these proceedings.

55. We notice that the investigation carried out thus far, is on the basis of independent inquiry conducted by the applicant and not on the basis of pleadings of the instant petition. This however would not mean that contents of the affidavits should not be made known to anyone, much less the Prosecutor. As already noticed, the deponents do not have constitutional immunity, for at the time of its execution, neither were they accused nor was there any formal accusation. Also they cannot be said to be self-incriminating in relation to the charges brought against any one of them. The contents of the affidavits are not pursuant to any question put to the deponents.

56. Reiteratingly, we clarify, that the affidavits were taken on record only for ensuring that the officers not only fully cooperate, but also disclose all such facts, which were well within their knowledge to the investigating agency. After all one of the accused had died in police custody. The charge sheet filed by the CBI in both the cases is not before us. Why should truth be not made known to all. Obviously investigation carried out, at least with respect to one FIR, by one of the agencies was mis-directed. Is it required to be examined as to whether subsequent investigation can be faulted for the very same reason or not is, for the Prosecutor and Trial Court to examine? But it would not mean that we lack any jurisdiction or authority, which, if required, we would not hesitate to do so.

57. Eventually we hold that the affidavits be made available to all the parties and the applicant is at liberty to obtain certified copies thereof, for use in the manner prescribed in law with the statutory safe guards and protection provided, under the Constitution, the Criminal Procedure Code and the Indian Evidence Act. Equally it shall be open for the applicant to take all steps, as may be required, in law, for unearthing the truth in relation to both the incidents of crime, should the need so arise after perusing the same.

Application stands disposed of in the aforesaid terms.

****

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

Faisel Babu NaduvilParambil ...Petitioner

Versus

State of Himachal Pradesh and another ...Respondents

CrMMO No. 418 of 2018

Decided on: September 28, 2018

Code of Criminal Procedure, 1973- Section 482- Inherent power- Exercise of- Quashing of FIR- **Indian Penal Code, 1860**- Section 420 and 120-B – Complainant registering FIR on allegations that accused fraudulently made him to deposit sum of Rs.6,00,000/- in their bank account by assuring that son of complainant would be provided with Work Visa- Neither Work Visa was provided by accused nor money refunded- Parties compromising matter and accused seeking quashing of FIR-On facts, held alleged offences do not involve mental depravity or are of heinous nature- Petition allowed- FIR quashed. (Para 16)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 466

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

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

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate with Mr. Subhash Chandran K.R., Advocate.

For the respondents: Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

None for respondent No.2.

ASI Raj Kumar, Police Station Sadar, District Bilaspur, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

In the instant proceedings, filed under S. 482 CrPC, a prayer has been made on behalf of petitioner for quashing of FIR No. 210/17 dated 22.9.2017, under Ss. 420 and 120B IPC, registered at Police Station Sadar, District Bilaspur, Himachal Pradesh as well as consequential proceedings pending in the court of learned Chief Judicial Magistrate, Bilaspur.

2. For having a bird's eye view, necessary facts as emerge from the record are that respondent No.2, Smt. Sunita Thakur filed a complaint before the Judicial Magistrate 1st Class, Bilaspur under S 156(3) CrPC, alleging therein that persons namely Alisha and Gulshan Khan fraudulently made her to deposit a sum of Rs.6.00 Lakh in the bank account of person namely Mustafa at Kerala on the pretext of getting work visa in favour of her son. Above named complainant also alleged that Alisha and Gulshan Khan assured her that her son would be provided with work visa, however, the fact remains that neither work visa was

provided to her son nor money was refunded, as such, she was compelled to file complaint under Section 156(3) before the Judicial Magistrate 1st Class, Bilaspur.

3. On the direction of the Judicial Magistrate 1st Class, Bilaspur, FIR detailed herein above came to be lodged at Police Station Sadar, Bilaspur. During investigation, police found involvement of the present petitioner as well as other persons namely Mustafa and Jafar Shah in the crime, in as much as amount of Rs.6.00 Lakh was found to have been deposited in the saving bank account of Mustafa at Kerala on the askance of the present petitioner and Jafar Shah. Person namely Mustafa, by way of a petition i.e. CrMP(M) No. 166 of 2018, prayed for grant of bail on the ground that an amount of Rs.8.00 Lakh stands paid to respondent No.2, however, aforesaid prayer of said person was not accepted in those proceedings, who thereafter filed an independent petition i.e. CrMMO No. 95 of 2018 under S. 482 CrPC, praying therein for quashment of FIR, as has been taken note herein above as well as consequential proceedings pending before the learned Chief Judicial Magistrate, Bilaspur.

4. This court having taken note of the compromise entered into between complainant-Sunita Thakur and Mustafa, whereby she was paid a sum of Rs.8.00 Lakh in lieu of Rs.6.00 Lakh allegedly paid by her for procuring work visa for her son, quashed FIR No. 210/2017, dated 22.9.2017, vide judgment dated 26.6.2018, qua him (Mustafa) only.

5. Mr. Sanjeev Bhushan, learned Senior Advocate duly assisted by Mr. Subhash Chandran K.R. Advocate, while inviting attention of this Court to the judgment dated 26.6.2018 passed by this court in CrMMO No. 95 of 2018, titled Mustafa vs. State of Himachal Pradesh, contended that since complainant-Sunita Thakur has already made a statement before this Court that she has received a sum of Rs.8.00 Lakh, as such, FIR lodged at her behest may be quashed and set aside, present petition having been filed by petitioner also deserves to be allowed. Mr. Bhushan, learned Senior Advocate, while making this court travel through the record, especially the status report fled by respondent-State, during the proceedings of the petition, strenuously argued that there is no evidence, if any, collected on record by investigating agency suggestive of the fact that role, if any, was ever played by the present petitioner at any stage of crime having been allegedly committed by him, as well as other accused, Alisha and Gulshan Khan. Mr. Bhushan, learned Senior Advocate, contended that as per investigation, Sunita Thakur (complainant) had deposited a sum of Rs.6.00 Lakh in the account of Mustafa, who in his statement given to the police, stated that he was disclosed by the Jafar Shah, that some money was to be transferred to his (Mustafa) account and that would be used for the construction of his (Jafar Shah) house. Mr. Bhushan, learned Senior Advocate also contended that even bare perusal of complaint having been filed by the complainant to the Judicial Magistrate 1st Class under S. 156(3) CrPC, nowhere reveals role, if any, of the present petitioner, in the alleged crime, rather, specific allegation is/was against Alisha and Gulshan Khan, who allegedly made her deposit some amount into the saving bank account of Mustafa. Lastly, Mr. Bhushan, learned Senior Advocate contended that since a sum of Rs.8.00 Lakh stands paid to the complainant, prayer made in the instant petition for quashing of FIR, deserves to be accepted.

6. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly acknowledging the factum with regard to receipt of a sum of Rs.8.00 Lakh having been paid to the complainant pursuant to compromise arrived *inter se* her (complainant) and Mustafa, contended that there is ample evidence on record to suggest that aforesaid amount was deposited in the account of Mustafa on the askance of present petitioner. However, Mr. Thakur, learned Additional Advocate General was unable to point out any material available on record suggestive of the fact that, at any point in time, complainant-Sunita Thakur had

any conversation or contact with Faisel Babu (petitioner), who allegedly got a sum of Rs.6.00 Lakh deposited in the account of Mustafa.

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

8. Having heard the learned counsel representing the parties and perused record, this court finds that there is no direct evidence adduced on record by the investigating agency to demonstrate that a sum of Rs.6.00 Lakh was deposited into the account of Mustafa at Kerala on the askance of present petitioner, rather, Mustafa, in his statement has stated that a sum of Rs.6.00 Lakh was deposited in his account for the construction of house of one co-accused, Jafar Shah. If statement of Mustafa made during his judicial interrogation, is read in its entirety, it suggests that he disclosed that his account number was given to the present petitioner by Jafar Shah, who resides in Dubai. Allegedly, on 12.3.2017, a sum of Rs.6.00 Lakh was deposited into the account of Mustafa, but definitely, there is no evidence available on record to connect the present petitioner with the aforesaid transaction. If, for the sake of arguments, it is presumed to be correct that account number of Mustafa was given to the complainant on the askance of co-accused Jafar Shah, even then this court is unable to find any document available on record suggestive of the fact that such account number was ever provided to the complainant Sunita Thakur by Faisel Babu, rather, it is an admitted case of the investigating agency that Rs.6.00 Lakh came to be deposited into the account of Mustafa on the askance of co-accused Alisha and Gulshan Khan.

9. At this stage, it may be noticed that in the proceedings having been filed by Mustafa i.e. CrMMO No. 95 of 2018, this court had an occasion to peruse compromise/settlement arrived *inter se* complainant-Sunita Thakur and Mustafa, wherein factum with regard to receipt of Rs.8.00 Lakh in lieu of Rs.6.00 Lakh stood recorded. On 20.3.2018, respondent No.2-Sunita Thakur stated on oath before this Court that she, of her own volition and without there being any external pressure, has entered into compromise with the person namely Mohammad Mustafa son of Shri Mohammad, through his next friend/ brother-in-law. She categorically stated before this court in those proceedings that she has received a sum of Rs.8.00 Lakh towards full and final settlement and has no objection in case, FIR No. 210/2017 dated 22.9.2017 lodged at Police Station Sadar, Bilaspur, Himachal Pradesh, at her instance, is quashed and set aside.

10. Mr. Sanjeev Bhushan, learned Senior Advocate, while inviting attention of this Court to the agreement/ compromise arrived *inter se* parties as well as judgment passed by this court in CrMMO No. 95 of 2018, prayed that since nothing concrete has emerged against the petitioner, FIR as detailed herein above, may be quashed and set aside alongwith consequential proceedings pending before the Judicial Magistrate 1st Class, Bilaspur.

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

themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

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

In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

12. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

13. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in**DimpeyGujral 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."

14. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **ParbatbhaiAahir @ ParbatbhaiBhimsinhbhaiKarmur 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."

15. In the case at hand also, the offence alleged against the accused is under Ss.420 and 120B IPC, which do not involve offences of mental depravity or of heinous

nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in society, this court deems it appropriate to quash the FIR as well as consequential proceedings thereto, especially keeping in view the fact that the complainant has compromised the matter with the accused, in which case, the possibility of conviction is remote and no fruitful purpose would be served in continuing with the criminal proceedings.

16. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), of FIR No. 210/17 dated 22.9.2017, under Ss. 420 and 120B IPC, registered at Police Station Sadar, District Bilaspur, Himachal Pradesh in its totality alongwith consequential proceedings pending in the court of Chief Judicial Magistrate, Bilaspur, Himachal Pradesh and the petitioner-accused is acquitted of the charges framed against him. Bail bonds, if any, furnished by the petitioner are discharged.

17. The petition is disposed of in the aforesaid terms, alongwith all pending applications. Passport of the petitioner be released forthwith.

CrMP No. 1384 of 2018

18. Infructuous.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Appeals No. 212, 213 & 394 of 2017
Reserved on: 30.08.02018
Decided on: 20.09.2018

Cr. Appeal No. 212 of 2017:

Hari Ram Bahadur .....Appellant.

Versus

The State of H.P. .....Respondent.

Cr. Appeal No. 213 of 2017:

Geeta ....Appellant.

Versus

The State of H.P. ....Respondent.

Cr. Appeal No. 394 of2017:

Kishan ....Appellant.

Versus

The State of H.P. ....Respondent.

Indian Penal Code, 1860- Sections 302 & 201- Murder and destruction of evidence- Proof- Trial Court convicting accused and sentencing them for murdering "NB" and destroying evidence of said offence- Appeal- On facts, (i) deceased "NB" having illicit relationship with wife (A3) of accused No. 1 (ii) A1 complaining about it to employer of deceased (iii) Accused No. 2 found missing from his room on night of incident (iv) deceased last seen in company of accused as he and A3 had gone to market for purchases and on next day his body was recovered (v) A3 getting recovered jute sack used for cleaning blood soiled floor and walls of their room (vi) A3 identifying places of offence and from where dead body was recovered (vii) A1 had motive to kill deceased as he found deceased having illicit relationship with his wife (viii) Witnesses deposing qua blood spots on road, stairs leading to room of accused 1 and 3, as well as on walls (ix) Said blood tallied with blood of deceased- Held, chain of

circumstances being complete clearly establishes involvement of accused in commission of aforesaid offences- Appeal(s) dismissed- Conviction upheld. (Para 27 & 28)

Indian Evidence Act, 1872- Section 3- Circumstantial evidence- Appreciation- Held, in case based on circumstantial evidence each and every circumstance must be proved by prosecution and circumstances as a whole should make out chain leading to only conclusion that accused committed offences alleged by prosecution. (Para 27)

For the appellant(s):	Ms. Richa Thakur, Advocate, LegalAid Counselin Criminal Appeals No.212 & 213 of 2017.
	Mr. Lalit K. Sehgal, Advocatein Criminal Appeal No. 394 of 2017.
For the respondent in allthe appeals:	Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocates General with Mr. J.S. Guleria and Mr. Bhupinder Thakur, Deputy Advocates General.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge.

The present appeals have been preferred by the appellants/accused/convicts (hereinafter referred to as "the accused persons") laying challenge to judgment, dated 01.04.2017, passed by learned Sessions Judge, Kinnaur, Sessions Division at Rampur Bushahr, H.P., in Sessions Trial No. 31 of 2014, whereby the accused persons were convicted for the offences punishable under Sections 302 and 201 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as "the IPC").

2. The facts which are necessary for the purpose of adjudication of the present appeals are that accused No. 2, Kishan, is cousin of accused No. 1, Hari Ram Bahadur, and accused No. 1 is husband of accused No. 3, Geeta. The accused persons, who are Nepali nationals, and the deceased (Narayan Bahadur) was also a Nepali national, came to village Dalash for earning their livelihood. The accused persons and the deceased started working as labourers in orchards. In the month of April, 2014, the accused couple and the deceased started residing together in a room at Dalash and accused Kishan started living in a different accommodation. The deceased, during his stay with the accused couple, developed illicit relations with accused No. 3 and it came in the knowledge of accused No. 1, when he saw the deceased and accused No. 3 in the room in compromising condition. Thus, it resulted into hostile relations between the deceased and accused No. 1. Subsequently, one Shri Bhagwan Prakash (complainant), on the request of the deceased, employed him in his orchard and also gave him a separate room in his house located in Dalash. A week prior to the incident, accused No. 1 met the complainant in Dalash market and expressed his rancor for the deceased. Accused No. 1 informed the complainant about the illicit relations of the deceased with his wife, but the complainant informed him that the deceased told him that accused No. 3 is like his sister. On this, accused No. 1 further divulged to the complainant that he himself saw the deceased and accused No. 3 in compromising condition. After 3-4 days, the deceased came to the complainant and told that during the night 2-3 Nepali persons were searching for him and he apprehended that they came to assault him. So, the deceased started residing in the complainant's house at Buni. It has further come in the prosecution story that on 29.04.2014 the deceased took Rs.11,000/- from the complainant, which he intended to send, through someone, to his home. As per the allegations, accused No. 1 hatched a conspiracy with his wife (accused No. 3) and accused No. 2 to kill the

deceased and on 01.05.2014 the deceased was called to the residence of accused No. 1 at Dalash. The deceased, without apprehending any threat to his life, went to the residence of accused No. 1 and 3. The deceased alongwith accused No. 3 went to the market for bringing chicken. Subsequently, as per the conspiracy, accused No. 1 and 2 started taking liquor with the deceased and large quantity of liquor was administered to the deceased. In the course of taking liquor, all the accused persons assaulted the deceased. Accused No. 1 thrashed the deceased with a stick, accused No. 2 gave beatings with leg and fist blows and accused No. 3 gave a blow with a scythe. Pursuant to the severe beatings, the deceased sustained multiple grievous bleeding injuries and finally he succumbed to his injuries. Thereafter, as per the prosecution case, the accused persons shifted the dead body of the deceased from the room and threw the same in an orchard located at some distance. The room was cleaned by accused No. 3 and she also wiped the blood from the floor of the room with a jute sack, which was thrown into the bushes. Thereafter, the accused persons fled away.

3. On the subsequent morning, the dead body was noticed by the people and the matter was reported to the police by village Chowkidar. Thus, a police team rushed to the spot and in the interregnum the complainant came to know about the murder of the deceased, so he also went to the spot. Inquest proceedings were conducted by the police and the investigation ensued. Police recorded the statement of the complainant under Section 154 Cr.P.C. and a case was registered against the accused persons. Site plans were prepared and the spots were photographed. Police took into possession the blood soiled earth, earth from the place of recovery of the dead body, samples of blood from the road, the stairs leading to the room, the floor and walls of the room of accused No. 1 and 3 were also taken and same were sealed in parcels. Police also took into possession the blood soiled jute sack, which was found near the residence of accused No. 1 and 3. Thereafter, the dead body was sent to Civil Hospital, Anni, for postmortem examination. Dr. Bhagwat Mehta conducted the postmortem examination and handed over to the police preserved jars of viscera and blood sample of the deceased.

4. Subsequently, the police initiated search operation and on the same day, i.e., 02.05.2014, the accused persons were arrested from Gugra forest, which is about 20 kilo meters from Dalash. On 04.05.2014, accused No. 1 made a disclosure statement and got recovered a wooden stick with which he assaulted the deceased. He also got recovered tiffin in which he had consumed alcohol, showed the place where he alongwith his co-accused threw the dead body of the deceased. Accused No. 1 also divulged to the police that he is wearing the same clothes, which he was wearing at the time of the incident. His clothes were found to have blood patches. Accused No. 2 showed a *dhabha*where, on 01.05.2014, he consumed half bottle of country made liquor with accused No. 1. He also got recovered the glass in which he consumed the liquor. Blood stained clothes, which accused No. 1 was wearing at the time of the incident, were also taken into possession. Likewise, accused No. 3, while in the police custody, pointed out the shop from where she alongwith the deceased purchased chicken and the place where she threw the jute sack after cleaning the blood from the floor of her room and the place wherefrom, she alongwith other accused persons, threw the dead body of the deceased. She got effected the recovery of scythe with which she gave a blow to the deceased.

5. The police prepared the necessary spot maps and statements of the witnesses were also recorded. Reports from RFSL were procured and after completion of the investigation, *challan* was prepared and presented in the Court.

6. The prosecution, in order to prove its case, examined as many as sixteen witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty and claimed to be tried.

7. The learned Trial Court, vide impugned judgment dated 01.04.2017, convicted the accused persons under Sections 302 and 201 IPC read with Section 34 IPC. The accused persons were sentenced to life imprisonment for the offence punishable under Section 302 read with Section 34 IPC and to pay fine of Rs.5,000/- each and in default of payment of fine, they were ordered to further undergo simple imprisonment for a year. The accused persons were further sentenced to rigorous imprisonment for seven years for the offence punishable under Section 201 IPC and to pay fine of Rs.2,000/- each and in default of payment of fine they were ordered to undergo simple imprisonment for six months. Substantive sentences were ordered to run concurrently, hence the present appeals preferred by the accused persons Hari Ram Bahadur, Kishan and Geeta.

8. Ms. Richa Thakur, learned Legal Aid counsel, for accused No. 1 and 3, has argued that accused Geeta was not, in any manner, connected with the offence and her conviction is wrong, as the same is recorded without there being availability of evidence against her. She has further argued that the prosecution has failed to prove the guilt of accused Geeta beyond the shadow of reasonable doubt, so she be acquitted. Mr. Lalit Kumar Sehgal, Advocate, learned counsel, for accused No. 2, has argued that the prosecution has failed to prove the guilt of accused No. 2 beyond the shadow of reasonable doubt, as the last seen together is not proved and the recoveries, allegedly effected under Section 27 of the Indian Evidence Act, are not in accordance with law. He has further argued that the prosecution has failed to prove the guilt of accused No. 2, so he be acquitted by setting aside the findings, as recorded, qua him, by the learned Trail Court. Conversely, the learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt and the appeals deserve dismissal, so the same be dismissed. He has further argued that the evidence clearly shows that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt by leading cogent and convincing evidence. He has argued that the learned Trial Court has appreciated the evidence in its true and right perspective. Thus, the judgment of conviction, as rendered by the learned Trial Court, needs no interference, as the same is as per law. He has argued that the appeals are without merits and the same be dismissed.

9. In rebuttal, the learned Counsel for the appellants have argued that the police had not associated the Chowkidar and other persons, as witnesses and had they been associated in the investigation, the truth would have come before the Court. It has been argued that under these circumstances, there is serious doubt about the prosecution story, so the accused be given benefit of doubt and acquitted after setting aside the judgment of conviction rendered by the learned Trail Court.

10. In order to appreciate the rival contentions of the parties we have gone through the record carefully.

11. In the case in hand, it emanates from the record that the deceased died due to head injury and its complication. The statement of PW-10, Dr. Bhagwat Mehta, the then Medical Officer, Civil Hospital, Anni, is relevant. This witness, on 03.05.2014, conducted the postmortem examination on the dead body of the deceased. This witness, on postmortem examination, observed as under:

"CRANIUM AND SPINAL CORD

Skull is normal. There is subarachnoid haemorrhage with significant brain injury.

THORAX AND ABDOMEN

Normal

MUSCLES, BONES AND JOINTS

There is lacerated wound on right upper leg below knee joint. There is fracture of upper third of tibia bone."

As per the opinion of this witness, the deceased died due to head injury and its complication and the probable time that elapsed (a) between injury and death: few minutes to few hours (b) between death and post mortem: less than 72 hours. He has further deposed that he preserved blood sample, urine sample, viscera, which were sealed by affixing seal having impression 'R' and the same were handed over by him to the police. He has issued post mortem report, Ex. PW-10/B. As per the testimony of this witness, the injuries on the person of the deceased could be caused with *drat* and *danda*. This witness, in his cross-examination, has denied that the incised would, as mentioned in the report, is not possible if a person is hit by *drat,* Ex. P-8. He has admitted that the head injury, as mentioned in the post mortem report by him, is possible if an inebriated person falls on sharp edged surface.

12. PW-1, Shri Bhagwan Prakash, deposed that he employed the deceased in his orchard and he started working since January-February, 2014. He has further deposed that the deceased used to reside with accused No. 1, who was an employee of his brother, Shri Satya Prakash. A month prior to the incident, the deceased expressed his willingness to live separately, as he was not having cordial relations with accused No.1. PW-1 provided accommodation to the deceased and after some days accused No. 1 met him and disclosed that the deceased had developed illicit relations with his wife (accused No. 3). Accused No. 1 also disclosed that he himself saw the deceased and accused No. 1 in compromising condition. He has further deposed that after 3-4 days the deceased told him that 3-4 Nepali *gurkhas*visited his *dera*(accommodation) and they were searching for him. He raised suspicion that there is threat to his life, thus he shifted the deceased from the orchard to his own house at Dalash. On 29.04.2014, the deceased took Rs.11,000/- from him, as he wanted to send the same to his parental house. He has further deposed that on 02.05.2014, when he was in Dalash, he came to know that a dead body is lying in an orchard, near liquor shop, so he rushed to the spot. The police and Pradhan Indu Sharma were there and the deceased was found lying dead. As per the testimony of this witness, the deceased had sustained multiple injuries on his body and head. He also saw blood spots on the path which were towards the house of accused No. 1. He has further deposed that on 01.05.2014 he saw the deceased with accused No. 1 and 2 at Dalash bazaar. He saw a blood stained jute sack lying near the way to the house of accused No. 1 and 3. As per his testimony, his statement was recorded by the police on 02.05.2014 under Section 154 Cr.P.C., which is Ex. PW-1/A. He remained associated with the police during the course of investigation and on 15.05.2014 police broke open the lock of the residential accommodation of the deceased, wherefrom identity card of the deceased was recovered, which was taken into possession vide seizure memo, Ex. PW-1/B. This witness has also identified accused No. 1 and 2 in the Court. He, in his cross-examination, has deposed that his residence is in village Booni, which is a kilometer away from Dalash. He has further deposed that where the dead body of the deceased was found that spot is 100 meters away from his building.

13. PW-2, Shri Satya Prakash, deposed that he owns an orchard at village Dalash and he knew accused No. 1 and 3. He had employed them in his orchard and gave them accommodation initially at Kaagi and subsequently in his own residential house at village Dalash. In the month of April, 2014, accused No. 1 and 3 shifted to Dalash in the

accommodation given by him and the deceased also started living with them. As per this witness, deceased was brother of accused No. 3, however, after eleven days the deceased shifted to the accommodation of Shri Bhagwan Prakash (PW-1). He has further deposed that on 02.05.2014 he came to know that deceased was found dead near liquor vend at village Dalash, so he went to the spot alongwith the police and found the deceased, who had sustained head injury. This witness also accompanied the police to the accommodation of accused persons and saw blood stains on the wall and bed. In his presence, the police also recovered a blood stained *boru*(jute sack) from the bushes near the building.

14. PW-3, Shri Ram Prakash, deposed that prior to ten days of the incident he had employed accused No. 2 in his orchard at Shakahar. As per this witness, accused No. 2 was earlier living with accused No. 1. On 01.05.2014 he received a telephonic call from accused No. 1, who told him that he is going to Nepal and wanted some money. So, he sent accused No. 2 to village Dalash to pay Rs.1,000/- to accused No. 1. He has further deposed that on 02.05.2014, around 02:30 to 03:00 p.m. all the accused persons came to him at village Shakahar and later the police nabbed the accused persons. He came to know about the murder of the deceased. On 05.05.2014, the police came to his house with accused Kishan Bahadur and searched his room. The police recovered a blood stained shirt of the accused, which was sealed in a cloth parcel and sealed with 2-3 seals having impression 'K'. The facsimile seal 'K' was handed over to him, which he brought to the Court. This witness, in his cross-examination, has deposed that on 01.05.2014 accused Kishan Bahadur did not return to his room.

15. PW-4, Shri Prem Chand, deposed that he was acquainted with accused No. 1 and 3, as they were residing in the building above his shop. He has further deposed that he also knew the deceased. As per the version of this witness, on 01.05.2014 accused No. 3 (Geeta) and the deceased came to his shop and purchased 1.5 kg chicken and the deceased paid Rs.200/-. On the subsequent day, he came to know qua the murder of the deceased. This witness, in his cross-examination, has deposed that accused No. 3 and the deceased came to his shop around 05:30 p.m.

16. PW-5, Shri Brikam Singh, Patwari, deposed that on application dated 15.05.2014, Ex. PW-5/A, moved by the police, he issued *jamabandi*, Ex. PW-5/B and *tatima*, Ex. PW-5/C, qua the land where the dead body of the deceased was found.

17. PW-6, Smt. Nirmala Devi, the then Ward Member, Gram Panchayat, Dalash, deposed that on 04.05.2014 she remained associated with the police in the investigation. On 04.05.2014, at 01:00 p.m., the police brought the accused persons to Panchayat Ghar qua investigation of a murder case. As per the version of this witness, police also associated Smt. Deepa Devi, Ward Member. In her and in presence of Smt. Deepa Devi police took into possession the clothes worn by accused No. 3, Geeta, which were packed in a cloth parcel and the same was stitched and sealed with three seals having impression 'T'. Later on, accused Geeta took the police to her accommodation, which was in the building of Shri Satya Prakash (PW-2) and identified the same as place of occurrence. Accused Geeta also disclosed that the blood spilled on the floor of the room was of the deceased and she cleaned the same with a *boru*(jute sack), which was thrown behind the bushes near to a field. Thereafter, the police took into possession a piece of cement from the floor and sealed the same in a cloth parcel by affixing three seals having impression 'T'. Accused No. 3 also got recovered a *drat* from the room, which was kept beneath the fuel wood. The police prepared sketch of the same, which is Ex. PW-6/A, which bears her and the signatures of accused No. 3. *Drat* was packed in a cloth parcel and sealed with three seals having impression 'T'. This witness has further deposed that accused No. 3 also got recovered clothes of the deceased near *Shegal* tree, near to liquor vend at Dalash. The clothes were taken into possession, put

in a cloth parcel and sealed with three seals having impression 'T'. As per this witness, the police prepared the spot maps of the places from where the recoveries were effected. The spots were also photographed and videographed. PW-6 has further deposed that accused Geeta disclosed in her presence that after committing murder of the deceased, his corpse was shifted to a field near to liquor vend and was thrown. She has deposed that on the same day accused No. 1 disclosed that on the night of 01.05.2014 he, in his accommodation, consumed liquor in steel tiffin with the deceased and accused No. 2. Accused No. 1 got recovered steel tiffin, which was put in a cloth parcel and sealed with three seals having impression 'T'. Accused No. 1 also got recovered a wooden *danda*(stick), which was used in hitting the deceased. The *danda*was taken into possession, put in a cloth parcel and sealed with three seals having impression 'T'. Accused No. 1 got recovered his clothes from a room, which he was wearing at the time of the incident. The T-shirt and the pants were packed in cloth parcel, which was sealed with three seals having impression 'T. PW-6 has further deposed that the sealed parcels, i.e., Exts. P-12, P-14 and P-16 were taken into possession by the police vide seizure memo, Ex. PW-6/C, in her and in presence of witness Deepa Devi and accused No. 1. As per this witness, facsimile seal 'T', after its use, was handed over to witness Deepa Devi and the police also took the sample seal impression 'T' on a separate piece of cloth, in her presence, which is Ex. PW-6/D, which bears her and the signatures of Deepa Devi. She has further deposed that on the same day accused No. 2 disclosed that on 01.05.2014 he had consumed alcohol, in a steel glass, alongwith accused No. 1 and the deceased in the residential accommodation of accused No. 1. Accused No. 2 got identified the spot where the corpse of the deceased was thrown. He has further disclosed that prior to consuming the liquor in the room of accused No. 1, he consumed alcohol with the deceased in the *dhaba*of Ranbeer at Village Dalash. Accused No. 2 got recovered a steel glass in which he had consumed liquor, which was packed in a cloth parcel after affixing three seals of impression 'T', and the same was taken into possession vide seizure memo, Ex. PW-6/E. She has identified all the accused persons in the Court.

18. PW-7, ASI Narender Kumar, deposed that on 02.05.2014, acting upon the information qua the murder of the deceased, he accompanied SI Rohit Mrigpuri, the then SHO, Police Station, Ani to village Dalash. As per the version of this witness, ASI Dilu Ram, Incharge, Police Post, Luhri, recorded the statement of Shri Bhagwan Prakash (PW-1) under Section 154 Cr.P.C., which is Ex. PW-1/A, afterwards the statement was handed over to him, which he took to Police Station, Ani, and on the anvil of the same FIR No. 47 of 2014, dated 02.05.2014 was registered. Subsequently, he handed over the case file to ASI Dilu Ram on the spot.

19. PW-8, Constable Vikram Singh, deposed that on 02.05.2014 on the direction of ASI Dilu Ram, he visited village Dalash. As per the version of this witness, he had brought the dead body of the deceased from the spot to CHC, Ani, for its postmortem examination. The post mortem examination was conducted on 03.05.2014 and on 04.05.2014 he handed over the viscera and postmortem report to ASI Dilu Ram. He has further deposed that on 09.05.2014, MHC handed over to him 22 sealed parcels, as mentioned in docket, Ex. PW-8/A, vide RC No. 48 of 2014, dated 09.05.2014, which he deposited on the same day in RFSL, Mandi, and the receipt thereof was handed over by him to MHC.

20. PW-9, Smt. Indu Sharma, the then Pradhan, Gram Panchayat Dalash, deposed that on 02.05.2014, around 07:30 a.m., she received a call from Shri Gopal Dass, Revenue Chowkidar, that a dead body is lying in an orchard, near the liquor vend at Dalash, so she rushed to the spot and waited for arrival of the police. Police came on the spot and on the basis of the preliminary inquiry it was unearthed that the deceased was Narayan Bahadur Nepali, a labourer in the orchard of Shri Bhagwan Prakash (PW-1). There were

injuries on the body of the deceased and she also saw blood spots on the road and on the stairs leading to the room of the accused in the building of Satya Prakash. So, she alongwith the police and Gopal Dass, Chowkidar, went inside the room and saw blood spots on the wall. She has further deposed that police also recovered a jute sack from the bushes near the building, which had blood spots. In her presence, the police photographed and videographed the spot and collected blood samples lying on the spot of recovery of the dead body. She has further deposed that police also took blood samples from the road, walls of the room and from the stairs. As per this witness, the blood samples were taken on white papers and the same were sealed in a cloth parcel after affixing three seals of impression 'H'. The police also took into possession a steel glass and two liquor bottles and the articles were put inside a carton box and sealed in a sack after affixing three seals having impression 'H'. She has further deposed that police took blood stained gunny bag from the bushes and the same was put in a plastic sack and sealed after affixing a seal having impression 'H'. The samples and parcels were taken into possession vide seizure memo, Ex. PW-9/A in presence of Shri Gopal Dass Chowkidar, which bears her signatures. She identified the accused persons in the Court. This witness, in her cross-examination, has deposed that the room, in which she alongwith the police went, was open.

21. PW-11, Lady Constable Krishna, deposed that on 04.05.2014 she remained associated in the investigation and during the course of investigation accused Geeta made a disclosure statement under Section 27 of the Evidence Act, Ex. PW-11/A. As per this witness, the disclosure statement of accused Geeta was to the extent that she can identify the shop from where she purchased 1.5 kg chicken with the deceased on 01.05.2014. Accused No. 3 also disclosed that she can get recovered a *boru*with which the blood of the deceased was cleaned from the floor and the *drat,* which was used to commit the offence. Accused No. 3 also disclosed that she can identify the spot wherefrom the deceased was thrown. She had also disclosed that the clothes, which she was wearing on 04.05.2014 are the same, which she was wearing at the time of commission of the offence and she can get identified the place where the clothes of the deceased were thrown. She alongwith the accused signed disclosure statement, Ex. PW-11/A. She has further deposed that subsequently they went to Dalash, where the accused handed over her worn clothes to the police, which were taken into possession vide seizure memo, Ex. PW-6/B. This witness, in her cross-examination, has deposed that the police recovered a *drat* and *boru*from the house of the accused and the clothes of the deceased were recovered from the place down from the road, near the house of the accused.

22. PW-12, Constable Pawan Kumar, deposed that on 04.05.2014, accused No. 1 made a disclosure statement under Section 27 of the Evidence Act, which is Ex. PW-12/A, and disclosed that he could get recovered a *danda*and identify the place from where the deceased was pushed. Accused No. 1 had also disclosed that he could get identified the place where he consumed liquor with the deceased on 01.05.2014 and he could also get recovered a tiffin in which alcohol was consumed. As per this witness, the disclosure statement was made in his and in presence of Constable Suresh Kumar. He has further deposed that on the same day accused Kishan also made a disclosure statement, Ex. PW-12/B, in his and in presence of Constable Suresh Kumar and disclosed that he could get recovered a glass in which liquor was consumed by him alongwith the deceased on 01.05.2014. Accused No. 2 further disclosed that he knows the place where he disposed of his clothes, which he was wearing on the day of the incident and can also get recovered a *danda.* As per PW-12, on 15.05.2014, he alongwith ASI Dilu Ram went to the house of Shri Bhagwan Prakash (PW-1) in village Dalash and the room of the deceased was searched. An identify card of the deceased was recovered, which was taken into possession vide memo,

Ex. PW-1/B. This witness, in his cross-examination, has deposed that the room of the deceased was locked, which was opened by Shri Bhagwan Prakash by breaking the lock.

23. PW-13, HC Roshan Lal, brought original *roznamcha*register qua *Rapat* No. 10, dated 02.05.2014, and *Rapat* No. 6, dated 02.05.2014, of Police Post, Luhri. The copies of *rapats* are Ex. PW-13/A and Ex. PW-13/B, respectively.

24. PW-14, ASI Pushap Dev, deposed that on 02.05.2014, at 07:30 p.m., Shri Gopal Dass, Chowkidar, PhatiSoidhar, reported that a dead body of a Nepali is lying near liquor vend at Dalash. The information was conveyed to Incharge, Police Post, Luhri and SDPO, Anni vide GD entry No. 7(A), Ex. PW-14/A. Consequently, SI Rohit Mrigpuri, SHO, Police Station, Anni, alongwith other police personnel went to the spot. He has further deposed that he received statement, Ex. PW-1/A, endorsed by ASI Dilu Ram, whereupon he registered FIR, Ex. PW-14/C, which bears his signatures. He has further deposed that on 02.05.2014 ASI Dilu Ram deposited with him eight sealed parcels, which were duly sealed with seal 'H' and to this effect he made relevant entries at Sr. No. 359 of *Malkhana*register No. 19, copy of which is Ex. PW-14/D-1. On 04.05.2014 eight more sealed parcels, which were also duly sealed with seals 'T' and 'R' were deposited by ASI Dilu Ram with him and qua this he had made entry at Sr. No. 361 of *Malkhana*register No. 19, copy of which is Ex. PW-14/D-2. He has further deposed that on 05.05.2014, ASI Dilu Ram deposited with him a sealed parcel bearing three seals having impression 'K' and to this effect requisite entries were made at Sr. No. 362 of *Malkhana*register No. 19, copy of which is Ex. PW-14/3. This witness has further deposed that on 09.05.2014, vide docket, Ex. PW-8/A, the parcels were sent to RFSL, Mandi, through Constable Vikram Singh, vide RC No. 48 of 2014, dated 09.05.2014, copy of which is Ex. PW-14/E, and the receipt qua the same was handed over to him.

25. PW-15, Inspector Rohit Mrigpuri, deposed that on 02.05.2014, at 07:30 a.m., information was received qua the murder of the deceased, so Incharge, Police Post, Luhri, was informed and he went to the spot at 08:30 a.m. alongwith ASI Narender Kumar and Constable Mukesh Kumar, vide GD entry 10(a), Ex. PW-14/B. He got identified the dead body as that of deceased Narayan Bahadur and conducted the inquest proceedings vide form 25.35(1)A, Ex. PW-15/A. After culmination of the investigation and receipt of FSL reports, i.e., Ex. PX and Ex. PY, he prepared the *challan* and supplementary *challan.*

26. PW-16, ASI Dilu Ram, Investigating Officer, through his depositions tried to support the prosecution case. The relevant excerpts of his testimony are suffice to be discussed here. He has deposed that he went to the accommodation of the accused persons, as, as per the complainant, they were suspected perpetrators of the crime. He has further deposed that the blood drops found on the spot were towards the accommodation of the accused persons. During the course of investigation he recovered a jute sack, which was lying in the bushes at a distance of 20 feet from the room. He stated that when he reached Police Station, Anni, by that time accused persons had already been traced and brought to Police Station, Anni. He collected a concrete sample of the floor and put the same in a cloth parcel, which was sealed with seal having impression 'T'. As per this witness, accused Geeta got recovered a *boru,* which was stained with blood and also got recovered a *drat,* which was hidden beneath the fuelwood, kept in the room. In nitty-gritty, this witness supported the prosecution case qua recoveries effected by the police and the investigation carried out. This witness, in his cross-examination, he alongwith Pradhan Indu Sharma, Gopal Dass, Chowkidar, and the complainant followed the blood stains and came to the room in the building of the complainant. As per this witness, the room was bolted and it was unlocked.

27. After going through the record, it is clear that the case of the prosecution rests upon circumstantial evidence and as far as the law qua circumstantial evidence is

concerned, the same in nitty-gritty is that each and every circumstance is required to be proved by the prosecution and the circumstances, as a whole, have to make out a chain in a manner that the only conclusion is that the accused persons have committed the offences, as alleged by the prosecution.

28. The learned counsel for the appellants have tried to dilute the case of the prosecution on the point that the deceased while talking to PW-1, Shri Bhagwan Prakash, did not disclose that the accused persons visited his *dera*alongwith 3-4 Nepalis and this makes it clear that it was not the accused persons from whom the deceased was apprehending threat to his life. However, it has come in the statement of PW-1 that accused Hari Ram Bahadur apprehended that the deceased was having illicit relations with his wife Geeta (accused No. 3). PW-3, Shri Ram Prakash, categorically stated that accused Kishan did not come to his room during the night of 01.05.2014, thus the absence of accused Kishan in his room during the night of 01.05.2014 is a circumstance which proves the fact that he was with other accused persons and they were all together. PW-4, Shri Prem Chand, clearly proves that the deceased was last seen in the company of accused Geeta. As per the version of PW-6, Smt. Nirmala Devi, the then Ward Member, Gram Panchayat, Dalash, accused Geeta led the police personnel to her residential room, which was in the building of Shri Satya Prakash (PW-2) and she got identified the same as the place of occurrence. This witness has further deposed that accused Geeta disclosed that the blood of the deceased spilled on the floor of the room and she cleaned the same with a *boru,* which was thrown behind the bushes in the adjoining field. Thus, it stands established from the evidence of PW-6 that accused Geeta identified the place of occurrence as also the place where the dead body of the deceased was thrown.

29. Learned counsel for the appellants have also tried to seek advantage of the fact that the Chowkidar, who has informed the police qua the dead body of the deceased lying on the spot, had not been examined by the prosecution, but non-examination of the Chowkidar is of no help to the defence, as he has only disclosed to the police that a dead body was lying on the spot and his role is nothing more than that, so benefit of non-examination of Chowkidar cannot be given to the accused persons.

30. In the case in hand, the evidence, emanating from the record, makes out a complete chain of circumstances and one of the major link in the chain of the circumstances stands proved through the testimony of PW-6, Smt. Nirmala Devi. This witness proves the disclosure statement made by accused Geeta and the consequent recoveries made thereupon. PW-4, Shri Prem Chand, deposed that on 01.05.2014 accused Geeta and the deceased came to his shop and purchased 1.5 kg chicken. Thus, through the version of PW-4 it stands established that the deceased was last seen with accused Geeta on 01.05.2014 and on the subsequent day, i.e., 02.05.2014 corpse of the deceased was found in an orchard. It can be more than safe to hold that the deceased was last seen in the company of accused Geeta and subsequently he went to the accommodation of accused couple, where accused No. 2 was also present. The evidence also clearly speaks that the deceased consumed liquor with accused 1 and 2 and as accused No. 1, Hari Ram Bahadur, was having rancor for the deceased, as he was against the deceased, who was having illicit relations with his wife (accused No. 3). Accused No. 1 was nursing a grudge against the deceased, so the accused persons hatched a conspiracy and consequent thereto the deceased was killed by them. Therefore, the prosecution has successfully proved that the deceased was last seen with accused Geeta, accused No. 1 had motive to kill the deceased and his dead body was thrown by them in an orchard. The accused persons also caused disappearance of the evidence by cleaning the blood of the deceased from the floor and walls with a jute sack, which was subsequently thrown in bushes.

31. The testimony of PW-3, Shri Ram Prakash, in whose accommodation accused No. 2, Kishan, was staying, categorically deposed that during the night of 01.05.2014 accused Kishan did not return to his room. He has further deposed that on the subsequently day, i.e., 02.05.2014, at about 02:30/03:00 p.m. all the accused persons visited him at village Shakahar and afterwards the police came to apprehend them. Thus, on the night of occurrence accused Kishan was not in his room and on the subsequent day he was in the company of accused couple. The above circumstances, clearly points out to only one conclusion that accused Kishan was accomplice with accused couple.

32. It stands fortified that after the recovery of the dead body of the accused, police, alongwith PWs, 1, 2 and 7, Shri Bhagwan Prakash, Shri Satya Prakash and Smt. Indu Sharma, respectively, observed blood lying on the road just above the orchard, on the stairs leading to the room of accused couple and accused couple was found missing from their room from the early morning of 02.05.2014. Similarly, PW-2, Shri Satya Prakash, categorically deposed that on 02.05.2014, when he alongwith the police went to the house of accused couple, the accused couple was not there.

33. The testimony of PW-9, Smt. Indu Sharma, the then Pradhan, Gram Panchayat, Dalash, is very important. She has deposed that on 02.05.2014, around 07:30 a.m., Shri Gopal Das, Chowkidar, telephonically informed her that a dead body is lying in the orchard, near the liquor vend at Dalash, so she went to the spot and waited for arrival of the police. Thereafter, she remained associated in the investigation and saw blood spots on the road and on the stairs leading to the room of the accused couple. This witness further deposed that she went inside the room of the accused couple and saw blood spots on the walls. As per this witness, a jute sack smeared with blood was also found near the building and the police photographed the spots, took into possession blood samples from the road, from the walls of the room and from the stairs. The blood samples, which were taken, were sealed in a cloth parcel by affixing seals having impression 'H'. Likewise, the blood soaked sack was also taken into possession and sealed in parcel having seal 'H'. She has further deposed that a steel glass and two liquor bottles were also taken into possession and put inside a carton box and the carton box was further put inside a sack, which was sealed with seal impression 'H' and to this effect seizure memo, Ex. PW-9/A, was prepared.

34. The statement of PW-16, ASI Dilu Ram, fortifies the version of PW-9. He has deposed that he found blood stains on the road and the same were leading to the accommodation of the accused persons. He had also found blood stains on the stairs, which were leading to the room of the accused persons. Blood stains were also found inside the room on the walls. As per the version of this witness, he recovered a jute sack, which was lying in a bush about 20 feet from the room of the accused. He had lifted blood from the spots and also took into possession the blood soaked jute sack and prepared separate parcels thereof, which were sealed with seal having impression 'H' and to this effect seizure memo, Ex. PW-9/A, was prepared. On the same day, he handed over all the parcels to MHC Pushap Dev. Now, PW-14, Pushap Dev, had specifically deposed that on 02.05.2014, ASI Dilu Ram deposited with him eight duly sealed parcels having seal impression 'H' and to this effect he made entry in the *malkhana* register, copy thereof is Ex. PW-14/D-1. He has further deposed that on 09.05.2014 he sent all the parcels, through PW-8, Constable Vikram Singh, to RFSL, Mandi, vide RC, Ex.PW-14/E, which were safely deposited in the laboratory.

35. The chemical examination report, Ex. PX, demonstrates that human blood was found on the blood samples lifted from the road, stairs and inside the room and the jute sack had been found to have contained human blood of group 'O', which was the blood group of the deceased.

36. The testimonies of all the above witnesses are consistent on the point that blood was lying on the road, stairs and in the room of the accused couple. Their testimonies are also consistent to the recovery of a blood soaked sack, Ex. P-28, sealing of parcels and sending the same to RFSL. In fact, nothing emanates from the evidence which could even remotely provide a faint line to form basis for the acquittal of the accused persons.

37. The above evidence cumulatively shows that the accused persons lifted the bleeding body of the deceased from the room and the same had been thrown in the orchard and in the process the oozing blood fell on the staircase and the road. It also stands established that in the evening of 01.05.2014 the deceased was seen in the company of accused Geeta. PW-4, Shri Prem Chand, saw the deceased going towards the room of accused couple, so it is for the accused persons to explain how the deceased sustained injuries in their room and how he died. However, the accused persons could not offer any explanation to that effect and what to say of plausible explanation. The evidence also clearly establishes involvement of the accused Kishan in the commission of the offence, as it has come on record that during the night of 01/02.05.2015 he was not in his room and was in the company of accused couple. This fact is fortified from the fact that human blood had been found on his clothes and accused Kishan has failed to offer any acceptable explanation that how and under what circumstances human blood had come on his shirt, Ex. P-2. Likewise, human blood was also found on the clothes of accused Geeta. It has come in the deposition of PW-16, ASI Dilu Ram, that on 04.05.2014, accused Geeta disclosed that on the day of occurrence, she was wearing the same clothes, which she had been found wearing at the time of her arrest, thus her clothes were also taken into possession in presence of PW-6, Smt. Nirmala, and PW-6 also testified the same. Subsequently, the clothes of accused Geeta were sent for chemical examination and as per report, Ex. PX, human blood was found on the shirt of accused Geeta. The blood and urine samples of the deceased, on being chemically tested, show presence of 169.62 mg% of alcohol in his urine and 191.92 mg% of alcohol in his blood. Thus, it is proved that the deceased had been administered heavy quantity of alcohol and the accused also wanted him to drink heavily, as they wanted to perpetrate the crime.

38. In the wake of what has been discussed hereinabove, in our opinion, especially when the chain of circumstances is complete, it is extremely difficult to draw any other conclusion, except that the accused persons perpetrated the crime. Thus, on the basis of the above discussion, it can be safely held that the prosecution has been able to prove its case beyond the shadow of reasonable doubts, as there is no missing link in the chain of circumstances, so the judgment of conviction, as rendered by the learned Trial Court, against the accused persons is the result of proper appreciation of fact and law and the same needs no interference. The appeals are without merit and the same are dismissed.

39. 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 SURESHWAR THAKUR, J.

Harish Kumar .....Appellant/defendant.
Versus
Suresh Chand & Others ....Respondents/Plaintiffs.

RFA No. 155 of 2008.
Reserved on : 31.08.2018.

Decided on : 13th September, 2018.

Suit for Recovery- Plaintiff agreeing to sell their share in joint land through their General Power of Attorney (GPA)-GPA holder receiving earnest amount on behalf of plaintiffs- Earlier suit of vendee for specific performance decreed by High Court subject to payment of balance price- Liberty also reserved to plaintiffs to proceed against GPA holder for recovering earnest amount from him- Plaintiffs filing suit for recovery of earnest amount- Receipts relied upon by GPA holder qua payment of amount to plaintiffs found forged by handwriting expert- Trial Court decreeing suit- Appeal also dismissed. (Para 7 to 9)

For the Appellant: Mr. T.S. Chauhan, Advocate.
For Respondents No. 1, 2, 3(a), 3(b) and 3(d): Mr. Rajneesh K. Lal, Advocate.
Nemo for other respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned trial Court decreed the plaintiff's suit, for a recovery of a sum of Rs.3,30,000/-, against, defendant No.1 along with interest 6% per annum, from, the date of agreement i.e. 18.12.1995 , till realization thereof, and, with defendant No.1 Harish Kumar, being aggrieved therefrom, hence, has instituted the instant Regular First Appeal, before this Court.

2. The plaintiffs' case, in brief, is that they were owners in possession to the extent of 2/3 rd share in the land measuring 1311.13 sq. meters comprised Khewat No.109 min, Khatauni NO.486 min, Khasra Nos. 967 and 969, Up Mahal KasbatiMehatpur, Tehsil and District Una, H.P., along with six shops on apart thereof. It has been pleaded that the defendants entered into an agreement to purchase the land of the plaintiffs on 18.12.1995. As per the plaintiffs the defendants have already received an amount of Rs.5,00,000/- on behalf of the prospective vendors, that is, the plaintiffs and their brother Tara Chand. The sale deed was to be executed on or before 15.8.1996 but lateron the time was extended till 14.2.1997. It has pleaded by the plaintiffs that though defendant No.2 had paid money to defendant No.1 but defendant No.1 did not pay the said amount to the plaintiffs and has misappropriated the same. It is further averred that in pursuance to the agreement to sell defendant No.2 was to file a suit for specific performance of contract which was decreed by this Court, on 27.7.2001. During the pendency of that suit the plaintiffs denied that they ever received the amount of earnest money but defendant No.1 contested that payment was made through receipts by this Court held that the same were forged receipts. As per the plaintiffs that defendant No.1 is liable to make the payment qua the share of the plaintiffs out of the amount of Rs.5,00,000/-. Accordingly to the plaintiffs, defendants No.1 and 2 are jointly and severally liable to make the payment to the plaintiffs even if defendant No.2 had paid the money to defendant No.1, who was not authorized to receive the money and defendant No.2 is still liable to pay in case defendant No.1 does not pay the amount to the plaintiff. It has been pleaded that that they are also entitled to the interest on the principal amount at the rate of 10% per annum from the date of the agreement (18.12.1995) till realization thereof. It is further averred that bonafide dispute between the parties started in the year 1997 which ended on July 27, 2001 and the limitation for the recovery of money started from the date of decision of the suit pending between the parties, that is July 27, 2001. The plaintiffs averred that rest of the amount of sale consideration was deposited by defendants in the Registry of this Court and which was lateron withdrawn by the plaintiffs in the year 2002. The defendants were repeatedly asked to pay the amount received by defendant NO.1 having general power of attorney but it was not paid to the bonafide vendors

and defendant No.1 has been putting off the payment of the said amount. The plaintiffs averred that defendants connived with each other and did not pay the amount to the prospective vendors.

3. The defendants contested the suit and filed separate written statements. Defendant No.1 in his written statement has taken preliminary objections inter alia maintainability of the suit, limitation, cause of action etc. On merits, defendant No.1 averred that plaintiffs and their brother Tara Chand were owner in possession of 1/6 share in the land measuring 7590.76 sq. meters. He denied, if any agreement to sell was executed inter se the defendants and the plaintiff but the same was entered into with defendant No.2 only on 17.12.1995 and 18.12.1995. Defendant No.1 denied that Tara Chand was his father. It is averred that the amount received by him was duly paid to the plaintiffs and Sh. Tara Chand. According to defendant No.1, he never filed any suit for specific performance as alleged. According to him the said suit was filed by defendant No.2 which was decreed on 27.7.2001. According to defendant No.1, there was no dispute in relation to genuineness of receipts executed by the plaintiffs and no issue was framed before the High Court and as such there was no question of deciding this aspect by the High Court. Defendant No.1 alleged that no verdict against him was delivered by the High Court, and, the plaintiffs have no right to file the present suit on the baseless assumptions. According to him, plaintiff No.1 had received Rs.1,00,000/-, and plaintiff No.2 had received Rs.3,00,000/- out of the earnest money and now the plaintiffs have no right to ask for the amount. Defendant No.2 in his written statement also has taken preliminary objections qua cause of action, limitation and estoppel. On merits, defendant No.2 admitted that plaintiffs were owners in possession of the land in question. Defendant No.2 averred that plaintiffs and their brother Tara Chand through their duly constituted attorney defendant No.1 had agreed to sell the land along with six shops for a total consideration of Rs.14,50,000/- vide agreement dated 17.11.1995. It is pleaded that plaintiffs and their brother Tara Chand and defendant No.1 failed to perform their part of agreement for sale for which defendant No.2 had to file civil suit No.29 of 1997 against them for specific performance of contract which was decreed by the High Court. He further averred that at the time of execution of the agreement, he paid a sum of Rs.1,00,000/- to the plaintiffs as earnest money through defendant No.1 and further a sum of Rs.4,00,000/- was paid by the answering defendant No.18.12.1995 through defendant No.1. It is further averred by defendant No.2 that he deposited Rs.9,50,000/-, the balance amount in the High Court and as such the total amount of Rs.14,50,000/- stood paid to the plaintiffs. It is pleaded by defendant No.2 that pursuance to the decree dated 27.7.2001 passed by the High Court, the sale deed of the suit land was duly executed on 26.12.2001 and the same was got registered on 16.2.2002 as per directions of the High Court. According to defendant No.2, he is not liable to pay any amount to the plaintiffs and the matter is only between the plaintiffs and defendant No.1 and that he has been falsely impleaded in the suit.

4. The plaintiffs filed replication, to, the written statement(s) of the defendant(s), wherein, they denied the contents of the written statements, 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 plaintiffs are entitled for the recovery of Rs.5,50,000/- as alleged, if so from whom?OPP.

2. Whether defendant No.1 had already made the payment of Rs.1,00,000/- to plaintiff No.1 and Rs. 3,00,000/- to plaintiff No.2 out of earnest money,as alleged, if so its effect?OPD.

3. Whether the suit is not maintainable in the present form?OPD.
4. Whether the suit is barred by limitation?OPD
5. Whether the plaintiffs have no cause of action?OPD.
6. Whether the plaintiffs are estopped to file the suit by their act and conduct?OPD
7. Whether the suit is bad for non joinder of necessary parties, as alleged?OPD.
8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence, decreed, the, suit of the plaintiffs/respondents herein. Now defendant No.1/appellant herein, being aggrieved therefrom, has, instituted the instant Regular First Appeal, before, this Court, wherein, he assail the findings recorded, in its impugned judgment and decree, by the learned trial Court.

7. Previous Civil Suit bearing No. 29 of 1997, was, instituted before this Court, and, therein one Shashi Pal Chaudhary, claimed rendition of a decree, of, specific performance, of, apt agreement, enclosed therein as Ex.PW7/A. The decree was espoused to be renderable, upon, one Raghunath, one Tara Chand, and, upon one Harish Kumar, and, the last of the aforesaid, is, the defendant in the instant suit. This Court had, upon, the aforesaid Civil Suit, hence, rendered, a, decree for specific performance, of, an agreement borne, therein, as, Ex.PW7/A. However, therein, a, right was reserved, vis-a-vis defendants No.1 and 3, to proceed against defendant No.4, namely, Harish Kumar for recovering from him, their share out of the amount of sale consideration, of, Rs.5,00,000/-, as, received by, the, latter from the plaintiff, in, the capacity, of, his being, their attorney. The verdict, upon, the aforesaid civil suit came to be rendered by this Court, on, 27th July, 2001. The plaintiffs herein proceeded, to, in consonance therewith, hence institute the instant civil suit bearing No. 4 of 2002, on 15.06.2002. Since as aforestated Civil Suit No. 4 of 2002 stands decreed by the learned trial Court, hence, the instant appeal.

8. Apparently, the plaintiffs herein, were arrayed as defendants No.1 and 3, in the earlier suit, bearing Civil Suit No. 29 of 1997, along with them, one Harish Kumar was arrayed as defendant No.4 therein. Defendants No.1 and 3, had contested qua defendant No.4, in his drawing Ex.PW7/A, with the plaintiff therein, purportedly on anvil, of, his being their General Power of attorney, borne and enclosed therein as Ex.PW11/A, rather his not holding any valid authorisation, (a) given Ex.PW11/A being a sequel, of, fraud and misrepresentation. However, the aforesaid plea reared therein, by defendants No.1 and 3, vis-a-vis, the validity of Ex.PW11/A, was not accepted by this Court. With the apt liberty, being preserved, vis-a-vis, defendants No.1 and 3, the plaintiffs herein, both whereof stood, arrayed in the aforesaid capacity, in, Civil suit No. 29 of 1997, by this Court, while recording a verdict, upon, the aforesaid civil suit, hence, (I) the findings returned by the learned trial Court, qua exhibit DW2/B, and, Ex.DW2/C, purportedly comprising the receipts issued by the plaintiffs/respondents herein, vis-a-vis, one Harish Kumar, and, appertaining to theirs, purportedly receiving a part, of, the sale consideration, from, one Harish Kumar, the appellant herein, and, in contemporaneity, vis-a-vis, the execution of Ex.PW7/A, rather being, unreliable and no credence being meteable thereon, are both valid and apt findings, given (a) theirs being anvilled, upon, the report of the handwriting expert, borne in Ex.PW3/A. The apt tenable reliance being placed, upon, Ex.PW3/A by the learned trial Court, in decreeing, the plaintiffs/respondents' suit, for, recovery of a sum of Rs.3,30,000/- along with interest at the rate of 6% per annum, from, the date of agreement till its realization, is also hence not amenable for interference; (b) nor the appellant herein can

contend, that, with the suit being filed belatedly since 19.12.1995, the, decree is interferable, (I) given the plaintiffs in Civil Suit No. 29 of 1997, rearing a contention in the written statement qua the apt General Power of attorney, enclosed therein as Ex.PW11/A, being a sequel of fraud, and, misrepresentation; (b) also when hence they were barred to in the alternative thereto, in the earlier suit, rear ,a, contradictory plea, of, one Harish Kumar, appellant herein in contemporaneity, vis-a-vis, execution of Ex.PW7/A, despite, his receiving, the, apt part of the sale consideration, hence, from one Shashi Pal Chaudhary, rather his not liquidating their proportionate share therein; (iii) besides when, hence, in the earlier civil suit, there, was no efficacious remedy hence recourseable by the plaintiffs/respondents herein, given theirs thereat standing arrayed as defendants No.1, and, 3, and, with the appellant herein being therein arrayed along with them, as, co-defendant No.4, to, rather within the ambit, of, any statutory provisions, borne in the CPC. rear any claim, for, recovery of the decretal amount, from, the appellant herein.

9. The above discussion, unfolds, the fact that the conclusions as arrived by the learned District Judge, Una, being based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned trial Court has not excluded germane and apposite material from consideration.

10. In view of above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the judgment and decree rendered by the learned District Judge, Una, upon, Civil Suit No. 4 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 SANDEEP SHARMA, J.

ICICI Lombard General Insurance Company Limited .....Appellant

Versus

Roop Lal and others .....Respondents

FAO(MVA) No. 338 of 2017

Decided on: August 28 , 2018

Motor Vehicles Act, 1988- Section 149 & 166 – Motor accident- Claim application- Defences- Driving licence- Validity- Claims Tribunal allowing application and fastening liability on Insurer- Appeal- Insurer contending that driving licence of deceased driver was not valid- Also seeking to adduce verification report by way of additional evidence- Held, Factum of genuineness of driving licence was in notice of insurer- It failed to get driving licences verified from Competent Authority- No case of permitting insurer to lead additional evidence made out- Driving licence on face of it valid- Insurance company cannot refuse to discharge its liability. (Para 8 & 9)

Motor Vehicles Act, 1988- Section 166 – Motor accident- Claim application- Compensation- Transport charges- Assessment- Claims Tribunal granting transportation charges on basis of bills adduced before it in toto- Bills however were raised even for those days during which claimant remained hospitalized for undertaking journey to places unconnected with his treatment- Transportation charges granted by Tribunal scaled down. (Para 17 to 19)

Cases referred:

Chandra Wati V/s Tek Chand & others, Latest HLJ 2014 (HP) 288

G. Ravindranath alias R. Chowdary vs. E. Srinivas &anr, AIR 2013 SC 2974

For the Appellant	:	Mr. Jagdish Thakur, Advocate.
For the Respondents	:	Mr. Mukesh Sharma, Advocate, for respondent No.1. Mr. Rajiv Rai, Advocate, for respondents No. 2 (a) to 2(e).

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal is directed against Award dated 9.3.2017 passed by the learned Motor Accident Claims Tribunal-III, Solan, District Solan (HP) in M.A.C. Petition No.:- 38ADJ-II/2 of 2015, titled Sh. Roop Lal versus Shyam Lal and others, whereby compensation to the tune of Rs. 4,19,630/- alongwith interest at the rate of 7.5 percent per annum from the date of filing of the petition till its realization has been awarded in favour of respondent No.1-petitioner (hereinafter, 'petitioner') and present appellant-Insurance Company has been held liable to indemnify the petitioner.

2. Briefly stated the facts as emerge from record are that on 6.12.2013 at about 6.45 am, petitioner was traveling in a vehicle bearing registration No. HP-11A-1400 to Bagga. When the vehicle reached at Torti, deceased Shyam Lal could not control the vehicle due to rash and negligent driving and it fell down from the hill at a distance of 150 feet, causing multiple injuries to the petitioner. FIR No. 11 dated 6.12.2013 was registered at Police Station Bagga. Initially, petitioner was taken to J.P. Hospital, Bagga and then to PHC, Darlaghat, from where he was referred to IGMC Shimla, where he remained admitted from 7.12.2013 to 17.12.2013. Allegedly, petitioner remained under treatment from IGMC Shimla and Fortis Hospital, Mohali and spent Rs.3.00 Lakh on his treatment, transportation, attendant and special diet charges. Petition under Section 166 of the Motor Vehicles Act, 1988 came to be filed on behalf of the petitioner for grant of compensation to the tune of Rs.20.00 Lakh, on account of serious injuries sustained by him in the motor accident, details of which are given herein above. Petitioner also claimed that he was aged about 47 years and was earning Rs.50,000/- per month from daily, farming and agricultural pursuits.

3. Respondents No. 2(a) to 2(e), while admitting factum with regard to accident, denied that vehicle in question was being driven in a rash and negligent manner. Aforesaid respondents also claimed that in case, Tribunal comes to the conclusion that the petitioner is entitled to compensation, liability to pay, if any, is of the appellant-Insurance Company.

4. Appellant-Insurance Company refuted the claim of the petitioner and denied that monthly income of the petitioner was Rs.50,000/- per month. Appellant-Insurance Company also denied that the accident took place near Torti on 6.12.2013 at about 6.45 am and claimed that the amount of compensation claimed by petitioner is highly exaggerated.

5. On the basis of pleadings of the parties, following issues were framed for determination by the learned Tribunal below on 2.4.2016:

"1. Whether on dated 6-12-2013, at about 6:45 a.m. at place near Torti Temple Bagga, Tehsil Arki, District Solan, H.P, petitioner sustained multiple injuries due to rash and negligent driving by the deceased Shyam Lal of a vehicle bearing No. HP-11A-1400, as alleged? ...OPP

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

3. Whether the petition is not maintainable? ...OPR

4. Whether the driver of the offending vehicle was not having valid driving licence at the time of accident? ... OPR

5. Whether the offending vehicle was being driven in violation of the provisions of Motor Vehicles Act and terms and conditions of Insurance Policy, as alleged?

...OPR

6. Relief"

6. Subsequently, learned Tribunal below, on the basis of evidence led on record by the respective parties, allowed the petition and awarded a sum of Rs. 4,19,630/- alongwith interest at the rate of 7.5 percent per annum, under following heads:

Pecuniary damages		
i)	Loss of future income	**Rs.1,20,960/-**
ii)	Medical Expenses:	**Rs.38,670/-**
iii)	Transportation Charges:	**Rs.88,000/-**
iv)	Attendant charges:	**Rs.11,000/-**
v)	Special diet charges:	**Rs.11,000/-**
Non Pecuniary damages		
i)	Pain and suffering :	**Rs.50,000/-**
ii)	Future loss of amenities discomfort etc:	**Rs.1,00,000/-**
	Total	**Rs.4,19,630/-**

7. Being aggrieved and dissatisfied with the amount of compensation awarded by learned Tribunal below, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein for setting aside the Award passed by learned Tribunal below.

8. Having carefully perused the pleadings vis-à-vis evidence available on record, this Court finds no force in the arguments of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that the Award passed by learned Tribunal below is not based upon proper appreciation of the evidence, rather, this Court is of the view that the learned Tribunal below has dealt with each and every aspect of the matter meticulously and there is proper appreciation of evidence led on record by the respective parties. Onus to prove issues No. 3, 4 and 5 was on the appellant-Insurance Company, however, it has failed to discharge its onus by leading cogent and convincing evidence, and as such, same rightly came to be decided against the appellant-Insurance Company. It is not in dispute that the copy of driving licence was tendered in evidence as Ext. R-3, perusal whereof clearly suggests that driver of the vehicle, deceased Shyam Lal was having a valid driving licence to drive Light Motor Vehicle (LMV) and Heavy Transport Vehicle (HTV) from 23.8.2012 to 22.8.2015. Submissions having been made by Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that since learned counsel representing the petitioner failed to make available copy of driving licence to the appellant-Insurance Company well within time, same could not be sent for verification to the office of RTO Mathura, who as per verification report has intimated that deceased was not having valid and effective driving licence and as such liability could not have been fastened upon the appellant, can not be accepted at this stage, because it is not in dispute that while tendering driving licence of deceased driver on record, factum, if any, with regard to

genuineness of driving licence possessed by deceased Shyam Lal was very much in the knowledge of the appellant-Insurance Company and as such it ought to have taken all steps to get it verified from the office of RTO Mathura.

9. Learned counsel for the appellant-Insurance Company states that an application under Order 41 Rule 27 read with Section 151 CPC (CMP No. 6606 of 2017) has been filed on behalf of the appellant-Insurance Company praying therein to place on record additional documents, wherein permission of this court has been sought to place on record verification report and letter dated 10.6.2017, issued by the RTO Mathura, wherein it has been reiterated that deceased Shyam Lal was not having a valid driving licence to drive the vehicle in question. As has been observed herein above that factum with regard to deceased Shyam Lal having no valid driving licence in his possession was very much in the knowledge of the appellant-Insurance Company at the time of tendering same in evidence as Ext. R-3. Steps for verification of the same ought to have been taken immediately by the appellant-Insurance Company and as such at a belated stage, that too after passing of Award, prayer made in the application referred to herein above can not be accepted.

10. Evidence available on record clearly suggests that the petitioner suffered permanent disability to the extent of 20% on account of injuries suffered by him in the alleged accident. Dr. Ashish (PW-3) has categorically deposed before the learned Tribunal below that the petitioner suffered permanent disability qua right lower limb and same is permanent in nature. While proving disability certificate, Ext. PW-3/A, aforesaid witness specifically denied the suggestion that disability may improve with time and as such there appears to be no force in the argument of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that petitioner has suffered 20% disability qua right lower limb and not with regard to whole of the body. No doubt, perusal of Ext. PW-3/A suggests that petitioner suffered 20% disability qua right lower limb but definitely there is no evidence led on record by the appellant-Insurance Company to refute the contention of the petitioner that on account of disability suffered by him, he has been incapacitated. It stands duly proved on record that ill-fated vehicle was being driven rashly and negligently by the deceased driver and as such, learned Tribunal below taking note of the fact that petitioner suffered 20% permanent disability, rightly arrived at a conclusion that petitioner has suffered permanent disability to the extent of 20% in relation to right lower limb, which has definite effect on his earning capacity, which can not improve in future. It is also not in dispute that petitioner was 45 years of age at the time of alleged accident and as such, there appears to be no illegality or infirmity committed by the learned Tribunal below, while applying multiplier of 14, which is strictly in consonance with **Sarla Verma's** case. Factum with regard to petitioner having remained admitted in hospital with effect from 7.12.2013 to 17.12.2013 i.e. for eleven days, stands duly proved on record as such, learned Tribunal below rightly awarded an amount of Rs.11,000/- each on account of attendant charges and special diet charges, as has been observed herein above. Perusal of disability certificate Ext. PW-3/A leaves no doubt that petitioner has suffered 20% disability with respect to right lower limb and learned Tribunal below rightly came to the conclusion that the possibility can not be ruled out that in future, petitioner, who is an agriculturist, may not be capable of doing any work so long as he lives.

11. Having perused material available on record, especially Ext. PW-3/A, this Court is in disagreement with Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that learned Tribunal below has wrongly recorded finding that the petitioner shall be unable to live a normal life.

12. True it is, petitioner suffered 20% disability with respect to right lower limb but this Court can not lose sight of the fact that capability as well as earning capacity of

petitioner, who is admittedly an agriculturist, has seriously been affected due to the disability suffered by him and as such, learned Tribunal below rightly held him entitled for a sum of Rs.1.00 Lakh on account of 'future loss of amenities and discomfort etc.'

13. This court is in disagreement with the contention of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that the amount awarded by learned Tribunal below on account of future loss of amenities and discomfort is not in terms of evidence led on record and as such sees no occasion to interfere with the same.

14. A Coordinate Bench of this Court in case **Smt. Chandra Wati V/s Tek Chand & others**, Latest HLJ 2014 (HP) 288, while dealing with the question as to how to grant compensation in injury cases, has held as under:

> "14. I have gone through the impugned award. The Tribunal has awarded a meager amount while ignoring the injuries suffered by the claimant/victim and affect of the said injuries, which has made her life miserable and dependant throughout her life. The said injuries also destroyed her matrimonial home, snatched the amenities and charm of her life and she has to be dependent on others throughout her life. She has undergone pain and suffering and has to undergo it forever. Not only this, it has also affected her privacy.
>
> 15. Now, the question is how to grant compensation in such injury cases. The concept of granting compensation is outcome of Law of Torts. The Tribunals, while examining a case of an injured and awarding compensation to him/her, have to do some guess work, sympathetically, keeping in view the fate and physical frame of the injured/victim.
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> 16. The Apex Court in case titled as R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, reported in AIR 1995 SC 755, had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:
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> > "9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.
> >
> > 10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation

can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

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

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

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

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

> "In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable." 14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :- "Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

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

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

18. The Apex Court in case titled as Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, reported in 2011 AIR SCW 4787 also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

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

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

> "16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:

> "The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation is awarded in personal injury cases are the following: "Pecuniary damages (Special damages) (i) Expenses relating to treatment, hospitalisation, medicines, transportation,
>
> nourishing food, and miscellaneous expenditure. (ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (a) Loss of earning during the period of treatment; (b) Loss of future earnings on account of permanent disability. (iii) Future medical expenses. Non-pecuniary damages (General damages) (iv) Damages for pain, suffering and trauma as a consequence of the injuries. v) (Loss of amenities (and/or loss of prospects of marriage). (vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."
>
> 17. .....
>
> 18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

20. Admittedly, the claimant/victim was a house wife, who was maintaining her family, domestic home, looking after cows and selling milk; her income was about Rs.5,000/- per month and was of the age of 55 years at the time of accident. This fact is not denied by the other side nor there is a rebuttal.

21. Even otherwise, a domestic wife is the backbone of a home, maintaining the domestic home and takes all steps to keep her husband, children and other family members united, in good health and joyous mood. If anyone has to engage a helper for domestic help, the minimum wages which has to pay, is not less than Rs.3,000/- per month plus clothing and food. She has not only been deprived of the income from domestic work, but also lost her income by maintaining cows and selling milk. It is unrebutted, as discussed by the Tribunal in the impugned award, that she has become permanently disabled, helpless, hapless and a burden on others, has to suffer 45% permanent disability throughout her life and has lost her income, which was about Rs.5,000/- per month. The Tribunal also held that due to her dependency on others, she engaged a helper, to whom she is paying Rs.1500/- per month. She has produced that lady Smt. Chinta as a witness, who has proved and stated that she is receiving Rs.1500/- per month from the claimant as wages.

22. The Tribunal awarded Rs.75,000/- under the head of pain and suffering, which is too meager, while taking the physical frame of the claimant and other factors in consideration and in view of the judgments of the Apex Court, referred hereinabove, read with the judgment of the Apex Court in case titled as Nizam's Institute of Medical Sciences versus Prasanth S. Dhananka& others, reported in 2009 AIR SCW 3563."

15. Hon'ble Apex Court in **G. Ravindranath alias R. Chowdary** vs. **E. Srinivas &anr**, AIR 2013 SC 2974, has held that compensation in personal injury cases should be determined under the following heads:

"Pecuniary damages (Special damages)

I. Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.

II. Loss of earning (and other gains) which the injured would have made had he not been injured comprising: -

a) Loss of earning during the period of treatment.

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

III. Future medical expenses.

Non-pecuniary damages (General damages)

IV. Damages for pain and suffering and trauma as a consequence of the injuries.

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

VI. Loss of expectation of life(shortening of normal longevity)"

Under the head of "non-pecuniary damages" i.e. general damages, provision has also been made for loss of amenities (and/or loss of prospects of marriage and loss of expectation of life (loss of longevity). Though in the aforesaid judgment, Hon'ble Apex Court has held that in personal injury cases, compensation shall be awarded only under head-I, II a) and IV, as noticed herein above, however, Hon'ble Apex Court while holding as above has carved out an exception by stating that compensation shall be granted under any of the heads (II)(b), (III), (V) and (VI), where there is specific medical evidence regarding loss of future income, on account of physical disability, medical expenses, loss of amenities and/or loss of prospects of marriage, loss of expectation of life.

16. Factum with regard to petitioner, who was 45 years of age at the time of accident, having suffered 20% disability is not in dispute. Similarly, on account of injury suffered by petitioner, factum with regard to his having remained admitted in hospital for

eleven days is also not in dispute and as such, applying ratio of law laid down in the aforesaid judgment as also the parameters laid down therein, this court sees no reason to interfere with the amount awarded by the learned Tribunal below under the head, "pain and suffering". However, this court is in agreement with Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that since petitioner stands duly compensated on account of medical expenses, attendant charges and special diet charges, amount awarded by learned Tribunal below on account of pain and suffering is on higher side, as such, same is reduced to Rs.40,000/- from Rs.50,000/-.

17. Having carefully perused the bills adduced on record on account of transportation charges, Ext. PW-1/B-64 to Ext. PW-1/B-82, this court is persuaded to agree with Mr. Jagdish Thakur, Advocate that the learned Tribunal below has erred in awarding Rs.88,000/- on account of transportation charges. Perusal of bills adduced on record suggests that on 6.12.2013, claimant was taken to Shimla from Bagga in a taxi and he had paid Rs.3,000/- vide Ext. PW-1/B-64. Similarly, it is admitted case of the parties that petitioner remained admitted in the Hospital with effect from 7.12.2013 to 17.12.2013, but the bills adduced on record by petitioner suggest that money has been claimed on account of taxi charges even for those dates during which petitioner remained admitted. Bill Ext. PW-1/B/66 suggests that on 17.12.2013 i.e. when petitioner was discharged from hospital, taxi was hired from Shimla to Bagga for Rs. 3,000/-, but it is not understood that why vehicle would go from Village Bagga, Tehsil Arki, District Solan, to take petitioner from Shimla. Similarly, perusal of Ext. PW-1/B-68 suggests that on 6.1.2014, petitioner hired taxi from Bagga to Una and paid Rs.6,000/- but there is no explanation rendered on record that why the vehicle was hired by petitioner for going to Una, especially when he was under treatment at IGMC Shimla. Similarly, bills placed on record reveal that repeatedly petitioner hired taxi to visit Fortis Hospital Chandigarh but there is no evidence led on record that on account of injuries suffered by petitioner in the accident, he was compelled to take treatment from Fortis at Chandigarh rather, material available on record clearly suggests that petitioner took treatment on account of injuries suffered by him in the accident from IGMC Shimla and as such there was no occasion for him to claim transportation charges on account of his having visited Fortis Hospital Mohali.

18. Otherwise also, perusal of Exts. P-71 and P-72 (Ext. PW-1/B-63) clearly suggests that petitioner visited Fortis Hospital on 6.10.2014 for getting himself checked in the Department of Internal Medicines and not in Orthopaedic Department. There is no material led on record by petitioner to show that he kept on visiting Fortis Hospital Chandigarh on account of injuries suffered by him in the alleged accident, as such, learned Tribunal below had no occasion to award amount on account of transportation charges to the petitioner qua the bills, which were paid on account of journeys undertaken by petitioner from Bagga to Chandigarh.

19. Leaving everything aside, this Court, having perused record finds considerable force in the argument of Mr. Jagdish Thakur that there appears to be no attempt on the part of learned Tribunal below to verify whether on the dates qua which amount has been claimed by the petitioner on account of taxi charges, petitioner had actually performed journeys to Shimla or Chandigarh to get himself checked/treated for the injuries suffered by him on account of alleged accident. Though this court taking note of the facts as have been discussed herein above, would have reduced the amount under the head of transportation charges substantially but taking note of the fact that appellant-Insurance Company was unable to rebut the bills adduced on record, deems it fit to reduce the amount awarded under this head to Rs.50,000/- instead of Rs.88,000/-

20. Consequently, in view of modifications made herein above, appellant-claimant is held entitled to following amounts under various heads:

Pecuniary damages		
i)	Loss of future income	**Rs.1,20,960/-**
ii)	Medical Expenses:	**Rs.38,670/-**
iii)	Transportation Charges:	**Rs.50,000/-**
iv)	Attendant charges:	**Rs.11,000/-**
v)	Special diet charges:	**Rs.11,000/-**
Non Pecuniary damages		
i)	Pain and suffering :	**Rs.40,000/-**
ii)	Future loss of amenities:	**Rs.1,00,000/-**
	Total	**Rs.3,71,630/-**

21. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld.

22. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award dated 9.3.2017 passed by the learned Motor Accident Claims Tribunal-III, Solan, District Solan (HP) in M.A.C. Petition No. 38ADJ-II/2 of 2015, is modified to the above extent only.

CMP No. 6606 of 2017

23. In view of the observations made in para-9 above, application is dismissed.

Any other pending applications, are also disposed of. Interim direction if any is vacated.

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

Ludar Mani .....Appellant.

Versus

Hem Dutt& another .....Respondents.

RSA No. 659 of 2005
Reserved on : 11.9.2018
Decided on : 20.9.2018.

Himachal Pradesh Land Revenue Act, 1954- Section 45- Entries in periodical record- Presumption – Held, entries recorded in periodical records carry presumption of truth till rebutted- Continuous entries standing in favour of "D" showing him non-occupancy since not rebutted are valid- Conferment of Proprietary rights of said land on "M" wrong- Regular second appeal allowed- Decree of First Appellate Court set aside- Suit decreed. (Para 17)

For the appellant: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate, for the appellant.

For the respondent: Mr.G.R. Palsara, Advocate, for respondent No.1.
Mr. Suneet Goel, Advocate, forrespondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the aggrieved plaintiff, against, the, concurrently recorded verdicts, by both the learned courts below, whereunder, a, disaffirmative decree, stand, recorded vis-a-vis the plaintiff. The plaintiff being aggrieved therefrom, has, hence preferred the instant appeal, before this Court.

2. Briefly stated the facts of the case are that one Dumna Ram, s/o Poshu was recorded as non occupancy tenant in the land comprised under old kh. kh. No. 29/70, khasra Nos. 1167, 1172, 1177, 1270, 1305, 1313, 1365, 1455, 1468, 1521, 1522, 1614, 1621, 1623, 1636, 1137, 1144, 1377, 1543, 1257, 1326, 1667 kita 22, measuring 6-4-6 bighas, situated at village Bakhrogi, H.B. No. 172 @ Mastgarh, Tehsil Chachiot, District Mandi, H.P. In this land Sh. Dumna Ram as non occupancy tenant to the extent of ¼ share of the H.P., and, he was non occupancy tenant to the extent of ¾ share of owner Madho Prasad and others.

3. In the meantime, Sh. Dumna Ram has sold his ¼ share to DhameshwarDutt vide mutation No. 29 and later on said DhameshwarDutt further sold the same to Prakash Chand vide mutation No. 31. As such Sh. Prakash Chand, stepped into the shoes of Dumna Ram, and, became the joint owner in possession to the extent of ¼ share i.e. land bearing kita No. 29, kh. No. 72, khasra No. 1257, 1326 and 1667 kita 3 measuring 1-14-1 bighas while the remaining land in which Dumna Ram was non occupancy tenant to the extent of his share i.e. kita No. 29 kh. No. 7071, khasra Nos. 1167, 1172, 1177, 1270, 1305, 1313, 1365, 1455, 1468, 1521, 1522, 1614, 1621, 1623, 1636, 1137, 1144, 1377, 1543 kitas 19 measuring 4-10-5 bighas remained in possession of Sh. Dumna.

4. That later on Prakash Chand defendant No.2 joint owner of the ¼ share out of the above land inducted defendant No.1 as non occupancy tenant under him in respect of the land comprising khasra No. 1257, 1326 and 1667, kitas 3 measuring 1-14-1 bighas. Later Sh. Dumna Ram acquired the proprietary rights qua ¾ share in which he was non occupancy tenant and while the proprietary rights qua the land of ¼ share of Prakash Chand (defendant No.2) were conferred upon defendant No.1. Hem Dutt vide mutation No. 180 on dated 16.5.1989.

5. It is stated by the plaintiff that this mutation No. 180 has been wrongly attested by learned A.C. II Grade because defendant No.1 was non occupancy tenant in respect of ¼ share of Prakash Chand defendant No.2 and he was not a tenant with the ¾ share of Om Chand and others, of which Dumna Ram was the non occupancy tenant in possession. Therefore, the aforesaid mutation concerning the mention of ¾ share of Om Chand and others is wrong, illegal, incorrect and misunderstanding of the mutation officer of the said mutation to this extent is liable to be declared wrong, illegal, null and void and not binding upon the rights of the plaintiff.

6. It is pertinent to mention that said Dumna Ram during his lifetime had bequeathed the suit land in favour of the plaintiff and after his death, the plaintiff had stepped into his shoes and became absolute owner of the suit land. It is further stated by the plaintiff that during private arrangements and division made beteenDumna Ram and

defendant No.1, the land mentioned in para No.3 in the plaint was allowed to be cultivated and possessed by the defendant, while the suit land was continued to be cultivated and possessed by Dumna Ram firstly as non occupancy tenant of ¾ share of Om Chand and others and later on as owner thereof after having become owner thereof by the operation of law.

7. Plaintiff prays that his possession over the suit land be confirmed as exclusive owner and mutation No. 180 and revenue entries to the contrary concerning the suit land be declared as wrong, illegal, incorrect, void and contrary to the factual position and defendant be restrained from interfering over the suit land.

8. On notice defendant No.1 and 2 appeared, and, have controverted the claim of the plaintiff and they have resisted his suit by filing separate written statements. Defendant No.1 Sh. Hem Dutt have taken the preliminary objections that suit of the plaintiff is not maintainable, suit is barred by limitation, plaintiff has no cause of action and locus standi to file the present suit and this court has no jurisdiction to decide the present suit.

9. On merit it is alleged by the defendant No.1 that Dumna Ram was in possession of ¼ share of the State of H.P. and proprietary rights were confirmed to him and rest of the land of ¾ share was in his possession. It is alleged by the defendant No.1 that he was non occupancy tenant under Dumna Ram and was so inducted by Dumna Ram in the month of September, 1966 and by 1971-72 the said entry had appeared in the revenue record also as non occupancy tenant with respect to the land in dispute that is measuring 1-14-1 bighas. Defendant N.2 was neither owner of the disputed land nor is in possession of the same because the land which has coming in the ownership and possession of the Dumna Ram was under the possession of Hem Dutt defendant No.1 and after the passage of time under H.P. Tenancy and Land Reforms Act, 1972 be became the exclusive owner of the land and defendant No.2 was nowhere in the picture at that time and as such mutation sanctioned in favour of the defendant No.1 is legal and as per law. It is alleged by the defendant No.1 that he is in physical possession of the land bearing khatta No. 29/72, khasra No. 1257, 1326 and 1667 kittas 3 measuring 1-14-1 bighas. As such the present suit of the plaintiff be dismissed with costs.

10. On the other hand defendant No.2 has taken the preliminary objections that the suit of the plaintiff is not maintainable, suit is barred by limitation. On merit it is stated by the defendant No.2 that co-owner cannot be tenant and no tenancy can be created by co-owner and the conferment of proprietary rights of ¾ shares is wrong, illegal, null and void and the entries to this effect are also wrong and not admitted.

11. It is admitted by the defendant No.2 that he has purchased ¼ share and he is owner in possession of the suit land. He further stated that Dumna Ram was not in exclusive possession of the remaining land as non occupancy tenant in which he has ¾ share, but is also in the possession of defendant No.2. He further stated that conferment of proprietary rights in favour of defendant No.1 is wrong and denied. Land reform officer has not adopted the judicial procedure and the mutation is wrong, illegal and *void ab initio* and is not admitted to be correct, which has been sanctioned behind the back of the defendant No.2 and the mutation sanctioned if any is also contrary to the facts and entries pertaining to the land is illegal and *void ab initio* and is liable to be set aside. It is prayed by the defendant No.2 that plaintiff is not entitled for any relief and his suit be dismissed with costs.

12. 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 liable to be declared as exclusive owner in possession of the suit land, as alleged? OPP.
2. Whether mutation No. 180 and revenue entries in favour of defendants are liable to be corrected as alleged? OPP.
3. Whether plaintiff is entitled to relief of permanent prohibitory injunction as prayed for? OPP
4. Whether the suit is not maintainable in the present form? OPD-2.
5. Whether the suit is barred by limitation? OPD-2.
6. Whether the plaintiff has no locus-standi to file the present suit? OPD-1.
7. Whether plaintiff has no cause of action, nor any right to sue the defendant? OPD-1.
8. Whether the jurisdiction of this Court is barred udner the H.P. Tenancy and Land reforms Act? OPD-1.
9. Relief.

13. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court, hence dismissed the plaintiff"s suit. In an appeal, preferred therefrom, by the plaintiff, before the learned First Appellate Court, the latter Court also affirmed the findings recorded by the learned trial Court.

14. Now the plaintiff 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 26.5.2006, this Court, admitted the appeal, on, the hereinafter extracted substantial questions, of, law:-

i) Whether the two Courts below have misconstrued the entries in the revenue papers, while dismissing the suit?

Substantial question of law No. 1.

15. One Dumna held, as, owner ¼ share in the suit khasra numbers, and, the aforesaid share held by afore Dumna, stood alienated by him, qua, one DhameshwarDutt, in, respect whereof mutation No. 29 stood attested, (a) and, the latter thereafter alienated, it, to defendant No.2, and, in respect thereof mutation No. 31, stood, in sequel thereto, hence attested, (b) and, hence defendant No.2 rather became owner to the extent of ¼ share, in, the suit land.

16. The emerging dispute, is, centered upon the validity, of, attestation, of, mutation borne in Ext. PB, mutation whereof stood attested on 16.5.1989, (a) whereunder, vis-a-vis, the suit khasra numbers, and, qua one Prakash Chand hence proprietary rights stood conferred, vis-a-vis, khatakhatauni No. 39, min 63, khasra No. 1257 1326 and 1667, kita 3, area 1-14-1 bighas, (b) and, the apt conferment of proprietary rights, are, disclosed therein, to, appertain, vis-a-vis, the land owned by one Prakash Chand, Chaharam, Om Chand and Madho Prasad. In consonance therewith, hence entries were made in the column of ownership, and, in the column of possession thereof, of, the apt jamabandi (c) Ext. PB, the order, hence, conferring proprietary rights, upon, Prakash Chand, would stand fastened with an aura, of, validity, and, would also garner legal clout, only, when a perusal thereof, makes displays qua, its, rendition, being anviled, upon, apt reflections borne, in, the prior thereto jamabandi(s), (c) the revenue officer concerned, while attesting, the, order also bearing in mind, (i) the names of land owners concerned, (ii) their shares thereon, the name(s) of gairmurusi(s), and, their shares in the suit khasra numbers, as, find reflection therein.

17. For making the aforesaid gaugings, an allusion, vis-a-vis, the, jamabandi borne in Ext.PA, appertaining to the year 1965-66, is, of utmost importance, (a) wherein the apt names, of, the land owners are borne, and, also therein, (b) the names of Dumna, and, of one Prakash Chand hence stand reflected, as owners in possession, to, the extent of ¼ shares, in, khatoni No. 35, (c), and, in the column of possession, the name of Dumna, stands reflected, as a gairmurusi, under the apt land owners, as, reflected in the prior thereto column, of, ownership. The afore referred alienation(s) apparently occurred, vis-a-vis, ¼ share, in, the suit khasra numbers, initially, from Dumna to Dhameshwar, and, subsequently from Dhameshwar, to Prakash Chand, (d) and, in respect thereof, mutation No. 29, and, mutation No.31, stood respectively attested. The afore mutation Nos. 29 and 31, as stood respectively attested, in sequel, to, alienation(s) of ¼ share, in, the suit khasra numbers, when remain un-challenged, thereupon they acquire an aura of validity. The effect thereof, is, qua Prakash Chand, hence, acquiring only ¼th share in the suit khasra numbers, (e) and, when one Dumna, is, reflected in the column of possession of, the, jamabandi, appertaining to the suit land, relating to the year 1965-66, to be a gairmurusi, under the land owners, as, reflected in the prior thereto column of ownership, (f), and, therefrom, an inference is garnerable qua Prakash Chand, not being a recorded gairmurusi, under, the land owners, as, mentioned in the prior thereto column of ownership, (g) rather one Dumna, being the solitary gairmurusi, under, the apt land owners, excepting, the afore Prakash Chand, who, rather, had, in the afore manner acquired 1/4th share in the suit khasra numbers, (h) likewise in, the, jamabandi prior thereto, and, appertaining to the year 1971-72, one Prakash Chand is reflected, to hold apt proprietary rights, upto, ¼ share, in the joint suit khasra numbers, yet, when, the, apt mutation, borne in Ext. PB, was, recorded, rather therein one afore Prakash Chand, hence stood bestowed proprietary rights, vis-a-vis, the area mentioned therein (iii) and, also a reflection is borne qua his hence holding exclusive proprietary rights, under, the land owners mentioned therein. Visibly the aforesaid order(s), is, per-se fallacious, (i) given in the afore referred jamabandies, his, being reflected, as owner to the extent of ¼ share, in, the suit khasra numbers, ownership whereof, he acquired under afore referred mutation (a) mutation whereof rather stood attested in pursuance, to, a sale made in his favour by Dumna, and, when, for, reasons assigned, it, stands hereinabove concluded, qua, the afore hence mutations rather holding validity, thereupon, the, order borne in Ext. PB, is, per-se rendered hence flawed, (c) contrarily the existence, of, a reflection, in, the order, attesting mutation No. 180, qua, the afore Prakash Chand rather acquiring proprietary rights under the land owners mentioned therein, (d) acquisition, of, proprietary rights thereunder, rather, obviously stands sparked from, it, being in gross disconcurrence, and, in incompatibility, with, the afore referred jamabahdi prepared prior, to, the recording, of, mutation No. 180, (d) especially when Dumna rather, holds, in the afore jamabandi, a, status of a gairmurusi, under the land owners concerned, and, with a presumption of truth standing attached therewith, and, presumption whereof rather remaining un-rebutted, and, hence thereunder, the, apt right being solitary vested, in, one Dumna, (e) thereupon it was incumbent, upon, the revenue officer concerned, who, attested the apt mutation, on 16.5.1989, to re-bear in mind all the apt afore reflections borne therein, than, to confer thereunder, proprietary rights, upon, Prakash Chand, under the owners concerned, as reflected therein, (f) reteriatedly, when the right to secure conferment, of, apt proprietary rights, vis-a-vis, the land owners mentioned therein, rather stood solitary vested, in, one Dumna, thereupon the order borne in Ext. PB, is, vitiated. The substantial question of law is answered accordingly.

18. For the reasons which have been recorded hereinabove, this Court holds that the learned first appellate 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, suffer, from a gross perversity or absurdity of mis-appreciation, and, non appreciation of evidence on record.

19. Consequently, there is merit in the instant appeal and it is allowed accordingly. In sequel, the impugned judgments, are, set aside. The suit of the plaintiff is decreed to the above extent. However right, if any, in the suit land, of, one Hem Dutt shall remain unaffected. All pending applications also stand disposed of. Decree sheet be prepared accordingly. Records be sent back forthwith. No order as to costs.

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

M/s Devki Nandan Steel Works and Ors ....Applicants/Petitioners
Versus
HP State Electricity Board Ltd. and Ors ....Non-applicants/Respondents.

OMP No. 390 of 2018 in
Arb. Case No. 102 of 2016
Date of Decision: 04.9.2018

Arbitration and Conciliation Act, 1996- Section 14 & 15- Substitution of arbitrator- Arbitrator (Retd. Chief Engineer) refusing to entertain petition on account of non-communication of his appointment as Arbitrator- Thereafter, pleading inability to arbitrate and communicating Department also- Held, appointment of arbitrator shall terminate, if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay- And where his inordinate delay terminates, substitute arbitrator has to be appointed as per Rules applicable- Petition of petitioner for substibution of arbitrator allowed. (Para 7)

Arbitration and Conciliation Act, 1996- Section 12- Appointment of Arbitrator- Neutrality Principle- Held, notwithstanding any agreement, an impartial person is required to be appointed as arbitrator- Person having direct or indirect connections or relationship or interest in any of parties or subject matter in dispute cannot be appointed- Senior Advocate of High Court appointed as arbitrator. (Para 11)

Cases referred:
Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52
VolestalpineSchienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665

For the Applicants/Petitioners: Mr. P.S. Goverdhan, Advocate.
For the Non-applicants/respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. ***(Oral)***

By way of instant application filed under Section 14 of the Arbitration and Conciliation Act, 1996 (in short "the Act") read with Section 151 of CPC, a prayer has been made on behalf of the applicants, for substituting Mr. J.S. Chandel, retired Chief Engineer (Electrical) new Police Lines, Bharari, Shimla, by new Arbitrator as he has refused to entertain the claim petition.

2. Despite repeated opportunities, respondents have failed to file reply and as such, this Court is constrained to decide the petition on the basis of material available on record.

3. Averments contained in the petition as well as documents annexed therewith suggest that this Court vide order dated 23.12.2016, passed in Arb. Case No. 102 of 2016, referred the dispute inter-se parties to the arbitration of Mr. J.S. Chandel, retired Chief Engineer (Electrical) new Police Lines, Bharari, Shimla. Since above named arbitrator appointed by this Court neither issued any notice to the applicants nor sent intimation, if any, with regard to the commencement of arbitration proceedings, applicants apprised Mr. J.S. Chandel, with regard to the passing of the order dated 23.12.2016 and requested him to commence the proceedings, however, fact remains that above named arbitrator refused to accept the statement of claim on the ground that he has no official communication with regard to his appointment as arbitrator in the matter.

4. Applicants got the Chief Engineer (OP) South HPSEB, Shimla, served with legal notice calling upon him to clarify the position, but no reply was ever received by the applicants, whereafter applicants personally visited Shri J.S. Chandel, at this residence, who disclosed that he had already expressed his inability to the department to arbitrate on the matter. But this fact never came to be disclosed to the petitioner. Perusal of documents (Annexures P-1 and P-2) placed on record by the applicants suggests that department was repeatedly requested to take appropriate steps for appointment of an arbitrator, but since no reply, whatsoever, was received, the applicants were compelled to approach this Court in the instant proceedings, praying therein for substitution of Mr. J.S. Chandel, retired Chief Engineer (Electrical).

5. Having heard the learned counsel for the parties and perused material available on record, this Court finds that despite there being specific direction contained in order dated 23.12.2016, passed by this Court in Arbitration Case No. 102 of 0216, Mr. J.S. Chandel, retired Chief Engineer (Electrical) new Police Lines, Bharari, Shimla, failed to enter into reference and commence the arbitration proceedings and as such, it was obligatory on the part of the department to take appropriate steps for substitution of above named arbitrator. It also emerges from the pleadings that Mr. J.S. Chandel, had expressed his inability to the department to adjudicate the dispute inter-se the parties but no communication in this regard was ever made to the applicant. No reply has been filed to the proceedings, as such, this Court has no option, but to place reliance on the averments contained in the application. Since arbitrator appointed by this Court vide order dated 23.12.2016, has failed to enter into reference and commence the proceedings, his mandate has terminated in terms of Section 14 of the Act, which reads as under:-

> ***14. Failure or impossibility to act.—***
>
> ***(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if—***
>
> ***(a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and***
>
> ***(b) He withdraws from his office or the parties agree to the termination of his mandate.***
>
> ***(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.***

> ***(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.***

It is quite apparent from the bare perusal of aforesaid provision of law that mandate of an Arbitrator shall terminate and he shall be substituted by another Arbitrator if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay. Section 15 of the Act, provides that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules applicable to the appointment of the arbitrator being replaced. Section 15 of the Act is reproduced herein below.

> ***15. Termination of mandate and substitution of arbitrator.—***
>
> ***(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—***
>
> ***(a) where he withdraws from office for any reason; or***
>
> ***(b) by or pursuant to agreement of the parties.***
>
> ***(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.***
>
> ***(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.***
>
> ***(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.***

6. In the case titled ***Union of India and Ors. v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52***, the Hon'ble Apex Court has held as under:-

> ***11. At this stage, we may take note of the scheme of the Act as well, by noticing those provisions which would be attracted to deal with such a situation. Relevant provisions are extracted below for ready reference:***
>
> ***"14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—***
>
> ***(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and***
>
> ***(b) he withdraws from his office or the parties agree to the termination of his mandate.***
>
> ***(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.***
>
> ***(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.***

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the Arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

* * *

32. Termination of proceedings.—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where—

(a) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings." (emphasis supplied)

12. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a peremptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the

order of the High Court terminating the mandate of the Arbitral Tribunal is flawless. This aspect of the impugned order is not even questioned by the appellant at the time of hearing of the present appeal. However, the contention of the appellant is that even if it was so, as per the provisions of Section 15 of the Act, substitute arbitrators should have been appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced". On this basis, it was the submission of Mr Mehta, learned ASG, that the High Court should have resorted to the provision contained in Clause 64 of GCC.

13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in TrippleEngg. Works. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid "classical notion" has been made are taken note of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

> ***"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. 2007 5 SCC 304, 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 Manufacturing Co. (P) Ltd. 2007 7 SCC 684 wherein following a three-Judge Bench decision in Punj Lloyd Ltd. v. PetronetMhb Ltd. Punj Lloyd Ltd. v. PetronetMhb Ltd., 2006 2 SCC 638, 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.***
>
> ***7. The apparent dichotomy in ACE Pipeline and Bharat Battery Mfg. Co. (P) Ltd. was reconciled by a three-Judge Bench of this Court in Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd., 2008 10 SCC 240, wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression 'to take the***

necessary measure' appearing in sub-section (6) of Section 11and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. 2009 8 SCC 520 Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (Indian Oil case, SCC p. 537)

> ***'48.(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. The above discussion will not be complete without reference to the view of this Court expressed in Union Of India v. Singh Builders Syndicate Union Of India v. Singh Builders Syndicate , 2009 4 SCC 523, wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in Singh Builders Syndicate this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in Deep Trading Co. v. Indian Oil Corpn. 2013 4 SCC 35followed the legal position laid down in Punj Lloyd Ltd. which in turn had followed a two-Judge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. 2000 8 SCC 151 The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act."

(Emphasis in original)

7. It is quite apparent from the aforesaid exposition of law that when there is failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can be terminated. In the case at hand, it is quite apparent that Arbitral Tribunal failed to perform its functions and as such, prayer made in the instant application for substitution of arbitrator deserves to be accepted.

8. Now question, which remains to be decided is that who is to be appointed as new Arbitrator in place of Mr. J.S. Chandel, whose mandate to be an arbitrator stands terminated in terms of Sections 14 and 15 of the Act, as has been discussed hereinabove. Perusal of amended Section 12 of the amended Act 3 of 2016, clearly suggests that notwithstanding any agreement *inter-se* parties, impartial/neutral person is required to be appointed as an Arbitrator. Aforesaid Section further provides that a person having direct or indirect connection or relationship or interest in any of the parties or in relation to the subject matter in dispute, cannot be appointed as an Arbitrator and his/her appointment as arbitrator can be laid challenge. At this stage, it would be apt to reproduce Section 12 of the Act, herein below:-

> ***"12. Grounds for challenge.—***
>
> ***(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances ,-***
>
> ***a) Such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and***
>
> ***b) Which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.***
>
> ***Explanation 1. –The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.***
>
> ***Explanation 2. – the disclosure shall be made by such person in the form specified in the Sixth Schedule.]***
>
> ***(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.***
>
> ***(3) An arbitrator may be challenged only if—***
>
> ***(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or***
>
> ***(b) he does not possess the qualifications agreed to by the parties.***
>
> ***(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.***
>
> ***[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:***

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]"

Perusal of aforesaid amended provision of Act clearly suggests that person having direct/indirect control over the day to day affairs of the authority, cannot be appointed as an Arbitrator.

9. Hon'ble Apex Court in ***VolestalpineSchienen GMBH v. Delhi Metro Rail Corporation Ltd***., (2017) 4 SCC 665, has held as under:-

"14. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Subsection (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below:

8. (i) for sub-section (1), the following Sub-section shall be substituted, namely-

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.;

(ii) after Sub-section (4), the following Subsection shall be inserted, namely—

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing.

(emphasis supplied)

THE SEVENTH SCHEDULE

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.---The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above. (emphasis supplied)

15. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

NEUTRALITY of ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process.

54. In the Act, the test for neutrality is set out in Section 12(3) which provides-

12(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. GangaramChhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. MunusamyMudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator

"was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and BipromaszBipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter

by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and nonState parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as

based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator.

(emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be

permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

10. In the judgment referred herein above, it has been categorically laid down by the Hon'ble Apex Court that main purpose for amending the provision is/was to provide for neutrality of arbitrators and in order to achieve the neutrality, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties or subject matter of dispute falls under any of the categories specified in the schedule, he shall be ineligible to be appointed as an arbitrator.

11. Consequently, in view of aforesaid detailed discussion as well as law laid down by the Hon'ble Apex Court supra, instant application is allowed and with the consent of the learned counsel representing the parties, **Shri Ramakant Sharma, Senior Advocate, HP High Court, Shimla**, is appointed as an arbitrator to adjudicate the dispute inter-se parties. His consent/declaration under Section 11(8) of the Arbitration & Conciliation Act has been obtained. He 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 to the 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. The application stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

M/s Northern International Educational and Research Centre ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWP No. 2952 of 2017

Decided on: August 30, 2018

Constitution of India, 1950- Article 226- Writ petition- Petitioner challenging decision of Government withdrawing Essentiality-cum-Feasibility certificate granted earlier to it for starting GNM/B.Sc. (N) Institute in State- Petitioner permitted to withdraw petition in view of pendency of similar matter before Hon'ble Apex Court. (Para 2)

For the petitioner Mr. N.K. Sood, Senior Advocate with Mr. Aman Sood, Advocate.

For the respondents Mr. Ashok Sharma, AG with Mr. Adarsh Sharma, Ms. Ritta Goswami and Mr. Nand Lal Thakur, AAG's, for respondents No.1 and 2.

Mr. Ravinder Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice (oral):

Petitioner, by the medium of this petition has mainly prayed for the following reliefs:

"a) Decision dated 17/07/2017 of the Council of Ministers of Respondent State, forming part of (Annexure P-21,) and communicated through letter dated 22/07/2017 (Annexure P-22) withdrawing the Essentially cum Feasibility / No Objection Certificate dated 31/05/2016 (Annexure P-14) issued to the Petitioner for starting GNM/B.Sc.(N) institute in attached with Dr. RPGMC Tanda, being illegal, arbitrary, unconstitutional, discriminatory, irrational and unreasonable be quashed and set aside.

b) Respondents be directed through an appropriate writ order or direction to grant and issue afresh Essentiality cum Feasibility/ No Objection Certificate in favour of the Petitioner for starting GNM/B.Sc.(N) institute in attachment with Dr. RPGMC Tanda, and further direct the Respondents to take all follow up steps in the direction of grant of requisite permissions, approvals/sanctions, affiliations etc. so as to enable the Petitioner to start and effectively run the aforesaid courses.

OR

c) That following the recommendation of the Directorate Level Evaluation Committee (Annexure P-18), the Respondent State be directed to revive the earlier Essentiality cum Feasibility/No Objection Certificate dated 31/05/2016 Annexure (P-14) qua the Petitioner or issue such certificate afresh and further direct the Respondents to take all follow up steps in the direction of grant of requisite permissions, affiliations so as to enable the Petitioner to start and effectively run the aforesaid courses.

d) That Respondents be further directed to issue and grant the Petitioner all requisite No Objections, Affiliation(s) to enable the Petitioner to effectively commence and start the aforesaid courses and commence the process of admissions of prospective candidates/students and to run the aforesaid courses.

e) That any other appropriate writ order or direction to which the Petitioner is found entitled to in the facts and circumstances of the case so as to enable it to commence and run the aforesaid courses in its proposed campus at Village Ghurkari, Tehsil and District Kangra (H.P.) be also made in the interest of justice."

2. For the reason that SLP No. 027377 of 2017 titled **Jyoti Education Welfare Society Regd.** vs. **The State Of Himachal Pradesh** is pending before the Hon'ble Supreme Court of India, in which present writ petitioner is party respondent, learned counsel for the petitioner, under instructions, seeks permission to withdraw the present petition, with liberty to file a fresh petition, on same and subsequent cause of action, if so required and desired, depending upon outcome of the SLP. Permission granted.

3. Accordingly, petition is disposed of as withdrawn alongwith pending applications, if any, with liberty as prayed for. However, it is made clear that limitation shall not come in the way of the petitioner.

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

M/s Sanya Enterprises.. .....Petitioner.

Versus

Shri Rangi Ram .....Respondent.

Cr.MMO No. 55 of 2017
Decided on : 7.9.2018

Criminal Proceedings- Initiation of- Pendency of Civil Suit- Effect- Held, mere pendency of civil suit will not bar aggrieved party to avail remedies contemplated in relevant penal statutes- Petitioner seeking indulgence of Court in initiating criminal proceedings against respondent for transferring property he had agreed to sell- Agreement executed in 2006- Petitioner filing suit for Specific performance in 2014- Further, held, on account of inordinate delay in filing suit, respondent perceived petitioner of having abandoned his rights under agreement- Petition dismissed. (Para 1 & 2)

For the Petitioner: Mr. R.S Chandel, Advocate.

For the Respondent: Mr. Ramakant Sharma, Sr. Advocate with Mr. PeeyushRathour, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

An agreement to sell was executed inter-se one Rangi Ram with M/s Sanya Enterprises. The aforesaid agreement to sell inter-se the aforesaid was executed, on 7.1.2006. The vendee therein did not, uptill 18.6.2014, institute any Civil Suit, for, rendition of a decree of specific performance qua the aforesaid alleged agreement to sell, rather only on 18.6.2014, it, issued a notice upon the respondent herein, whereunder, the respondent herein, was, requested, to, execute a registered deed of conveyance vis-a-vis the contentious suit property, in respect whereof, in the year 2006, an agreement to sell was executed inter-se the petitioner, and, the respondent herein. Thereafter, the plaintiff/petitioner instituted, hence, a Civil Suit No. 54 of 2014, seeking therein rendition of a decree of specific performance qua the afore-referred agreement to sell. The aforesaid suit is pending adjudication before this Court.

2. Nowat the contentious mutation of exchange was attested in the year 2010. The learned counsel for the petitioner contends that the mutation of exchange, appertains to the property, in respect whereof, the afore-referred agreement to sell was executed, and, in its execution, the, corpus of the contentious suit property, has been destroyed, and, thereupon he contends that the respondent herein has committed a serious penal misdemeanor.

3. Even though this Court finds immense force, in, the contention reared before this Court by the learned counsel for the petitioner, that, even when a civil litigation, is, pending inter-se the petitioner, and, the respondent herein, yet its mere pendency, not, barring the aggrieved petitioner herein, to, vis-a-vis analogous or similar causes' of action embodied in both, rather canvass appropriate remedies, as, contemplated in the relevant penal statutes. However, the aforesaid submission is not amenable for acceptance by this Court, (a) given the petitioner herein, despite his awareness, vis-a-vis , the period of limitation, prescribed in the Limitation Act, for, his in compliance therewith, hence,

instituting, within three months, since the execution of an agreement to sell, an apt suit seeking rendition of a decree, for specific performance of agreement to sell, (b) his not instituting an apt suit within the afore-referred period, (c) rather his instituting the apt suit, only, in the year 2014, (d) whereupon it appears qua hence the respondent herein, perceiving qua the petitioner herein, prima-facie waiving and abandoning his right under the agreement to sell executed inter-se the petitioner, and, respondent herein, hence, his proceeding to much subsequent, to the year 2006, and, beyond the apt prescribed period of limitation for instituting a Civil Suit, for, rendition of a decree of specific performance of apt agreement, rather bonafidely proceeding to make a contentious exchange, with respect, to, the contentious suit property, in respect whereof,an agreement to sell was also executed. Consequently, the aforesaid act is neither ingrained with any vice, of, any malafides nor any criminal liability is attracted, upon, the respondent herein, rather it is befitting for the petitioner, to, in, the, Civil Suit concerned, array the exchangees, under, the contentious mutation of exchange, as party(s) to the lis, and, to also rear a challenge therein, thereto.

In view of the above, there is no merit in this petition, and, the same is accordingly dismissed. All pending applications stand disposed of accordingly. Records be sent back. No costs.

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

Peer Mohammad Azad .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 611 of 2017 alongwith
Cr. Appeal Nos. 612 of 2017 and 613 of 2017.
Reserved on: 27th August, 2018.
Date of Decision: 13th September, 2018.

Indian Penal Code, 1860- Sections 467 & 468- Forgery- Proof- Trial court convicting accused "GH" of putting false signatures of complainant "JM" on document- Report of Handwriting Expert not attributing forged signature to be in hand of accused- Held, accused "GH" wrongly convicted for forgery. (Para 10)

Indian Penal Code, 1860- Sections 420, 468 & 471- Deception, forgery and use of forged document- Proof- Trial Court convicting accused "GH" "GA" and "GM" of getting nikahnama between accused "GH" and victim executed by deceiving that "GH" was single- But "GH" was already married on date of its execution- Defence evidence however revealing that first marriage between "GH" and his wife stood dissolved by way of local custom- Held, accused were wrongly convicted of said offences by trial Court. (Para 11 & 12)

Indian Penal Code, 1860- Sections 406-Criminal misappropriation- Proof- Trial Court convicting accused "GH" of misappropriating huge money of complainant in US Dollars and other articles- Appeal- Evidence showing vast improvements in statement of complainant given before Court vis-à-vis her previous statement qua money and articles given to "GH"- Held, complainant not credible witness- Accused "GH" wrongly convicted of offence of criminal misappropriation. (Para 13)

For the Appellant(s): Mr. Anoop Chitkara, Mr. Syed Wasiq, Advocate, Mr. Ab. Majid and Ms. Sheetal Vayas, Advocates.

For the Respondent(s): Mr. Hemant Vaid, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

All the aforesaid appeals are being disposed of by a common judgment, as, all arise, from, a common verdict rendered, by the learned trial Court.

2. The learned trial Court convicted besides sentenced the accused/convicts, namely, Gulam Hassan Hakim, Gulzar Ahmad Hakim, and, Peer Mohammad Azad, in, the hereinafter extracted manner:-

Sr. No.	Name of the accused	Under Section	Sentence	Fine	In default of payment of fine
1.	**Gulam Hassan Hakim**	U/s 376 IPC	Rigorous imprisonment for 7 years	Rs.10,000 /-	Simple imprisonment for 3 months
		U/s 406 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/s 420 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/s 494 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/s 495 IPC	Rigorous imprisonment for seven years	Rs.5,000/-	Simple imprisonment for three months
		U/s 496 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/S 467 IPC	Rigorous imprisonment for 7- years	Rs.5,000/-	Simple imprisonment for thee months
		U/s 468 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/s 471 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month

		U/S 120-B, IPC	Simple imprisonment for 6 months	---	---
2.	**Gulzar Ahmad Hakim**	U/s 406 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/s 420 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/s 495 IPC	Rigorous imprisonment for seven years	Rs.5,000/-	Simple imprisonment for three months
		U/s 496 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/S 467 IPC	Rigorous imprisonment for 7- years	Rs.5,000/-	Simple imprisonment for thee months
		U/s 468 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/s 471 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/S 120-B, IPC	Simple imprisonment for 6 months	---	---
3.	**Peer Mohammad Azad**	U/s 495 IPC	Rigorous imprisonment for seven years	Rs.5,000/-	Simple imprisonment for three months
		U/s 496 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/S 467 IPC	Rigorous imprisonment for 7- years	Rs.5,000/-	Simple imprisonment for thee months
		U/s 468	Rigorous	Rs.5,000/-	Simple

		IPC	imprisonment for three years		imprisonment for 1 month
		U/s 471 IPC	Rigorous imprisonment for three years	Rs.5,000/-	Simple imprisonment for 1 month
		U/S 120-B, IPC	Simple imprisonment for 6 months	---	---

All the sentences were ordered to run concurrently.

3. The facts relevant to decide the instant case that on 24.10.1995 complainant/prosecutrix lodged a complaint against accused Gulam Hassal Hakim, Gulzar Ahmad and Peer Mohammad Azad to the effect that she was carrying the business of export and import and was living in India for the last 14 years. That during this period she visited her native place in California 64 times and in September, 2001 she came to Mcleodganj and stayed in Mount View for a night and, thereafter, stayed in Hotel Annex Him Queen Mcleodganj. That Gulam Hassan invited her for dinner and introduced himself as a tourist guide and complainant stayed in Hotel Annex Him Queen for three days. That accused Gulam Hassan told her that he sells Kashmiri carpets and upon request of the complainant saw her carpets and had chosen two carpets. That complainant encashed her traveler cheque from Western Union and paid 1200 US dollars to Gulam Hassan towards price of those carpets. That Gulam Hassan had promised to post these two carpets to her native place in California, but she did not received the said carpets. That the complainant went to Delhi where Gulam Hassan had already booked a hotel room for complainant and Gulam Hassan had telephonically communicated to the complainant on 11.09.2001 regarding bomb blast in USA and called the complainant to Kashmir. The complainant wanted to visit her children to California but there were no flights to USA as per the directions of the US President and she stayed at Delhi for a week. That initially complainant refused to visit Kashmir, but since there were riots in Delhi, so complainant visited Kashmir on 1.10.2011 and accused Gulam Hassan met her at Srinagar airport with his friends. Complainant stayed for one night in Mother Indian Houseboat and thereafter left for Pehlgaum. That complainant stayed at Pehalgaum for two weeks. Accused Gulam Hassan had borrowed 1800 US dollars from the complainant for which she enachsed her traveler cheque at J&K Bank, Srinagar and, thereafter, she left for California. That when complainant left India accused Gulam Hassan continuously telephoned her on various occasions and even during midnight and Gulam Hassan also talked to her family members and, thereafter, after ten weeks complainant returned to India and Gulam Hassan proposed her for marriage. The accused Gulam Hassan gave reference of his being unmarried. Complainant also told that said proposals were given to her telephnically by Gulam Hassan when she was in California. That Gulam Hassan also talked abut the marriage with complainant's mother and children. That complainant came to Dharamshala and checked in Hotel Annex Him Queen and went to Pehalgaum. On 30.05.2002, she was married with Gulam Hassan at Srinagar. That the marriage ceremonies were solemnised by a Muslim Priest, regarding this marriage, Nikahnama was prepared which was signed by the complainant, Gulam Hassan and remaining accused. That the aforesaid marriage agreement was prepared in the same day at High Court of Srinagar and the said agreement was signed by Advocate Hakak, Ajay Ahmed and by Gulam Hassan and accused Peer Mohammad and accused Gulazar Ahmad Hakim as well as complainant, but this agreement was not proper as it was declared in the agreement

that both the parties were un-married at the time of aforesaid marriage. That after marriage, the complainant, stayed for five days with Gulam Hassan as husband and wife and, therefore, complainant returned to California. That Gulam Hassan instructed the complainant to closure her business at California and return to Pehalgaum. That complainant purchased many items worth 3000 US Dollars for the use of Gulam Hassan and when complainant came back, Gulam Hassal picked her at Delhi Airport. That complainant had eight big boxes with her and she stayed during night in hotel at Delhi and had also given to Gulam Hassan 9600 US Dollars in order to purchase piece of land. That Gulam Hassan and complainant returned back to Dharamshala, Gulam Hassan has sexually assaulted her and left for Pehalgaum. They stayed at Dharamshala being husband and wife in a separate house and she purchased fridge and other house holds articles worth 2500 US dollars. ON 8.11.2002 Gulam Hassan left in the morning for Kashmir and complainant was alone at her house at Dharamshala. That after some time accused Gulzar came to the house of complainant with three porters and told the complainant that Gulam Hassan was not coming back. The complainant had sold all the articles of her house to Gulzar for Rs.1,00,000/-. Complainant was sitting in the van and Gulzar brought a blank paper having a stamp on the top and Peer Mohammad gave her cold drink as she was very upset. That the person wearing glasses asked the complainant to sign the blank paper on both the sides and also asked whether she had received Rs.1,00,000/-, and he also told her to first collect the money and then sign the register. Accused Gulzar paid her Rs.1,00,000/- in the presence of accused Mohammad and the person who was wearing glasses. That thereafter Gulam Hassan told the complainant to go back to California. That after this she returned again in March, 2003 and accused Gulzar told her to stay with Gulam Hassan as it is customary in India to buy gold for the family and the complainant had purchased gold worth 1000 US dollars and for Gulam Hassan and Gulzar at Dharamshala being family members. Whens he questioned Gulam Hassan about her carpets and the land so purchase,d Gulam Hassan told her that he had bought land for her at Pehalgaum to construct a house and she did not remember how much money she had paid to Gula Hassan, her husband for the construction of house. That Gulam Hssan sent her back to Dharamshala and asked her to send more money and on this she had deposited Rs.15,000/-. That Gulam Hassan had pretended to complainant to be single and, therefore, complainant married Gulam Hassan. Accused Gulzar and Peer Mohammad signed the receipt and continuously lied with her that Gulam Hassan was single and thereby accused conspired to cheat her. Accused cheated her as Gulam Hassan was already married. Accused Peer Mohammad is signatory of the Nikhanama, marriage agreement and receipt and in September, 2005, the complainant came to know that Gulam Hassan was already married. It is stated that Gulam Hassan also cheated Japanese girl, who disclosed to the complainant that Gulam Hassan had already married and thereby Gulam Hassan cheated many women and accused Gulzar had also cheated many other women and had extracted more than Rs. One crore from them. The complainant went to the police to lodge the report but the police refused to register any complaint, and, thereafter she approached the Magistrate to lodge a complaint and on the direction of the Magistrate, the FIR was registered against the accused in the police station concerned. Thereafter police completed all the investigating formalities and arrested the accused.

4. 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.

5. The accused/convict Gulam Hassan Hakim stood charged, by the learned trial Court, for, his committing offences punishable under Sections 406, 420, 494, 495, 496, 467, 468, 471 read with Section 120 B, IPC and Section 376 of the IPC, accused/convict

Gulzar Ahmad Hakim stood charged for his committing offences punishable under Sections 406, 420, 495, 496, 467, 468, 471 and read with Section 120-B, IPC, whereas, accused Peer Mohammad Azad stood charged for his committing offences punishable under Sections 495, 496, 467, 468, 471 and read with Section 120-B, IPC. In proof of the prosecution case, the prosecution examined 31 witnesses. On conclusion of recording, of, the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case. They have also examined two witnesses in defence.

6. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, upon, the accused/convicts, for theirs hence committing, the, aforesaid offences.

7. The appellants herein/accused, stands aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellants 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, 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 being replaced by findings of acquittal.

8. 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.

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 learned trial Court, had, pronounced a verdict, of, conviction, and, consequent imposition of sentence, upon, accused Gulam Hassan Hakim, for, his committing, the, apt criminal misdemeanor(s), of, his forging Ex. PW1/E, (i) forgery whereof, purportedly ensues, from, his appending thereon, the, false signatures, of, one Josephine Marray alias Tabasum. However, the apt conviction, and, consequent imposition of sentence, upon, convict Gulam Hassan Hakim, for his purportedly, hence, forging the signatures, of, aforesaid, upon, Ex.PW1/E, is palpably fallacious, (ii) given the learned trial Court, rather misreading the opinion rendered by the FSL concerned, and, as borne in Ex.PW26/A, (iii) wherein, the handwriting expert concerned, on making apt comparison, of, the sample signatures of the aforesaid, with, the disputed signatures, earmarked as Q-1 to Q-3, and, as, borne in Ex.PW1/E, his making a clear opinion, qua, the aforesaid rather not authoring, the afore referred disputed signatures, (iv) reiteratedly, hence, the conviction and consequent imposition of sentence, upon, Gulam Hassan Hakim hence for his forging, the, signatures of the complainant, upon, Ex.PW1/E, is set aside.

11. The marriage agreement, entered inter se, the complainant, and, accused Gulam Hassan Hakim, is, borne in Ex.PW1/D, and, thereunder, the, complainant hence contracted marriage, with, accused one Gulam Hasan Hakim. The complainant, does not, deny qua hers executing EX.PW1/D. The criminal misdemeanor(s) ascribed by the complainant, vis-a-vis, accused Gulam Hassan Hakim, and, the witnesses thereto, namely Peer Mohammad Azad, and, one Imtiyz Ahmad Hakak, is, anvilled, upon, (a) all aforesaid rather beguiling, her to execute it, (b) the, apt deception practised, upon, her is, embodied in

the complaint, besides, is, testified, by her rather to arise, from, its rather containing a false recital, vis-a-vis, accused Gulam Hassan Hakim, not, at the stage contemporaneous to the execution of Ex.PW1/D, being single or unmarried, rather his thereat being married to one Jamila, (c) AND, his not annulling his marriage with Jamila, though, assured to her by accused Gulam Hassan Hakim, and, the witnesses to Ex.PW1/D. The prosecution in proving the aforesaid factum, had, depended upon the testification, in consonance therewith, rendered by the complainant/prosecutrix, and, upon Ex.PW29/B, wherein, Jamila, is, continued to be reflected, as, wife of accused Gulam Hassan Hakim, besides reliance was placed, upon, Ex.PW29/A, wherein similar therewith reflections also stand carried. The afore reflections, borne, in the afore referred exhibits, do carry, a presumption of truth, and, even though there, is, no strict interdiction, under, Muslim Law, against, the contracting, of, second marriage, inter se Muslims, despite, subsistence, in contemporaneity thereto, of, a prior marriage, of, either of the spouses concerned. (i) Dehors, afore, the prosecutrix's ascription of penal misdemeanors, to her husband, and, the witnesses to Ex.PW1/D, may, when stand founded, upon, a purported false recital, rather standing borne therein, and,comprised in one Gulam Hassan Hakim, rather in contemporaneity thereto hence cohabiting with one Jamila, also may hence achieve success, (ii) upon, best evidence, in, consonance therewith standing adduced. (iii) However, since reliance is placed, upon, the afore exhibits, thereupon, the falsity or otherwise ,of, the aforesaid recitals borne therein, is enjoined to be tested, given, the, afore reflections, borne, in the aforesaid exhibits, rather tentatively, carrying forth, the, prosecutrix's ascriptions. However, for the reasons to be assigned hereinafter, the reliance placed thereon, by the learned trial Court, is fallacious, (iii) given the learned trial Court, not, bearing in mind, the deposition rendered by DW-1, the son, of, the deceased Moulvi, of, the village concerned, (iv) especially, when, the apt defence evidence, unless cogently eroded, rather stands at a pedestal at par with the prosecution evidence, hence, also, if, efficacious, rather does also enjoin, meteing, of, apposite credence, and, probative vigour thereto. In his testification, borne in his examination-in-chief, DW-1, has with utmost candour, hence, made voicings therein, qua his deceased father, the Moulvi of the village concerned, in his presence, and, the in presence of 5-6 people rather dissolving besides annulling, the, marital ties inter se Jamila Begum, and, one Gulam Hassan Hakim. The afore rendered testification, was, concerted to be shred, of, its efficacy, by the learned PP concerned, by his subjecting the aforesaid witness, to cross-examination, (v) yet, he was unable to elicit, from him, any articulation, qua, no custom prevailing in the area concerned, against any oral dissolution, of, a muslim marriage, under, the aegis, of the Moulvi, of, the area concerned. Consequently, with the prosecution not thereafter, through, an appropriate motion, being made therebefore, producing the relevant best evidence, with open pronouncements therein (a) that the father of DW-1 being not the Moulvi of the village concerned, (b) nor it producing evidence, that, under the apt custom prevailing in the area concerned, there being a mandate, for, dissolution of marital ties, only, through a written deed, (c) thereupon, want of adduction thereof, rather leads, hence, to an inevitable conclusion qua the deposition, of, DW-1 hence carrying worth, and, apt probative vigour.

12. Be that as it may, even if, in the afore exhibits, borne in Ex.PW29/A, and, in Ex.PW29/B, one Jamila Begum, is continued, to be reflected to be residing in the house, of, Gulam Hassan Hakim, yet the afore reflections, would not, hence belittle, the testification of DW-1, as, her residing, in the house of the accused, may not per se, beget any further inference, of hers yet continuing to cohabit, with, one Gulam Hassan Hakim, as his wife. The further reason for making the aforesaid inference, arises, from the factum qua with the testification, of, the aforesaid, rather constituting the best evidence, for, belittling the efficacy, of, the testification of DW-1, (i) whereas, the prosecution, not, citing her, as a prosecution witness, nor hers stepping into the witness box, rather hence galvanizes, a firm inference qua the testification of DW-1, rather remaining hence uneroded. In aftermath, it is

to be concluded qua the apt recitals, borne in Ex.PW1/D, qua in contemporaneity, to the execution thereof, Gulam Hassan Hakim being single, not hence holding any vice, of, any falsity.

13. Furthermore, it is also to be determined whether the ascriptions, made by the prosecutrix, against the accused, appertaining to mis-appropriations, rather holding any credibility or not. For gauging the credibility, of, the prosecutrix's ascriptions qua the aforesaid factum, (i) it is imperative, to, allude to her testification, borne in her cross-examination, (ii) importantly when, upon, rather occurrence therein, of, gross improvements, and, embellishments, vis-a-vis, the apt echoings occurring in her examination-in-chief, and, vis-a-vis, her previous statement recorded in writing, whereupon, rather her credibility, would, stand pronounced, to, be hence eroded. During the course, of, the exacting cross-examination, of, the prosecutrix, by the learned defence counsel, the latter confronted her, with, her previous statement, borne in Ex.PW17/A, and, was able to therethrough, hence, make emergences, qua her testification, in her examination-in-chief, vis-a-vis, Gulam Hasan, borrowing 1800 US dollars, being both an improved, and, an embellished version, given, it, visibly standing not embodied in Ex.PW17/A. Likewise her version in her examination-in-chief qua hers lending 9600 US dollars, to accused Gulam Hassan, for purchasing land, in Pehalgaum, is also an apt improved or embellished version, as it, upon hers being confronted, with, her previous statement, recorded in writing, borne Ex.PW17/A, rather not finding any mention therein. Further more, her testification in her examination-in-chief, qua hers being asked by accused Gulam Hassan, to close her business at California, and, to return to his house, at Pehalgaum, is also ridden with an aura of falsity, given, Ex.PW17/A, wherewith, the prosecutrix, during, the course of her cross-examination, stood, confronted with, by the learned defence counsel, rather not carrying any concurrent therewith articulations. Likewise her version, in her examination-in-chief, qua, upon, hers returning from California, thereupon, accused Gulam Hassan picking her at Delhi Airport, whereat,she had eight big boxes with her, and, hers staying in a hotel in Delhi, is, also an improved or an embellished version, (i) as it, upon, hers being confronted with her previous statement recorded in writing, and, as, borne in Ex.PW17/A, it, not finding any mention therein. (ii) Furthermore, her version in her examination-in-chief qua the accused Gulam Hassan hence sexually assaulting her at Dharamshala, is also, an improved, and, an embellished version, (iii) given, upon, hers, being confronted by the learned defence counsel, with her previous statement recorded in writing, and, as borne in Ex. PW17/A, it, not finding any mention therein. (iv) Likewise her version, in her examination-in-chief, qua, theirs staying at Dharamshala, in, a separate accommodation, as husband and wife, and, hers purchasing T.V. Fridge etc, worth 2500 US dollars, (v) as also her version, qua, on, 8.11.2002, accused Gulam Hassan, leaving, in the morning to Kashmir, and, hers being alone at Dharamshala, and, her friend coming to his house, and, after some time, accused Gulzar Ahmed, coming to her house, with three porters, and, telling that accused Gulam Hassan, is, not coming back, and, hers selling the articles lying in house to accused Gulzar, for Rs.1,00,000/-, (vi) are all hence an apt improved, and, embellished version(s), given, on hers being confronted, by the learned defence counsel, with, her previous statement, borne in Ex.PW17/A, the aforesaid factum, not, finding any mention therein. Moreover, her version occurring, in her examination-in-chief, qua, a Muslim Priest hence coming to the houseboat, wherein, she was staying, for rather solemnizing her marriage, with, accused Gulam Hassan, as also, her version occurring in her examination-in-chief qua after, the, solemnising, of, their marriage in the houseboat, theirs, coming to High Court at Srinagar, (vii) whereat, the apt marriage agreement, borne in Ex.PW1/D, was prepared, is also ridden with an aura of falsity, given, Ex.PW17/A, wherewith the prosecutrix stood confronted, during, the course of her cross-examination, not carrying, any, concurrent therewith apt recital(s). Furthermore, her version in her

examination-in-chief qua accused Gulzar Ahmed after purchasing the aforesaid articles, hence, bringing her, to, the court, on the pretext of giving her, a receipt, and, hers signing a blank paper, is also an improved besides an embellished version, vis-a-vis, her previous statement recorded in writing, as, borne in Ex.PW17/A, given hers, on, being confronted therewith, it, not, finding any mention therein.

14. The afore apparent gross embellishments, and, improvements, as, made by the prosecutrix, in her examination-in-chief, vis-a-vis, her previous statement recorded in writing, and, as borne in Ex.PW17/A, do, on all fronts, hence render all her echoings, as, borne in her examination-in-chief, to be hence ridden, with, a pervasive vice of falsity, (b)with, the further concomitant effect qua her testification, in, purported corroboration, of, the contents of Ex.PW17/A, being not amenable, for meteing, of, any probative vigour or any credence thereto.

15. The effect of the aforesaid discussion, is, qua despite the testification of the prosecutrix, as, comprised in her examination-in-chief, being omnibusly incredible, it rather being hence grossly improper, for, the learned trial Court, to proceed to render an order of conviction, upon, the convicts/appellants herein. In aftermath, the findings of conviction, as, recorded by the learned trial Court, upon, the convicts , hence, suffer from gross perversity or absurdity of gross mis-appreciation, of, evidence on record.

16. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court, has not appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, suffers from, a, gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

17. Consequently, all the appeals are allowed and the judgement of conviction, impugned before this Court, is, set aside. In sequel, all the convicts/appellants are acquitted of the offences charged. The convicts/appellants are ordered to be released forthwith, from, judicial custody, if they are not required in any other case or process of law. Fine amount, if any, deposited by the convicts be refunded to them. Release orders be prepared accordingly. 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.

Smt. Priya &anr. ....Petitioners.

Versus

AbdeshKondal&ors. ....Respondents.

CMPMO No. 285 of 2018.
Date of decision: September 06, 2018.

Code of Civil Procedure, 1908- Section 24- **Hindu Marriage Act, 1955**- Section 9- Transfer of case- wife seeking transfer of petition filed for restitution of conjugal rights by her husband from court of Senior Civil Judge, Kangra at Dharamshala, to court of Senior Civil Judge, Chamba, on ground that after being evicted from matrimonial house, she is residing with her parents at Chamba- Husband opposing transfer- Held, in matrimonial disputes, convenience of wife is of paramount consideration- Case instituted by wife against husband and others under Prevention of Domestic Violence Act, also pending in court of

Senior Civil Judge, Chamba- Petition pending before Senior Civil Judge, Dharamshala, ordered to be transferred to Chamba- Petition allowed. (Para 3 & 4)

Cases referred:

Rajani Kishor Pardeshi v. Kishore Babulal Pardeshi (2005) 12 SCC 237

Anjali Ashok Adhwani v. Ashok KishinchandSadhwani AIR 2009 SC 1374

For the petitioners	:	Mr. Anand Sharma, Advocate.
For the respondents	:	Mr. Govind Korla, Advocate.

The following judgment of the Court was delivered:

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

This petition under Section 24 of the Code of Civil Procedure has been filed with a prayer to transfer HMA No. 1 of 2018 Annexure P-4 (petition under Section 9 of Hindu Marriage Act) from the Court of learned Senior Civil Judge, Kangra at Dharamshala to that of learned Senior Civil Judge, Chamba on the ground that petitioner No.1 (respondent in the Court below) after being removed by her husband, the respondent No. 1 herein, from the matrimonial home is presently residing with her parents in Mohal Mai Ka Bag, Chamba town, District Chamba, hence it is difficult for her to defend herself in the pending petition filed by respondent No. 1 for a decree of restitution of conjugal rights in the court of learned Senior Civil Judge, Kangra at Dharamshala. Also that, a petition she preferred under Sections 12 and 18 of the Protection of Women from Domestic Violence Act against her husband, respondent No. 1 and his parents respondents No. 2 and 3 is also pending in the same court at Chamba as Senior Civil Judge, Chamba is also the Chief Judicial Magistrate.

2. Mr. Govind Korla, Advocate, learned counsel representing the respondents has opposed the petition on the grounds, inter-alia, that the same has been filed merely to delay the proceedings in the pending petition filed in the Court of Senior Civil Judge, Kangra at Dharamshala under Section 9 of the Hindu Marriage Act for passing decree of restitution of conjugal rights . Also that the respondents are poor persons, hence to arrange a Counsel at Chamba and attend the hearing there would result in lot of inconvenience and financial hardship to them.

3. Having gone through the record of this case and taking into consideration the rival submissions coupled with the law laid down by the Apex court in ***Rajani Kishor Pardeshi***v. ***Kishore Babulal Pardeshi (2005) 12 SCC 237*** and ***Anjali Ashok Adhwani***v. ***Ashok KishinchandSadhwani AIR 2009 SC 1374,*** since it is the convenience of the wife paramount consideration while considering an application of this nature coupled with the factum of one more case i.e. a petition under Sections 12 and 18 of the Protection of Women from Domestic Violence Act, Annexure A-1 colly, between the same parties is pending disposal in the same court i.e. Senior Civil Judge, Chamba (on criminal side Chief Judicial Magistrate), the transfer of the petition Annexure A-4 registered as HMA No. 1 of 2018 in the books of the court of learned Senior Civil Judge, Kangra at Dharamshala would be in the interest of the petitioners herein and thereby even no prejudice is likely to be caused to the respondents also as they are defending themselves in the same Court at Chamba in the proceedings initiated by petitioner No. 1 under the provisions of domestic Violence Act. The submission that transfer of the petition Annexure P-4 to Chamba may result in lot of inconvenience and also huge financial loss to the respondents have merely been made for rejection for the reasons that allowing the proceedings to continue in the court of Senior Civil Judge, Kangra at Dharamshala in the pending petition it is the petitioner No.1 who

being a lady and her minor daughter petitioner No. 2 dependant upon her would be the sufferer in real sense.

4. For all the reasons hereinabove and also the legal position discussed, this petition is allowed. Consequently, the petition registered as HMA No. 1 of 2018 Annexure A-4 is ordered to be transferred from the books of the court of learned Senior Civil Judge, Kangra at Dharamshala to that of Senior Civil Judge, Chamba for disposal in accordance with law.

5. The parties through learned Counsel representing them are directed to appear in the transferee court on *8.10.2018.* Learned Senior Civil Judge, Kangra at Dharamshala shall sent the record of the petition to the transferee court so as to reach there well before the date fixed. The transferee court i.e. Senior Civil Judge-cum-Chief Judicial Magistrate, Chamba shall conduct proceedings in the transferred petition and also in the petition filed by the petitioners against the respondents under the provisions of Domestic Violence Act simultaneously i.e. on the same day so that the respondents are not compelled to prosecute the present petition and the petition already pending before the transferee court on different dates.

6. The petition is accordingly disposed of, so also the pending application(s), if any.

7. An authenticated copy of this judgment be sent to the court of learned Senior Civil Judge Kangra at Dharamshala and learned Senior Civil Judge, Chamba for compliance.

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

Ravi Kumar and others .....Petitioners

Versus

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

Cr. MMO No. 134 of 2018
Reserved on: 10.09.2018
Decided on: 17.09.2018

Code of Criminal Procedure, 1973 - Sections 320 & 482- Inherent power- Exercise of- Quashing of FIR- Accused seeking quashing of FIR pursuant to compromise with victim- State opposing petition- Held, in appropriate cases to meet out ends of justice FIR or complaint can be quashed even in non-compoundable cases- On facts, in view of compromise, FIR ordered to be quashed- Petition allowed. (Para 9 & 12)

Cases referred:

B.S. Joshi and othersvs. State of Haryana and another, (2003) 4 SCC 675

Preeti Gupta and anothervs. State of Jharkhand and another, (2010) 7 SCC 667

Jitendra Raghuvanshi and othersvs. Babita Raghuvanshi and another,(2013) 4 SCC 58

ParbatbhaiAahir alias ParbatbhaiBhimsinhbhaiKarmur and othersvs.State of Gujarat and another, (2017) 9 Supreme Court Cases 641

For the petitioners: Mr. TenzenTashi Negi, Advocate.

For the respondents: Mr. Ashwani Sharma and Mr. P.K. Bhatti, Additional Advocate Generals, for respondent No. 1.

Mr. Arsh Rattan, Advocate, vice Mr. Pradeep Kumar Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

ChanderBhusanBarowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code"), has been maintained by the petitioners for quashing of Criminal Case No. 88/2016, under Sections 341, 323, 147, 149, 504 and 382 of the Indian Penal Code, pending before the learned trial Court, on the basis of compromise arrived at between the parties.

2. Briefly stating the facts, giving rise to the present petition are that on 04.01.2016, respondent No. 2 was going from Hoshiarpur to Kullu, at around 11:45 p.m., when he reached at Saloni, he saw two cars on each side of the road, in which 5-6 persons were sitting and when he was about to pass these cars, two persons stepped out of the car and asked respondent No. 2 to stop the car, they also demanded money from respondent No. 2. Feeling threatened, respondent No. 2 ran away from the spot, however at around 12:05 a.m., when respondent No. 2 reached Bhota, the car bearing No. HP-21B-9211 (Skoda) overtook him and stopped right in front of him. Thereafter the persons sitting in the said car allegedly caused physical hurt to respondent No. 2 and stole money from his car, as well as from his purse. Accordingly, FIR, under Sections 341, 323, 147, 149, 504 and 382 of the Indian Penal Code, came to be registered against the petitioners. However, now the parties have entered into a compromise **(Annexure PB)** and they do not want to pursue the case against each other. Hence the present petition.

3. Learned counsel for the petitioners has argued that as the parties have compromised the matter, vide Compromise Deed **(Annexure PB)**, no purpose will be served by keeping the proceedings against the petitioners, hence the proceedings pending before the learned trial Court may be quashed and set aside.

4. Learned counsel appearing on behalf of respondent No. 2 has argued that the present petition may be allowed, in view of the compromise arrived at between the parties.

5. On the other hand, learned Additional Advocate General has argued that the present petition be dismissed.

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

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

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole**

purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.

[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomesnecessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.

[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

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

[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after

the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

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

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

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

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

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the

powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

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

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

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

10. Similarly, Hon'ble Supreme Court in **ParbatbhaiAahir alias ParbatbhaiBhimsinhbhaiKarmur and others***vs.***State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

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

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

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

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

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

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

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

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

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

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in

an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

11. Thus, taking into consideration the law as discussed hereinabove, this Court finds that the interest of justice would be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise Deed **(Annexure PB)**, placed on record.

12. Accordingly, looking into all attending facts and circumstances, I find this case to be a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code. Accordingly the present petition is allowed and Criminal Case No. 88/2016, under Sections 341, 323, 147, 149, 504 and 382 of the Indian Penal Code, pending before the learned trial Court is ordered to be quashed.

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

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

Tilak Raj. ...Petitioner

Versus

Chief Engineer (MZ), HP PWD Mandi & Another. ...Respondents

Arb. Case No. 28 of 2018
Date of decision: 14.9.2018

Arbitration and Conciliation Act, 1996- Section 12(5)-Seventh schedule- Neutrality principle- Held, in view of Section 12(5) of Act and Seventh schedule, Arbitrator having official relationship with any of parties, cannot continue as Arbitrator with arbitration- Appointment of Superintending Engineer is substituted by Hon'ble retired Judge of High Court as Arbitrator. (Para 7)

Arbitration and Conciliation Act, 1996- Section 29A (1)(3)and (4)-Arbitration-Extension of time-Termination- Held, each Arbitrator is required to pass award within one year from entering upon reference, and this period can be extended by six months if no award passed within time or extended time, proceedings shall terminate unless Court either prior or after expiry of period so specified further extends period. (Para 6)

For the Petitioner: Mr. R.L. Chaudhary, Advocate.

For the Respondents: Mr.Shiv Pal Manhans&Ms.Rameeta Kumari, Additional Advocates 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 under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of a new independent Arbitrator to adjudicate upon the claim of the petitioner against the respondents arising out of agreement No. 198 of 2006-2007 entered upon between the parties to execute the work with respect to construction of link road from Manali Leh to village Marbal Km.0/0 to 6/700 package No. HP-07-02.

2. In the reply, respondents have controverted the plea of the petitioner, rather, have levelled counter allegations upon the petitioner regarding executing the work without adhering to the terms and conditions of the agreement entered into between the parties.

3. It is undisputed that there is clause 25 in the agreement for referring the dispute arising out of the agreement for arbitration.

4. It is undisputed that to resolve the dispute between the parties, Mr. Kartar Singh, Engineer 1st Circle, HP PWD, Mandi, District Mandi was appointed as Arbitrator vide order dated 2.9.2016 passed by this High Court in Arbitration Case No. 76 of 2016 and further that he has failed to adjudicate the claims even during extended period granted to him and thereafter he has suspended the proceeding vide order communicated to the parties vide letter dated 14.3.2018 (Annexure P-2) till further extension or substitution of Arbitrator by this High Court as per amended provisions of Arbitration and Conciliation Act.

5. In reply, it is mentioned that the Arbitrator cannot finally adjudicate the dispute within stipulated period due to compelling climate condition of the area, as the work under dispute could not be inspected and re-measured on the site on account of blockade of road due to heavy snow fall, as the work site is situated in Lahaul valley and since November, 2017 till March, 2018, Rotang Pass, the gateway of the valley as well as site of work remained under cover of snow, making it impossible to jointly inspect the site work to reconcile the work executed and payment made to the petitioner.

6. Section 29A (1) of the Act provides that the award by arbitral tribunal shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. Section 29A (3) provides further extension of period specified in sub section (1) for a period not exceeding six months. Section 29A (4) provides that on failure to make the award within specified period under sub-section (1) or the extended period specified under sub-section (3), the mandate of arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period. Section 29A (6) provides that at the time of extending the period referred in sub-section (4), Court may substitute one or all of the arbitrators and in such case the arbitral proceedings shall continue from such stage already reached and on the basis of evidence and material already on record and the newly appointed arbitrator shall be deemed to have received the said evidence and material and as per sub-section (7), the reconstituted arbitral tribunal shall be deemed to be in continuation of the previously appointed arbitral tribunal and Section 29A (8) empowers the Court to impose actual or exemplary costs upon any of the parties under this section and proviso to sub-section (4) of Section 29A provides reduction of fees of arbitrator(s) by not exceeding five percent for each month of delay in making the award if it is found by the Court that the proceedings have been delayed for the reasons attributable to the arbitral tribunal.

7. In present case, the explanation for causing delay is genuine and beyond the control of Arbitrator as well as the parties and therefore, further extension of period as provided under Section 29A, deserves to be granted. However, in view of the provisions of Section 12 (5) of the Act and Seventh Schedule, continuance of appointment of

Superintending Engineer, 1st Circle, HPPWD, Mandi, as Arbitrator is not sustainable. Therefore, parties have agreed for substitution of Arbitrator.

8. It is submitted by learned counsel for the parties that in identical dispute Hon'ble Mr. Justice Surinder Singh Thakur, Judge (retired) has been appointed as Arbitrator in Arbitration Case No. 68 of 2017 and it would be convenient and beneficial to the parties to refer this dispute also to the same Arbitrator.

9. Therefore, allowing the petition, with the consent of the parties, I appoint Hon'ble Mr. Justice Surinder Singh Thakur, Judge (retired), as an Arbitrator by substituting the Arbitrator appointed earlier, with a direction to him to enter into reference within a period of two weeks from receipt of this order and to make a reasoned speaking award in terms of arbitration agreement, in accordance with law, on the basis of material placed before him during proceedings. Fee of learned Arbitrator shall be as per his entitlement as admissible in accordance with law.

10. Registry is directed to immediately supply copy of this order to Hon'ble Mr. Justice Surinder Singh Thakur, Judge (retired.)

11. Petition is allowed in the aforesaid terms.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Shri Sanjeev Kumar & Others. .....Respondents.

FAO No. 537 of 2017
Reserved on: 7.8.2018
Decided on: 23.8.2018.

Motor Vehicles Act, 1988- Section 166- Motor accident- Death- Claim application- Contributory negligence- Insurer challenging award of Claims Tribunal on ground that deceased while driving scooty was negligent and accident was result of her contributory negligence and entire liability cannot be imposed upon it- Evidence revealing scooty having been hit from rear by offending vehicle- Held, contributory negligence on part of deceased not proved- Appeal dismissed- Award upheld. (Para 4)

Motor Vehicles Act, 1988- Section 166- Motor accident- Death- Claim application- Compensation- Deduction towards Income tax- Held, there is no inflexible rule that while computing monthly income 30% of deceased is to be deducted towards income tax in every case- Rate of income tax being in variant figures depends upon income. (Para 5)

Cases referred:

Shyamwati Sharma & others Versus Karam Singh & Others, (2010)12 SCC 378

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

For the Appellant: Mr. Ashwani K Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.

For the Respondents: Mr. Ajay Chauhan, Advocate, for respondents No. 1 to 3.
Mr. Dheeraj K Vashishta, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, is, directed against the award of 1.9.2017, pronounced by the learned Motor Accident Claims Tribunal, Una, District Una, Himachal Pradesh, upon, MACP No. 119 of 2016, whereunder, it assessed, upon the dependents of the deceased Kusum Lata, compensation amount borne in a sum of Rs. 66,91,600/- alongwith interest at the rate of 9% per annum, from, the date of filing of the claim petition i.e. 29.11.2016 till its realization. The apt indemnificatory liability whereof was fastened, upon, the insurer. The compensation amount was ordered to be disbursed equally amongst petitioners No. 2 and 3. The petitioners No.2 and 3 being minors, hence the compensation amount, was ordered to be maintained in FDRs drawn, upon, some nationalized bank at Una, till theirs' attaining majority. Being aggrieved therefrom, the insurer of the offending vehicle, has hence instituted the instant appeal before this Court.

2. The learned counsel for the appellant, has made a vehement contention before this Court, that the affirmative findings returned by the learned tribunal, upon, the issue appertaining to the relevant mishap, wherein deceased Kusum Lata sustained injuries, and, injuries whereof stand pronounced in the apposite Post Mortem report, borne in Ex.PW-2/A, to stand entailed upon her head, entailment whereof, stands, testified by PW-2 (Dr. Subhash Sharma), to be a sequel of a road accident, rather warranting invalidation, by this Court, given (a) there existing firm evidence on record qua the deceased while driving a scooty, hers' rather not contributing to the accident (b) whereupon the apt proportionate indemnificatory liability was enjoined to be also burdened, upon, the insurer, of, the apt scooty, rather, than solitarily upon the insurer of the offending vehicle.

3. However, the aforesaid submission addressed before this Court, by the learned counsel for the appellant, though, is bedrocked, upon, pleadings apposite therewith, as, embodied in the reply furnished, to the apt claim petition, by the insurer, yet, with, no evidence in consonance therewith standing adduced, thereupon the aforesaid espousal, is, hence rendered persesurmisal.

4. Further more, contrarily, the factum of deceased Kusum Lata while being borne, on, the scooty, and, it being struck from the rear, by, the driver of the offending vehicle, stands testified by PW-1, and, also the factum aforesaid, is also embodied in the apt FIR, borne in Ex. PW-1/A. Even if PW-1 is not an eye witness to the occurrence nor the apt FIR hence constitutes any substantive piece of evidence, thereupon the testification of PW-1, and, the aforesaid apt recitals, borne/ embodied in FIR Ex. PW-1/A, may not comprise, overwhelming potent evidence, for hence validating the affirmative findings recorded, by the learned MACT concerned, upon, the issue appertaining to the relevant mishap, being a sequel of rash, and, negligent manner of the driving, of the offending vehicle by its driver (a) yet with an ocular witness, to the occurrence, one Rakesh Kumar (PW-4), in his examination-in-chief, rendering a testification bearing the utmost concurrence, with, the echoings borne in the apt FIR, and, (b) when during the course of his exacting cross-examination, his testification borne, in her examination-in-chief rather remained intact, (c) thereupon it is to be firmly concluded qua the tragic road mishap, hence being a sequel of rash and negligent driving of the offending vehicle, by its driver, and concomitantly it is also

to be concluded qua the deceased while atop the scooty, not, hence contributing to the tragic mishap.

5. Be that as it may, the learned counsel for the appellant, has contended that, with the Hon'ble Apex Court, in a judgment reported in a case titled as *Shyamwati Sharma & others* Versus *Karam Singh & Others*, reported in (2010)12 SCC 378, relevant paragraphs 7,8 and 9 whereof, stand extracted hereinafter, making therein trite expostulation of law, qua it being imperative, for, Courts of law, to, mete 30% deductions, workable towards income tax, as attractable upon the salary drawn by the deceased, (i) thereupon, it being incumbent upon this Court, to, in consonance therewith, mete the apt deduction, and (ii) he further contends that the figure, of, per mensem salary computed by the learned Tribunal also enjoining concomitant therewith deductions, and, (iii) thereafter the amount of compensation, determined by the learned tribunal, also, warranting re-assessment, and, re-computation. However, the aforesaid submission addressed before this Court rather is unnameable, for acceptance, given (i) the learned counsel for the appellant, not bearing in mind the apt underlinings, borne, in paragraph 9 of the judgment supra, on reading whereof, it is rather apparent qua the apt deduction(s) of income tax, vis-a-vis, the salary of the deceased, being imminently constituted in variant figures, (ii) besides its standing postulated therein, qua, the apt deduction borne, in 30%, only appertaining to the facts prevalent thereat, (iii) imperatively hence, the aforesaid judgment relied upon by the learned counsel for the appellant, does not, constitute any inflexible *ratio decidendi*, rather meteing(s) of deduction, vis-a-vis, the last drawn salary of the deceased, being obviously dependent, upon, the apt income tax returns filed, by the deceased, and, theirs being adduced into evidence (iv) whereas hereat, the insurance has not either tendered into evidence, the, apt income tax returns nor enabled their exhibition, (v) thereupon, any applying, in consonance therewith, to the fullest, the, meteing, of, 30% deduction thereon, would be grossly unjust, (vi) conspicuously, when for all the reasons' aforesaid, it does not postulate any inflexible binding *ratio decidendi* rather reiteratedly, the meteing of apt deductions being dependent, upon, the aforesaid apt evidence being adduced, whereas, the aforesaid evidence remains un-adduced hereat.

> "7. As notice above, the gross salary was Rs. 13,974 per month or Rs. 1,65,528 per annum. By adding 50% towards future prospects (as the deceased was less than 40 years of age), the deemed gross income would have been Rs. 20,691 per month or Rs. 2,48,292 per annum. The percentage of deduction towards income tax and surcharge, taken as 30% by the High Court does not required to be disturbed, having regard to the income. On such deduction, the next annual income of the deceased would have been Rs. 1,73,800. From the said sum, one-fourth (25%) had to be deducted towards the personal ad living expenses of the deceased. Thus the contribution of the deceased to his family would have been Rs. 1,30,350 per annum. By applying the multiplier of 15, the total loss of dependency will be Rs.19,55,250. By adding a sum of Rs. 5000 each under the heads of loss of consortium, loss of estate and funeral expenses, the total compensation is determined as Rs. 19,70,250/-.
>
> 8. The submission of the respondents that the deduction of 30% from the salary is not warranted in vie of the decision in Sarla Verma is not sound. In Sarla Verma the monthly salary of the deceased was only Rs. 4004 and the annual income even after taking note of future prospects was Rs. 72,072. The income was in a range which was exempt from tax, if the permissible deductions were applied. Therefore, this Court did not make any deduction towards income tax. But this Court made it clear that where the

annual income in in the taxable range, appropriate deductions should be made towards tax.

9. In this case as the annual income has been worked out as Rs. 2,48,292 appropriate deduction has to be made towards income tax. The rate of income tax is a varying figure, with reference to taxable income after permissible deductions and the year of assessment. The High Court has assessed the deduction as 30% and on the facts, we do not propose to disturb it. We however make it clear that while ascertaining the income of the deceased any deduction shown in the salary certificate as deductions towards GPF life insurance premium, repayments of loans, etc should not be excluded from the income. The deduction towards income tax/surcharge alone should be considered to arrive at the net income of the deceased."

6. Consequently, reiteratedly it was enjoined, upon, the insurer, to elicit from the income tax department, the annual returns filed by the deceased, and, as accepted by the Department concerned, yet the aforesaid elicitations, were not endeavored by the learned counsel for the insurer.

7. However, in the larger interest of justice, this Court deems it fit to make 15% deduction from the last drawn salary of the deceased.

8. With the Hon'ble Apex Court, in case titled as *National Insurance Co. Ltd. vs. Pranay Sethi and others,* reported in *2017 ACJ 2700*, the relevant paragraph No.61 (iii) extracted hereinafter, rather expostulating (i) that where the deceased concerned, is rendering employment, in 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, in contemporanity, vis-a-vis, the ill fated mishap, being also meteable thereto.

"(ii) 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 as 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."

9. For meteing the fullest justice, hence with the salary certificate borne in Ex.PW-5/A, making a pronouncement qua the deceased drawing, salary borne in a sum of Rs. 33,552/-, and, after meteing 15% deductions, vis-a-vis, the relevant last drawn salary of the deceased, the deceased's apt salary is reckonable at Rs. 28,519/-. The deceased was aged 31 at the relevant time, consequently, in consonance therewith, after meteing apt 50% incremental increase(s) towards future prospects, vis-à-vis, the deceaseds' last drawn salary, thereupon, the relevant last drawn salary, of, the deceased is reckonable, at Rs.42,778/-, [Rs.28,519/-(last drawn salary of the deceased)+ Rs.14259/- (50% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, two, hence, 1/3rd deduction is to be visited, upon, a sum of Rs.42,778/-, deducted, amount whereof, is calculated at Rs. 14,259/- per mensem. Consequently, the annual dependency, including the future hikes towards future prospects, is, worked out, now at Rs.42,778-14,259=28,519/- In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.28,519 x 12= 3,42,228/-. After applying, upon, the aforesaid figure, of, annual dependency, the apposite multiplier of 16, the total compensation amount, is assessed, in a sum of Rs.3,42,228 X 16 =54,75,648/-.

10. However, the quantification, of compensation, by the learned Tribunal in a sum of Rs. 50,000/-, vis-a-vis, the claimants under the head, cost of litigation and funeral expenses, and Rs. 1,00,000/- under the head, loss of love and affection, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in *National Insurance Co. Ltd. vs. Pranay Sethi and others,* 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 compensation amount(s), being awardable, to the widow, and, to the offspring and mother of the deceased, especially under the head, loss of love and affection, and, cost of litigation, hence reliefs in respect thereto, stand hence impermissibly granted, and, are quashed and set aside.

11. 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 off springs of the deceased. Accordingly, in addition to the aforesaid amount of Rs. 54,75,648/-/-, the claimants, are, nowat entitled, under, conventional head, namely, funeral expense, sums of Rs.25,000/-, as such, the total compensation whereto the claimants are entitled, comes to Rs.54,75,648/- + 25,000/-= Rs. 55,00,648/-.

12. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants are, held entitled to a total compensation, of, Rs. 55,00,648/-, along with pending and future interest thereon @ 7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. Compensation amount be disbursed equally amongst claimants/respondents No.2 and 3. The amount of interim compensation, if awarded, be adjusted against the aforesaid compensation amount, at the time of final payment. Since the claimants are minors, hence the amount of compensation qua their share is ordered to be kept in the FDR drawn upon some nationalized bank till they attain majority. All pending applications also stand disposed of. Records be sent back forthwith.

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

Ravinder Singh ....Petitioner.

Versus

Bhakra Beas Management Board through its Chairman. ... Respondents.

CWP No. 6588 of 2012
Decided on: 23.8.2018.

Constitution of India, 1950- Articles 14 & 16- Promotion – Absence of Statutory R&P Rules – Effect – Petitioner found discharging work of Senior Law Officer since December, 2010 when post fell vacant without being formally promoted to said post – No R&P Rules in existence in December, 2010-Promotion used to be made by Board as per administrative orders –R&P Rules notified in June, 2015 only – Petitioner claiming promotion to post of Senior Law Officer since December, 2010-Board contending that petitioner cannot be promoted by circumventing R&P Rules – Held, Board allowed status quo to continue as same was in its interest – Board continuously taking work from petitioner as Senior Law Officer for last many years, can not contend that he is not eligible for promotion for said post- Board directed to initiate proceedings for his promotion against post of senior Law

Office as per procedure as was in vogue as on 1.12.2010, and complete same within specified time. (Paras-7 to 9)

For the petitioner. Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate.

For respondent. Mr. N.K. Sood, Sr. Advocate with Mr. Aman Sood, Advocatel.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of the present writ petition, the petitioner has prayed for the following substantive reliefs:-

> *"i) That the respondent Board may be directed to consider the petitioner for deemed promotion to the post of Sr. Law Officer from the date when he became eligible to the said post i.e., the July, 2004*
>
> *Or*
>
> *The respondent be directed to treat the petitioner promoted as Sr. Law Officer from the year 2004 for the purpose of counting experience for future promotions.*
>
> *ii) That the respondent Board may be further directed to consider the petitioner for regular promotion to the post of Sr. Law Officer from 1.12.2010 from which date he is performing/discharging the duties of said post.*
>
> *iii) That the petitioner may also be held entitled to arrears of salary and consequential benefits with interest notionally from July, 2004 to November, 2010 and actually from December, 2010 till date."*

2. When the matter was heard on 16.8.2018, the following order was passed:-

> *" Heard for some time. Before any further order is passed, respondent-Board is directed to produce the original record pertaining to the promotions, which were effected vide office order dated 27th July, 2004 (Annexure P-2) along with the reasons, if any, as to why the petitioner was not considered for promotion to the post of Senior Personal Officer Legal (Adhoc)/Senior Law Officer (Adhoc) at that stage.*
>
> *List on 23d August, 2018. Copy dasti."*

3. Today the original record pertaining to the promotions which took effect in the year 2004, has been made available by the respondent-Board, perusal of which demonstrates that against 02 available vacancies of Senior Law Officer, 05 incumbents were considered, which also included the petitioner. The name of the petitioner is at Sr. No. 3 as per his seniority in the proceedings of promotion.

4. Mr. N.K. Sood, learned Senior Counsel on the basis of the record submits that in the year 2004 the senior-most 02 incumbents were promoted against the available 02 vacancies and as the petitioner was at Sr. No. 3 in seniority, therefore, he could not be promoted. Mr. Sood further submits that at the relevant time, there were no Rules governing Recruitment or Promotion to Class-I and Class-II posts in Bhakra Beas Management Board (in short 'BBMB') which included the post of Senior Law Officer, therefore, promotions were made on the basis of the seniority and the quota of the participating States.

5. Mr. Sood, further submits that promotions in the year 2004 were done on the strength of administrative orders, as at that time there were no R&P Rules, but as now, R&P Rules to the post in issue stand framed, which are statutory in nature, therefore, the petitioner cannot now claim right of promotion by circumventing the Rules, which stand published in the Gazette of India on 26th June, 2015.

6. Having heard learned counsel for the parties and having perused the pleadings as also the records which have been made available in the Court today, it is evident that in the year 2004, when Sh. Ram Paul and Ms. Neeru Chadha were promoted against the posts of Senior Law Officer, they were so promoted on the strength of their seniority by way of administrative orders, in the absence of there being any promotion Rules, governing promotion to the post in issue. Record also demonstrates that one post of Senior Law Officer became available in the respondent-Board on the superannuation of one Sh. D.L.Sharma, who retired on 30.11.2010. It is not in dispute that since then it is the petitioner, who is performing the duties of the post in issue, though he has not been formally promoted to the said post. In this background, Mr. Gautam, learned Senior Counsel has submitted that if not from the year 2004, then at least, the petitioner should be promoted against the post of Senior Law Officer from December, 2012, as he is performing the duties of the said post since then.

7. Be that as it may, it is not in dispute that when in the year 2004 promotions were made to the post of Senior Law Officer, the petitioner was there in the zone of consideration, but he was not promoted, as there were persons senior to him who were promoted to the posts in issue by an administrative order. It is also not in dispute that the petitioner since 1.12.2010 is performing the duties of Senior Law Officer, as is evident from communications which stand appended with the petition which have not been so refuted by the respondent-Board. It is also not in dispute that the Statutory Rules have come into force after their publication in the Gazette of India only in the year 2015. Averments made in para-12 of the petition that the petitioner is discharging the responsibilities of Senior Law Officer since 1.12.2010 have not been specifically denied by the respondent-Board in its reply. From the above, it is clear that the factum of petitioner performing the duties of Senior Law Officer since 1.12.2010 is not in dispute. That being so, it is not understood as to why respondent-Board did not consider and promote the petitioner to the post of Senior Law Officer either in December, 2012 or within some reasonable time thereafter. When respondent-Board has got executed the work of Senior Law Officer from the petitioner since 1.12.2010, it cannot be the case of respondent-Board that the petitioner is not eligible/competent to perform the duties of the said post. The only inference which can be drawn is that as the work of the office in issue was being discharged by the petitioner without being formally promoted, respondent-Board allowed the status quo to continue as the same was in its interest.

8. Therefore, taking into consideration the fact that the petitioner has been performing the duties against the post of Senior Law Officer since 1.12.2010, it will be in the interest of justice in case respondent-Board considers the petitioner for promoting him against the said post w.e.f. December, 2010, provided that he was otherwise not suffering from any ineligibility for promotion to the post in issue as on 1.12.2010. Ordered accordingly.

9. Respondent-Board shall initiate proceedings for promotion of the petitioner against the post of Senior Law Officer as per the procedure which was in vogue as on 1.12.2010 and complete the same within a period of six weeks from today. This shall be done after affording an opportunity of being heard to the petitioner. In case the petitioner is not suffering from any ineligibility for being promoted to the post of Senior Law Officer as on

1.12.2010, then necessary orders in this regard shall also be passed by the respondent-Board within the same period with all consequential benefits.

Petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Sunit Kumar .....Petitioner.
Versus
State of H.P. & others .....Respondents.

Cr.MMO No.394 of 2018.
Decided on: 19.09.2018.

Code of Criminal Procedure, 1973- Sections 173(8) and 482- Further investigation-Direction for-Accused facing trial before Special Judge for offences under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act – Allegations against him being that he was driving vehicle from which 'Charas' recovered by police during search – Case at stage of recording evidence of prosecution – Accused filing petition under Section 482 of Code for directing police to conduct 'further investigation' as vehicle was never intercepted by them during 'Naka' and it was lifted from garage – Petitioner relying upon 'Toll tax receipts' and 'job card' of garage – Held – Further investigation can be ordered by jurisdictional Magistrate under Section 173(8) of code when final report filed by Investigating Agency, and Magistrate is satisfied that further investigation necessary – Petition under Section 482 of Code not maintainable – Fair investigation though part of fair trial yet practice to conduct investigation in particular manner and fashion should not be encouraged as there will not only be possibility of multiplicity of litigation but administration of criminal justice system would also be paralyzed and proceedings stalled - On facts, material on record not found sufficient to direct further investigation – Petition dismissed. (Paras -6 to 10)

CaseS referred:
Vinay Tyagi vs. Irshad Ali alias Deepak & ors., (2013) 5 SCC 762
Baljinder Kaur vs. State of Punjab (2015) 2 SCC 629

For the petitioner: Mr. Abhimanyu Rathore, Advocate and Ms. Poonam Gehlot, Advocate.
For the respondents: Mr. R.P.Singh, Dy. AG with Mr. Kunal Thakur, Dy. AG for respondents No. 1 to 4.

The following judgment of the Court was delivered:

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

Heard.

2. The petitioner is accused in FIR No. 73 of 2017 registered under Section 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act against him and his co-accused Vishal on 26.4.2017 in Police Station Palampur, District Kangra, H.P. This petition is filed for a direction to the Investigating Agency to conduct further investigation on the

grounds inter alia that he was not apprehended in the manner as claimed in the report under Section 173 Cr.P.C. filed against him and rather picked up from "Sangrai Auto Service Station", Palampur where he had taken his vehicle No. HP 37E-4437, Alto 800 for service on 25.4.2017 at 15:17:14 hours and prior to that he had gone to Chandigarh on 23.4.2017. The documents i.e. receipts issued by Toll Plaza (Annexure P-2) and Job Card by Sangrai Auto Service Station (Annexure P-3) have been pressed in service. The mileage of the vehicle when brought to the service station and when released to the petitioner has also been pressed in service to allege that on 25.4.2017 he was not driving the vehicle from Baijnath side to Palampur and rather brought the vehicle to service station at a stage when its mileage was 32334 kms. The vehicle when released to the accused-petitioner through his Special Power of Attorney, its mileage was 32343 kms. He intends to show that had the vehicle been driven by him on that day from Baijnath side, its mileage should have not been like the one as in the release document Annexure P-3 (Colly.).

3. As per further case of the accused-petitioner, prior to the registration of FIR No. 73 of 2017 against him, one Sanki allegedly son of a businessman of Palampur town and an influential person in the area on 29.3.2017 had administered beatings to him and also his friend Vijay. Therefore, at the instance of Vijay Kumar, FIR No. 56 of 2017 (Annexure P-1) under Sections 323, 341 and 506 read with Section 34 IPC was registered against said Sanki and his companions in PS Palampur. The apprehension of the accused-petitioner is that he had been booked by the police of PS Palampur for extraneous consideration as a counter blast to FIR (Annexure P-1) registered at the instance of his friend Vijay Kumar against Sanki and his companions.

4. In reply, the response of respondent-State is that on 25.4.2017, the police of PS Palampur had laid a Naka for traffic checking and also gathering information qua illicit trafficking of narcotic and psychotropic substances at Chadhiar Chowk, Palampur. The Station House Officer of the Police Station had received information that the vehicle bearing registration No. HP 37E-4437 (Alto 800) was coming from Baijnath side to Palampur and its driver carrying charas in the said Car. Another vehicle bearing registration No. HP 37 A 2196 (Trax) came there and it was signaled by the police to stop. That vehicle was being driven by Shashi Kumar and occupied by its owner Sh. Gian Chand. Simultaneously, the offending vehicle HP 37-E-4437 being driven by the accused-petitioner also arrived at the place of Naka. On seeing the police party, the driver (accused-petitioner) felt nervous and perplexed. The police enquired his name and other antecedents which he disclosed and claimed that he is owner of the said vehicle. On completion of the procedure prescribed under the ND & PS Act, the search of the vehicle was conducted in the presence of independent witnesses and charas weighing 1 kg 43 grams kept inside the mudguard of the right side front tyre was recovered. The same was seized and taken into possession and on compliance of other codal formalities, rukka sent to Police Station Palampur on the basis whereof FIR No. 73 of 2017 was registered against the accused-petitioner and his co-accused on 26.4.2017. It is, therefore, denied that he along with the vehicle was picked up from Sangrai Auto Service Station, Palampur and booked falsely in this case.

5. Mr. Abhimanyu Rathore, Advocate assisted by Ms. Poonam Gehlot, Advocate, has strenuously contended that in the given facts and circumstances, the present is a fit case where in view of the facts disclosed in this petition a direction is required to be issued to the Investigating Agency to conduct further investigation in this matter. In order to buttress the arguments so addressed, reliance has been placed on the judgment of the Apex Court in ***Vinay Tyagi vs. Irshad Ali alias Deepak & ors., (2013) 5 SCC 762*** and ***Baljinder Kaur vs. State of Punjab (2015) 2 SCC 629.***

6. True it is that fair investigation and trial is a Constitutional right of an accused booked by the police for the commission of an offence, however, in the nature of the relief sought cannot be granted in a petition under Section 482 Cr.P.C. and that too on the basis of the material placed on record to substantiate the plea so raised in the petition. As a matter of fact, in the case in hand, the investigation is complete. Report under Section 173(2) Cr.P.C. stands filed and trial is in progress in the Court of learned Special Judge i.e. Addl. Sessions Judge (III), Kangra at Dharamshala. The trial according to Mr. Rathore, learned counsel was fixed today for recording prosecution evidence. As a matter of fact, had there been necessity of further investigation required in the matter, the remedy available to the accused-petitioner was to have resorted to the provisions contained under Section 173(8) Cr.P.C. ant not the present petition. Admittedly, such remedy has not been availed at an appropriate stage.

7. As per the ratio of the judgment of the Apex court in ***Vinay Tyagi's case*** (supra), the Magistrate before whom the report/charge sheet under Section 173(2) Cr.P.C. filed may *suo motu* exercise the jurisdiction to direct further investigation if from the police report, so filed, satisfied that the same is necessary. It has also been held in this judgment that the Magistrate seized of the matter should exercise such power sparingly only in exceptional cases, where investigation already conducted was not in proper direction. Therefore, had the accused-petitioner, been aggrieved, would have resorted to the remedy available to him at the stage when the police had filed the report/charge sheet against him in the trial Court. Although the prayer in the petition is not to direct the investigating agency to conduct fresh/de novo investigation/re-investigation and rather for a direction to conduct further investigation, yet as per further ratio of the judgment in ***Vinay Tyagi's case*** cited supra, in a petition under Section 482 Cr.P.C., the High Court may order fresh/de novo investigation/re-investigation in the exercise of extra-ordinary inherent jurisdiction by a speaking order, dealing specifically qua the fate of the investigation already conducted and the final report filed by the investigating agency before the Magistrate. There is also a caution that such jurisdiction should be exercised in exceptional cases where investigation already conducted is unfair, tainted, malaifide and in violation of settled principles of the investigative canons which pricks the judicial conscience of Court. Additionally, reasons as to why previous investigation is incapable of being acted upon should also be recorded. Anyhow, since, there is no prayer for fresh/de novo investigation/re-investigation, therefore, this part of the ratio of the judgment (supra) is not applicable in the case in hand and further ratio of this judgment, as noticed supra, rather substantiates the view of the matter that had the accused-petitioner been aggrieved by the insufficiency of the investigation conducted should have resorted to the remedy available to him at an appropriate stage i.e. when the report/charge sheet under Section 173(2) Cr.P.C. was filed against him in the court.

8. Now, if coming to the law laid down by the Apex Court in ***Baljinder Kaur's case*** cited supra, there is no denying to the legal proposition that investigation plays an important role in the process of administration of criminal justice because the same is foundation stone on which the entire prosecution case rests. In the case in hand, nothing tangible suggesting that the investigation has not been conducted in its right direction and rather for extraneous consideration or influenced by Sainky, an accused in FIR Annexure P-1, registered at the instance of Vijay Kumar, the another victim of occurrence having taken place on 29.3.2017, has come on record nor it can be believed at this stage that the police framed the accused-petitioner falsely.

9. In a case of this nature where an accused is held guilty, there is provision of minimum sentence of 10 years imprisonment and Rs. 1,00,000/- as fine and as such even if the father of aforesaid Sainky is a businessman or influential person, also cannot be said to

be the reason of framing the accused-petitioner in this case falsely. Though, to elaborate the documents annexed to this petition at this stage may cause prejudice to the defence of the accused-petitioner, however, suffice would it to say that such material is also not sufficient to persuade this Court to take a view of the matter that further investigation in the matter is required to be conducted on the lines as suggested by the accused-petitioner in this petition.

10. Otherwise also, the practice to conduct investigation in a particular manner and fashion should not be encouraged as in that event each and every offender will come with similar plea and in that event there will not only be the possibility of multiplicity of litigation but also the criminal administration justice system to be paralysed and the proceedings stalled. On the other hand, when the trial is in progress, the accused-petitioner is at liberty to raise any plea in his defence, including the pleadings in this petition. The machinery provided under the Code of Criminal Procedure and also the ND & PS Act also provide a remedy to an offender if ultimately found to be framed by the police falsely on some extraneous consideration.

11. For all the reasons hereinabove, there is no merit in this petition and the same is accordingly dismissed.

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

Sh. Attru. .....Petitioner.

Versus

The Principal Secretary (Power) & ors. .....Respondents.

CWP No. 257 of 2012
Date of decision: September 20, 2018.

Land Acquisition Act, 1894- Sections 11 and 18- Compensation - Enhancement – Procedure - Collector assessing market value of acquired land as per classification mentioned in revenue record – Petitioner accepting compensation of his land recorded as 'Banjar Kadeem' – However, subsequently on his application, revenue entries changed from 'Banjar Kadeem' to 'KayarAbbal' – Petitioner filing writ and claiming compensation for 'KayarAbbal' land – Held, if petitioner was aggrieved by determination of market value of acquired land and compensation awarded, remedy available to him was under Section 18 of Act – Relief prayed cannot be granted in exercise of writ jurisdiction – Petition dismissed. (Paras-6 and 7).

For the petitioner Mr. Romesh Verma, Advocate.

For the respondents Mr. R.P. Singh and Mr. Kunal Thakur, Dy. AGs, for respondents No. 1 and 2.
Mr. Sunil Mohan Goel, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

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

Heard further. On the previous date, following order came to be passed in this petition.

> "On hearing this matter for sometime, perhaps the appropriate remedy available to the petitioner was to have preferred the reference under Section 18 of the Land Acquisition Act for determination of the market value of the acquired land and enhancement of compensation and not filing the present writ petition in this Court. The petitioner, if so advised, may withdraw the writ petition and prefer the reference petition, if law permits him to do so. Of course, in the matter of limitation, he may resort to the provisions contained under Section 14 of the Limitation Act, had he not been pursuing the remedy in appropriate forum. Learned counsel representing the petitioner seeks adjournment to have instructions. Allowed. List on 20.09.2018."

2. Mr. Romesh Verma, Advocate, learned Counsel submits that the petitioner is not willing to withdraw the writ petition and want that the same is decided on merits.

3. In the given facts and circumstances, the present is a case where the market value of the acquired land has been assessed as per the classification of the acquired land i.e. 'Banjar Kadeem' entered in the revenue record and compensation paid by Land Acquisition Collector and received by him accordingly. Subsequently, in an application he filed for correction of the revenue entries, the classification of the acquired land came to be changed as 'Kayar Awal' from 'Banjar Kadeem' vide order dated 7.3.2011 Annexure P-3. It is in this backdrop, a direction has been sought against the respondents to redetermine the market value of the acquired land by getting the same as 'Kayar Awal' and the compensation at enhanced rates paid accordingly.

4. The beneficiaries i.e. respondents No. 3 and 4 have resisted and contested the writ petition on the grounds, inter alia, that the market value of the acquired land has rightly been assessed after taking into consideration its nature and classification and the just and reasonable compensation awarded to the petitioner. It is also pointed out that had he been aggrieved by the award, reference should have been filed for redetermination of the market value and enhancement of the compensation under Section 18 of the Land Reference Act. The writ petition, as such, is stated to be not maintainable nor the petitioner entitled to the relief sought. Also that the order Annexure P-3 qua change of the classification of the acquired land from 'Banjar Kadeem' to 'Kayar Awal' is null and void being not passed by Land Revenue Officer under the provisions of Land Revenue Act and rather by the Land Reforms Officers that too behind the back of beneficiaries i.e. respondents No. 3 and 4.

5. Respondents No. 1 and 2 have resisted and contested the writ petition on the similar grounds.

6. On taking into considerations the pleadings of the parties and also the submissions made on both sides it is apparent that had the petitioner been aggrieved by the determination of the market value of the acquired land and the compensation awarded, he would have resorted to the remedy available to him under Section 18 of the Land Acquisition Act. The relief as sought cannot be granted by this court in the exercise of its writ jurisdiction. Otherwise also, the date when the land was acquired its classification recorded in the revenue record was 'Banjar Kadeem' and not 'Kayar Awal'. Therefore, at a subsequent stage on the plea of the nature thereof changed as 'Kayar Awal' that too behind the back of the beneficiaries, the order Annexure P-3 is hardly of any help to the petitioner. The judgment of this Court dated 28.2.2012 passed in *CWP No. 3918 of 2011*, title ***Jawahar Singh and others*** versus ***The Himachal Pradesh State Electricity Board and others*** is not applicable in the given facts and circumstances because in that case the respondents-beneficiaries had itself agreed to pay the market value of the land at the same rate as awarded to the adjoining land owners in respect of their land acquired for the same public

purpose qua which no award was passed though it was acquired and taken in possession by the respondents-beneficiaries.

7. In view of the legal as well as factual position discussed hereinabove, there is no merit in the writ petition and the same is accordingly dismissed.

8. Pending application(s), if any, shall also stand dismissed.

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

Shri Dalip Singh and another .....Appellants.
Versus
Shri Godham and others. .....Respondents

RSA No. 346 of 2003
Reserved on: 14.09.2018
Decided on: 20.09.2018.

Code of Civil Procedure, 1908- Order VI Rule 4- Fraud and misrepresentation – Pleadings and proof - Requirement – Plaintiff filing suit and challenging sale deed purportedly executed by defendant No.1 (D1) in favour of his daughter-in-law, defendant No.2 (D2) , on strength of power of attorney executed by plaintiff - Plaintiff alleging of having executed said power of attorney in favour of (D1) to manage his (plaintiff's) land and never authorized him (D1) to alienate it – Suit decreed by trial court and appeal of (D1 & D2) dismissed by Addl. District Judge – Regular Second Appeal – Defendants contending before High Court that pleadings insufficient in plaint to raise plea of fraud and misrepresentation - And lower courts went wrong in deciding issue in absence of requisite pleadings – On facts, High Court found that (a) plaintiff was illiterate, rustic shepherd (Gaddi) who mostly remained out of his village alongwith his herd (b) (D1) initially remained Patwari and thereafter Kananugo of that area (c) sale deed by (D1) in favour of his daughter-in-law and thus he himself a beneficiary (d) agreements to sell allegedly executed by plaintiff in favour of (D2) not proved by examining scribe and attesting witnesses (e) plaintiff had specifically pleaded in his plaint that power of attorney executed by him to enable (D1) to manage his land in his absence and he never authorized D1 to alienate the suit land and also that sale deed result of fraud and misrepresentation (f) plaintiff mentioning in plaint manner in which fraud practiced upon him (g) further, plaintiff orally cancelling power of attorney, day before sale deed was executed by (D1) in favour of his daughter-in-law (h) No proof of payment of consideration by (D2) to plaintiff- Held, no question that plaint lacks in better particulars or of non-appreciation of evidence available on record arises at all- Regular Second Appeal dismissed . (Paras-22 to 31).

Code of Civil Procedure, 1908- Order VII Rule 11- Rejection of plaint- Grounds –Non pleading and effect- Defendant not alleging anything in written statement on ground of which plaint should be rejected - Plea also not raised during arguments of regular second appeal – Held, no substantial question of law regarding rejection of plaint arises. (Para-20).

Code of Civil Procedure, 1908- Section 100 – Regular Second Appeal- Concurrent findings- Interference with – Held, in regular second appeal, High Court normally should not interfere with concurrent findings of facts recorded by Lower Courts unless and until those have been

recorded in complete misreading, misconstruction and misappreciation of evidence on record and thereby serious prejudice has been caused to aggrieved party. (Para-18).

Case referred:
Sher Mangat Ram vs. Krishna Devi and ors.,2013 (3) Shim. L.C. 1507

For the appellants: Mr. Bhupinder Gupta, Senior Advocate with Mrs. Poonam Gehlot, Advocate.
For the respondents: ex-parte.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Defendants/counter-claimants in the trial Court are in second appeal. The complaint is that the judgment and decree dated 02.06.2003 passed by learned District Judge, Kangra at Dharamshala in Civil Appeal No. 77-K/XIII-2001, whereby the judgment and decree dated 28.02.2001 passed by learned Senior Sub Judge, Kangra at Dharamshala in Civil Suit No. 227/92, in favour of respondent No.1, the counter-claimant has been affirmed.

2. Godam, respondent No.1 (hereinafter referred to as the 'plaintiff') claims himself to be owner in possession of land entered in Khata No. 3, Khatauni No. 6, Khasra Nos. 1148/1087 and 1156/1094 measuring 0-32-39 hectares, situated in Mohal and Mauza Garh, Tehsil Dharamshala, District Kangra, H.P. (hereinafter described as the 'suit land'). As per record and the findings recorded by both Courts below, the plaintiff is an illiterate and rustic villager and Shepherd (***Gaddi***) by caste and mostly remains away from the native place with herd of his sheep and goats. Dalip Singh, respondent No.1, remained posted as Patwari and Field Kanungo in the area where the suit land is situated. He developed intimacy and friendship with the plaintiff. Consequently, the plaintiff also reposed faith in him. Defendant No.1, taking undue benefit of the simplicity and also long absence of the plaintiff from his native place, manged the execution of attorney in his favour to lookafter the suit property in his absence from the village along with the herd of his sheep and goats. The plaintiff in good faith accompanied defendant No.1 to Tehsil Kangra where papers were prepared by the later. The contents thereof were never explained to the former. The plaintiff even never intended to authorize defendant No.1 to alienate his property to anyone else as he was only authorized to manage the suit property. On the basis of forged and fictitious power of attorney defendant No.1 with *malafide* intentionto grab the suit land sold the same to defendant No.2, none-else but his daughter-in-law vide sale deed dated 8.10.1992, registered on 09.10.1992. The sale of the suit land according to the plaintiff was made by way of fraud, misrepresentation and without consideration and also consent of the plaintiff, hence was sought to be declared null and void and not binding on the plaintiff. Also that, alleged attorney to alienate the suit land was cancelled by the plaintiff on the same day i.e. 09.10.1992 and intimation in this regard was given to defendant No.1 in advance i.e., a day prior to it on 08.10.1992. Defendant No.1 was served with the copy of cancellation deed. When defendants No. 1 and 2 started threatening the plaintiff to dispossess him from the suit land on the basis of forged and fictitious sale deed, the suit for the decree of declaration that the plaintiff is owner in possession of the suit land and the sale deed being the result of fraud, misrepresentation and without consideration as well as the consent of the plaintiff is illegal, null and void.

3. Defendants No. 1 and 2 on entering appearance have contested the suit. In preliminary, the objections qua estoppel, waiver, valuation of the suit for the purpose of Court fee and jurisdiction, suit being benami and filed in collusion with defendant No.3, Chatro not maintainable, barred by limitation and filed without any locus-standi and also that the same could have not been tried by learned trial Court were raised. The gift of the suit land made by defendant No.3 was also sought to be declared as void, inoperative allegedly being the result of fraud, misrepresentation and undue influence. On merits, while admitting that defendant No.1 remained posted as Field Kanungo in that area with headquarter at Mataur during the period from January, 1980 to January, 1986. It is contended that the suit land was located at a distance of 9 kilometers away therefrom. The suit land was allotted to the plaintiff by the State Government and as he was incapable of selling the same due to fetters created under the Rules, therefore, agreed to sell the same in the year 1984 to defendant No.2 in a sum of Rs.16,000/-. An agreement dated 26.11.1984 (Ext. DW-1/A) was executed in this regard. In terms thereof, a sum of Rs.4,000/- was paid by defendant No.2 to the plaintiff. The sale deed was agreed to be executed by 22.7.1988, but well before it i.e. on 31.01.1985, the plaintiff required more money and sought the payment of balance sale consideration from defendant No.2. The balance sale consideration was also paid to him by the said defendant on that very day. Consequently, a new agreement was executed on that day and thereby the plaintiff authorized defendant No.1 to execute the sale deed qua suit land in favour of defendant No.2. After expiry of the statutory period, prohibiting the transfer of the suit land, defendant No.1 had executed the sale deed in favour of defendant No.2 qua which sale consideration to the tune of Rs.16,000/- was already received by the plaintiff. Therefore, it was urged that on execution of sale deed, defendant No.2 became owner in possession of the suit land.

4. Even the plaintiff allegedly shifted from the village to some other place and consequently sold his other land also to some person including his elder brother Chatro, defendant No.3. The suit, as such, is stated to be *benami* filed by the plaintiff at the behest and collusion of his brother Chatro, defendant No.3. It is also contended that after purchase of the suit land by defendant No.2, revenue entries qua the suit land could not be got up-dated and taking advantage thereof, defendant No.3 in the capacity of attorney of plaintiff has fraudulently made gift of the suit land in favour of his wife, defendant No.4. The gift deed was registered on 16.02.1994. Therefore, by way of filing counter-claims, defendants No. 1 and 2 have sought the gift deed so executed to be declared illegal, inoperative and against their right, title as well as interest in the suit land. Additionally, the decree for permanent prohibitory injunction restraining defendants No. 3 and 4 from causing interference in the suit land was also sought to be passed.

5. Defendants No.3 and 4 in separate written statement have denied the counter-claims being wrong and contended that the plaintiff being owner of the suit land had rightly executed a Special Power of Attorney to deal with the suit land in favour of defendant No.3. The later, therefore, being attorney of plaintiff had rightly gifted away the same in favour of defendant No.4. It is, therefore, denied that the gift deed was void, result of misrepresentation and fraud.

6. In replication, defendants No. 1 and 2 have denied the contents of written statement filed by defendants No. 3 and 4 being wrong and re-asserted the counter-claims they laid in the written statement filed to the suit.

7. The plaintiff in replication has also denied the sale of the suit land in favour of defendant No.2 on receipt of consideration and reiterated his case as set out in the plaint.

8. The issues in the suit initially were framed on 17.01.1994, however, certain issues were added on 23.05.1996. Learned lower appellate Court has taken for

consideration the issues including additional issues re-framed on 23.05.1996. The same read as follow:-

1. Whether the sale deed dated 8.10.1992 executed by defendant No.1, on the basis of forged general power of attorney dated 31.1.1985, in favour of defendant No.2, by Sub Registrar, Dharamshala vide No.752 dated 9.10.1992, is the result of fraud, mis-representation and without consideration, as alleged? If so, its effect? OPP.
2. Whether the sale deed is Sham and bogus document and does not convey any title in favour of defendant No.2, as alleged? OPP.
3. Whether the plaintiff is owner in possession of the land in suit, as alleged? OPP.
4. If issue No,3 is not proved, whether in the alternative, the plaintiff is entitled to possession, as claimed for?OPP.
5. Whether the plaintiff is estopped from filing the suit by his act, conduct, acquiescence and silence? OPP.
6. Whether the plaintiff has waived his right to sue? OPD.
7. Whether the suit is not properly valued for the purposes of Court fee and jurisdiction? OPD.
8. Whether the suit is not competent in the present form? OPD.
9. Whether the present suit is benami and has been filed in collusion with one Chatro, son of rounki, as alleged? OPD.
10. Whether the suit is not within time?OPD.
11. Whether this court has no jurisdiction to try the suit? OPD.
12. Whether the plaintiff has no locus-standi to sue? OPD.
13. Whether the gift deed dated 16.2.1994 made by defendant No.3 on behalf of plaintiff as his general power of attorney in favour of defendant No.4, is void, inoperative, based on fraud, mis-representation, undue influence and without authority? OPD.
14. Whether the defendant No.2 is entitled to declaration with consequential relief of permanent and mandatory injunction that he is owner in possession of the land in suit? OPD
15. Relief.

9. The parties were put to trial. The plaintiff besides his own testimony in the witness box as PW-1 had also examined PW-2 Maghi Ram, PW-3 Pratap Chand, PW-4 Budhi Singh, PW-5 Moti Ram and PW-6 Amrik Singh to prove that he being Shepherd had been mostly remaining away from his native place, however, throughout remained in possession of the suit land. Also that, defendant No.1 remained posted as Patwari/Kanungo in that area during the period from 1980 to 1986 and managed the execution of the impugned attorney, by taking the benefit of his simplicity and the factum of his being away from the village with herd of sheep and goats.

10. On the other hand, defendants No. 1 and 2 have examined defendant No.1 as DW-1, Sharatpal as DW-2, Ranjeet Singh DW-3, Roop Lal DW-4, Moti Ram DW-5, K.S. Pathania DW-6, Baldev Raj DW-7, B.C. Chaudhary DW-8 and R.C. Sood DW-9 to prove that the suit land was agreed to be sold by the plaintiff to defendant No.2 on payment of sale

consideration to him. The reliance was also placed on the documentary evidence i.e. Ext.DW-1/A, copy of agreement dated 26.11.1984, copy of agreement dated 31.01.1985 Ext.DW-1/B, copy of sale deed dated 08.10.1992 Ext.DW-1/C, five years average sale price certificate Ext.DW-1/D, copy of sale deed Ext.DW-1/E, copy of mutation Ext. D-O, copy of jamabandis Ext.D-P to Ext. D-Z, copy of rojnamcha Ext. DW-7/A, abstract of pass-book Ext.DW-7/A and copy of General Power of Attorney Ext.DW-6/A and Ext. DW-6/B.

11. On the other hand, defendant No.3 Chatro Ram has stepped into the witness box as DW-1/A and examined Udho Ram as DW-2/A.

12. Learned trial Court on appreciation of oral as well as documentary evidence had returned the findings on issues No.1 to 3 in affirmative i.e. in favour of the plaintiff and on remaining issues No. 5 to 14 in negative i.e. against defendants No. 1 and 2. As a matter of fact, issue No. 4 in view of findings on issues No. 1 to 3 had become redundant, however, learned trial Judge has wrongly answered the same in negative. As a result of findings recorded on all the issues, the suit was decreed and the counter-claims dismissed.

13. Aggrieved by the judgment and decree passed by learned trial Court, the legality and validity thereof was assailed before learned lower appellate Court. On re-appraisal of the entire evidence and hearing the parties on both sides, learned lower appellate Court has also dismissed the appeal and affirmed the judgment and decree passed by learned trial Court vide judgment under challenge in the present appeal.

14. The grounds of challenge as raised by defendants No. 1 and 2/appellants mainly are that trial Court has committed procedural illegality by firstly, framing issues on 17.01.1994 and thereafter again on 23.05.1996, which allegedly has resulted in serious prejudice to them. The lower appellate Court should have set aside the judgment and decree passed by learned trial Court on this score alone. The findings recorded beyond the pleadings on record have vitiated the impugned judgment and decree. The suit was filed with a prayer to set aside the sale deed Ext. PW-1/C, however, the whole thrust of the pleadings was regarding power of attorney allegedly obtained by defendant No.1 by way of fraud and misrepresentation. The pleadings were wholly deficient qua fraud and misrepresentation. No findings qua validity of Ext. DW-6/A was recorded by learned trial Court. The sale deed Ext. DW-1/C, as such, could have not been declared illegal, null and void. Both Courts below have not appreciated the case pleaded by the plaintiff in its right perspective and proceeded in the matter in a highly mechanical manner. The power of attorney was duly executed and registered with Sub-Registrar, hence could have not been held to be the result of fraud and misrepresentation. The findings to the contrary have been said to be erroneous. The case qua collusion of plaintiff and defendant No.3 Chatro pleaded by the defendants has not been considered at all. On the other hand, the defendant had admitted his signature on agreements Ext. DW-1/A and Ext. DW-1/B. The sale consideration he received from defendant No. 2 was also proved, however, such evidence available on record has not been appreciated. The impugned judgment has been sought to be quashed and set aside.

15. The appeal has been admitted on the following substantial questions of law:-

1. Whether the plaint of the plaintiff-respondent was liable to be rejected, in view of the relief claimed by the plaintiff?
2. Whether the plaint lacked particulars of fraud and, therefore, the courts below could not have gone into the question of fraud?
3. Whether the courts below ignored and misappreciated the material evidence on record, which if considered would have resulted in dismissal of the suit?

4. Whether the dismissal of the counter claim of the defendants-appellants was result of misreading the evidence on record?

16. Respondent-plaintiff was duly served and represented by Smt. Ranjana Parmar, Advocate. She, however, failed to put in appearance at later stage and, as such, he has been proceeded against ex-parte. Similarly, defendants No. 2 and 3 (defendants No. 3 and 4 in the trial Court) have also opted for not putting appearance despite service in this appeal, hence proceeded against ex-parte.

17. During the course of ex-parte arguments, Mr. Bhupinder Gupta, learned Senior Advocate assisted by Ms. Poonam Gehlot, Advocate has strenuously contended that on the execution of sale deed Ext. DW-1/C, consequent upon the agreement Ext. DW-1/A and Ext. DW-1/B as well as the receipt of entire sale consideration in advance by the plaintiff, defendant No.2 has become owner in possession of the suit land. The plaintiff having failed to prove its case that power of attorney Ext. DW-6/A and Ext. DW-6/B was the result of fraud and misrepresentation, the suit could have not been decreed. Similarly, defendant No.3 Chatro Ram had no authority to gift the suit land in favour of his wife, defendant No.4. According to Mr. Gupta, both Courts have failed to appreciate the evidence available on record in its right perspective. The impugned judgment and decree, as such, has been sought to be quashed and set aside and the suit dismissed, whereas, the counter-claims decreed.

18. On analyzing the arguments addressed on behalf of appellants/defendants No. 1 and 2 vis-a-vis the evidence available on record, it would not be improper to conclude that no substantial question of law what to speak of substantial questions of law as framed in this appeal arises for determination by this Court for the reason that the present is a case of concurrent findings recorded by both Courts below on appreciation of the given facts and circumstances and also the evidence available on record. Irrespective of the arguments addressed that on account of mis-appreciation of the evidence on record, the findings recorded by both Courts below have vitiated. Nothing tangible has been brought to the notice of this Court in this regard during the course of arguments. Support in this regard can be drawn from the ratio of the judgment of this Court in ***Sher Mangat Ram*** vs. ***Krishna Devi and ors.,2013 (3) Shim. L.C. 1507***, that in a case of findings of facts recorded by both Courts below on appreciation of evidence, the High Court in second appeal normally should not interfere therewith, unless and until convinced that the findings have been recorded in complete misreading, mis-construction and mis-appreciation of the evidence available on record and thereby serious prejudice has been caused to the aggrieved party.

19. It is in this backdrop, if coming to substantial question of law at Serial No. 1 supra, the relief sought in the plaint reads as follows:-

> "It is, therefore, prayed that a decree for the declaration that the plaintiff is the owner in possession of the land comprised in Khata No.3, Khatauni No.8, Khasra Nos. 1148/1087 and 1158/1094 land measuring 0-32-39 hecs plot 2 situated in Mohal and Mauza Garh Tehsil Dharmsala, Distt. Kangra, as per jamabandi for the year 1986-87, and is entitled to remain as such in the future as well and the sale deed executed thereof by the defendant No.1 vide sale deed Dated 8th OCT, 1992. Registered by Sub Registrar, Dharmsala vide No. 752 dated 9-10-92, on the basis of forged General Power of Attorney dated 31-1-1985, registered vide No. 29 by Sub Registrar Kangra, on behalf of the plaintiff and in favour of defendant No.1 in respect of the aforesaid land is a result of fraud, mis-representation and has been executed without consideration as well as consent of the plaintiff and is as such ineffective,

inoperative and null and void and the same does not create any title in favour of defendant No.2 and the said document of sale deserves to be rescinded/cancelled being null and void and the defendants have got no right, title or interest in the suit land in any manner whatsoever and the said Sale Deed is sham, bogus document and does not convey any title thereunder in favour of the defendant No.2 together with a decree of permanent prohibitory injunction restraining the defendants from claiming any rights in the suit land or interfere therein any manner, whatsoever and in case the defendant succeed in dispossessing the plaintiff forcibly from the said land during the pendency of the suit, on the strength of the said document of sale, a decree for possession be also passed in favour of the plaintiff and against the defendants with costs."

20. No objection to the effect that in view of relief claimed, the plaint deserves rejection has been raised in the written statement. Even during the course of arguments also, nothing has been brought to the notice of this Court as to how in view of relief claimed by the plaintiff, the plaint had to be rejected. Therefore, the plea to this effect has been raised merely for rejection and as such substantial question of law at Serial No.1 does not arise for consideration at all in the given facts and circumstances of the case.

21. Now, if coming to substantial question of law at Serial No.2, the plaintiff in order to urge that the power of attorney Ext. DW-6/A and Ext. DW-6/B were result of fraud and misrepresentation as well as undue benefit of his simplicity taken by defendant No.1, has averred as under in the plaint:-

"1. That the plaintiff is a Gaddi (shepherd), a rustic villager and uneducated person and does not understand the intricacies of the law. He respects and believes everyone in good faith.

2. That the defendant No.1 was initially Patwari and subsequently promoted as Kanungo in the revenue deptt. of Himachal Pradesh State Govt. He developed intimacy and friendship with the plaintiff. The plaintiff placed implicit faith in him and has been totally depending on his advice to every day to day matters being an educated person and custodian of law.

3. That the plaintiff used to remain away form his native place for some time during every year. The defendant No.1 adviced the plaintiff that he being in the revenue deptt. could well look after him to execute a Power of Attorney for that purpose. The plaintiff being simpleton, believed the defendant no.1 in good faith and accompanied him to Tehsil Kangra where he got prepared a paper and got the same signed from him. The plaintiff was not made known or explained the contents of the said power of attorney nor told implication thereof. The plaintiff, however, never intend to empower the defendant No.1 to sell the suit land on his behalf to anyone. He was only authorized to look-after the said land in his absence."

22. No doubt, in response to such averments in the plaint, the stand of defendants No. 1 and 2 is denial in toto. However, if coming to evidence available on record, the plaintiff while in the witness box as PW-1 had corroborated such averments made in the plaint in its entirety because according to him, defendant No. 1 remained posted as Field Kanungo in the area and hired accommodation for residential purposes in village Sukad. He was his neighbour and as such, developed intimacy and friendship as well as gained his

confidence. Since he at that time was working as labourer and also grazing sheep and goats, therefore, defendant No.1 approached him to lookafter his property during his absence from the village so that the same is not occupied by other person. Defendant No.1 thus obtained a document (DW-6/A) from him for managing the suit property. The same was got written from the Petition Writer in Tehsil Kangra. The contents thereof were never explained to him. It is after 5-6 years when came to know that defendant No.1 in the form of that document had obtained power of attorney of him. On 8.10.1992, he apprised the said defendant that he is going to cancel the same. Consequently, he got cancelled the so called power of attorney on 09.10.1992, however, defendant No.1 irrespective of it got executed and registered sale deed Ext. DW-1/C on the same day i.e. on 09.10.1992 in favour of defendant No.2. The plaintiff while in the witness box has further stated that he never received any sale consideration. It is he who is owner in possession of the suit land. He has admitted that there was prohibition to transfer the suit land for a period of 10 years in terms of its allotment to him. He has denied the execution of agreement Ext. DW-1/A and Ext. DW-1/B in favour of defendant No.2 and also receipt of sale consideration from her. He has also denied her possession over the suit land.

23. Now, if coming to the testimony of PW-3 Pratap Chand, Dalip Singh (Defendant No.1) remained posted as Kanungo during the period 1980 to 1986 in that area and had been residing in a rented house being his neighbour. He had been supplying milk to the said defendant for about one year. The suggestions that the office of defendant No.1 during that period was at Mataur and that he has deposed falsely were denied being wrong. Similar is the testimony of Budhi Singh, PW-3. Also that, he is neighbour of the plaintiff. According to him, the suit land is in possession of the plaintiff and that the same never came to be possessed by the defendants. In his cross-examination, it is stated that in 1984-85, office of Kanungo was situated at village Sukad and defendant No.1 also used to reside there. PW-6 Amrik Singh, Sadar Kanungo has also deposed that defendant Dalip Singh remained posted as Field Kanungo during the period from 1980 to 1986 at Kangra. He, however, failed to tell as to where was his headquarter situated. PW-2 Maghi Ram is working as labourer in I&PH Department to regularize the supply of irrigation water for the land situated in village Sukad. He has also deposed that it is the plaintiff, who is in possession of the suit land and he had been irrigating the same on his instructions.

24. On the other hand, the defence of defendants No. 1 and 2 as emerges from the evidence available on record is that defendant No.1 during his posting as Field Kanungo in that area was having his office at village Mataur. Even if the testimony of DW-2 and DW-3 Ranjeet Singh and for that matter DW-4 in this regard is believed to be true that the suit land is situated in Mohal and Mauza Garh, in that event also the same was under Kanungoi circle of defendant No.1 as has come in the statement of DW-2 Sharatpal. The distance between Mataur and village Garh (Sukad) where the suit land is situated, according to defendants themselves is 9 kilometers. Therefore, in this view of the matter, it is immaterial that defendant No.1 was residing either at Sukad or Mataur. The facts remain that suit land was within the area falling under the Kanungoi circle of which defendant No.1 was Kanungo. Otherwise also, it is established that defendant No.1 remained posted as Patwari also in that area. Therfore, the possibility of he was residing at Sukad and neighbour of the plaintiff at that time can not be ruled-out. The factum of plaintiff a simpleton person remaining away from his native place with herd of sheep and goats is satisfactorily proved on record. Defendant No.1 remained posted as Patwari and Kanungo in that area can reasonably be believed to have obtained Special Power of Attorney Ext. DW-6/A from the plaintiff by way of taking undue benefit of his simplicity and on the pretext that in his absence from the village, he will lookafter the suit land so that the same is not occupied by someone else.

25. Now, if coming to the execution of agreement Ext. DW-1/A and Ext. DW-1/B, the execution thereof is also not proved for want of examination of attesting witnesses thereto. Otherwise also, as per Ext. DW-1/A, the agreement dated 26.11.1994 the plaintiff allegedly agreed to sell the suit land thereby in a sum of Rs.16,000/- to defendant No.2 and to execute the sale deed by 22.07.1988. It is recorded in this document that earnest money to the tune of Rs.4,000/- was received in advance by the plaintiff from defendant No.2. As noticed supra, neither the attesting witnesses nor the scribe of this document have been examined. The same has been sought to be proved through DW Dalip Singh, who is not a signatory thereto. Otherwise also, defendant No.2, the beneficiary under this document is none-else but the daughter-in-law of defendant No.1 and as such, he himself is also the beneficiary of this document. Execution of this document, as such, is not at all proved beyond all reasonable doubt.

26. The factum of the plaintiff felt necessity of the balance sale consideration well before the date of execution of the sale deed allegedly by 22.07.1988 and the said amount i.e. Rs.12,000/- was paid to him on 31.01.1985 as well as another agreement Ext. DW-1/B was executed on that day is also not proved for the reason that the same has again been sought to be proved in evidence by defendant No.1 none-else but beneficiary thereto. The agreement was attested by PW-6 K.S. Pathania. As per this witness, the same was scribed at the behest of plaintiff who admitted the contents thereof in the absence of Moti Ram and this witness. Also that, a sum of Rs.12,000/- was paid to the plaintiff at the time of execution of this document. Also that, receipt of Rs.4,000/- by way of earnest money was also admitted by the plaintiff while the agreement Ext. DW-1/B was being reduced into writing at his instance. Similar even is the statement made by defendant No.1 while in the witness box, however, the evidence so come on record by way of testimony of DW-1 and DW-6 that a sum of Rs.12,000/- was received by the plaintiff at the time of execution of the agreement Ext. DW-1/B and he even admitted the payment of Rs.4,000/- by way of earnest money to him is not at all proved satisfactorily for the reason that nothing to this effect finds recorded in this document. As a matter of fact, had Rs.12,000/- been paid to the plaintiff at the time of execution of the agreement Ext. DW-1/B and he having admitted that Rs.4,000/- already received by way of earnest money, such facts if recorded in the agreement would have removed all doubts in this regard and the defendants' case that the plaintiff had sold the suit land to defendant No.2 on receipt of the sale consideration inspire confidence. However, nothing to this effect finds recorded in this document. Not only this but in the agreement Ext. DW-1/B, which, as a matter of fact, was executed in continuation to the earlier agreement Ext. DW-1/A, again there is no mention of execution of this agreement therein nor that earnest money Rs.4,000/- was paid to the plaintiff at that time. In Ext. DW-1/B, only mention is qua sale of the suit land by the plaintiff to defendant No.2 in a sum of Rs.16,000/-. This document rather gives an impression that the sale consideration was paid in advance to the plaintiff on 31.01.1985, when the same executed. The evidence as has come on record by way of testimony of DW-1 Dalip Singh and DW-6 K.S. Pathania, as such, is neither satisfactory nor plausible. Learned lower appellate Court has rightly observed that man may tell lie but not the circumstances and as regards the present controversy, the recitals in agreement Ext. DW-1/B not substantiate the claim of the defendants at all.

27. The further plea raised by the defendants qua withdrawal of Rs.12,000/- from the account of defendant No.1 on 31.01.1985 though has been supported from the testimony of DW-9 R.C. Sood, Manager, State Bank of India, Dharamshala, however, from the withdrawal entries Ext. DW-7/A it is not proved that this amount was withdrawn and paid only to the plaintiff and none-else towards balance sale consideration, particularly, when no mention thereof finds recorded in the agreement Ext.DW-1/B.

28. Now, if coming to Ext. DW-6/A, the Special Power of Attorney, the same was also executed on 31.01.1985 by the plaintiff in favour of defendant No.1 for managing the suit property and purportedly also to alienate the same. DW-6 K.S. Pathania again is a witness to this document. Although, he admitted the execution of Ext. DW-6/A by the plaintiff in favour of defendant No.1, however, in the absence of reference of this document in Ext. DW-1/A executed on the same day belies the testimony of DW-6 in this regard. In Ext. DW-6/A also, there is no mention of execution of the agreement between the plaintiff and defendant No.2 qua sale of suit land and receipt of sale consideration entirely by the plaintiff from defendant No.2 and authorization given to defendant No.1, her father-in-law to execute the sale deed. The absence of such facts in the attorney Ext. DW-6/A casts aspersions qua its authenticity and genuineness.

29. Now if coming to the sale deed Ext. DW-1/C, in this document, there is no reference of earlier agreement Ext. DW-1/A dated 26.11.1984 and Ext. DW-1/B dated 31.01.1985. There is again no mention in this document that the sale consideration i.e. Rs.16,000/- was paid by the vendee to the vendor through his attorney i.e. defendant No.1. On the other hand, the sale deed Ext. DW-1/C reveals that sale consideration i.e. Rs.16,000/-was received by the vendor on 31.01.1985. The agreement Ext. DW-1/B in which the factum of payment of sale consideration of Rs.16,000/- finds recorded without there being mention about the earlier agreement dated 26.11.1984 Ext. DW-1/A and the payment of earnest money of Rs.4,000/- on that day, renders the entire story introduced by defendants No.1 and 2 highly doubtful.

30. Interestingly enough, as per the evidence produced by the plaintiff on coming to know about the Special Power of Attorney Ext. DW-6/A and the so called authority given by him thereby to defendant No.1 to sell the suit land to defendant No.2 went to defendant No.1 on 08.10.1992 and apprised him that he is going to cancel the attorney Ext. DW-6/A. The attorney was ultimately cancelled by him at 11.00 a.m. on the next day i.e. 09.10.1992. The execution of the sale deed on 08.10.1992 after the plaintiff's having disclosed to defendant No.1 his intention to cancel the attorney Ext. DW-6/A the registration thereof on the next date i.e. 09.10.1992 is nothing but a clever move on the part of defendant No.1 to grab the suit land. The execution and registration of sale deed Ext. DW-1/C even after the revocation of the attorney Ext. DW-6/A is nullity having created no right, title and interest in favour of defendant No.2 so far as the suit land is concerned. Both Courts below have rightly considered this aspect of the matter also on the basis of evidence available on record and also the law applicable.

31. In this backdrop, from the re-appraisal of the oral as well as documentary evidence in its entirety, no question that plaint lacks in better particulars i.e. of fraud and non-appreciation of evidence available on record arises at all. Otherwise also, it has not been brought to the notice of this Court as to what evidence has been ignored and not taken into consideration by both Courts below and how it has been mis-appreciated during the course of arguments addressed. The substantial questions of law at Serial Nos. 2 and 3 do not arise at all in the present appeal.

32. The substantial question of law at Serial No. 4 pertains to dismissal of the counter-claims of the defendants/ appellants. It is the plaintiff who has been held to be owner in possession of the suit land, therefore, there is no question of gifting away the same by defendant No.3 in favour of defendant No.4. On the other hand, when Special Power of Attorney Ext. DW-6/A has been held to be the result of fraud, misrepresentation and also undue benefit of the simplicity of the plaintiff, therefore, the sale deed Ext. DW-1/C executed on the basis thereof, that too, at such a stage when the same was revoked by the plaintiff is illegal, null and void, hence not binding on the plaintiff. The counter-claims have,

therefore, been rightly rejected by both Courts below. No such substantial question of law arises for determination in the present appeal.

33. For all the reasons discussed here-in-above, this appeal fails and the same is accordingly dismissed, so also the pending application(s), if any.

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

Anwar Hussain and another .....Appellants.
Versus
Sh. Sher Mohd. and others. .....Respondents

RSA No. 80 of 2018
Decided on: 26.09.2018.

Code of Civil Procedure, 1908- Order XXII Rules 3, 4 and 9 – Death of parties – Decree against dead party – Effect – Held, decision in favour or against dead person renders same nullity – Decree passed without taking note of death of party to lis or deciding question of abatement and substitution of legal representatives can be challenged at any time including at its execution stage. (Para-2).

Cases referred:
Jaswant Singh versus State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674
Jagan Nath and others v. Ishwari Devi, 1988(2) Shim.L.C. 273
Karam Chand and others v. Bakshi Ram and others, 2002(1) Shim.L.C. 9

For the appellants: Mr. Ashok K. Tyagi, Advocate.
For the respondents: Mr. Sudhir Thakur and Mr. Anirudh Sharma, Advocates for respondents No. 1, 2(a) & 2(c).

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

CMP(M) No. 1055/18 in RSA No. 80/18

In compliance to the order passed on the previous date, this application has been filed for substitution of legal representatives of Sitara Begum, respondent No.2(d). She, however, has expired during the pendency of the appeal in the lower appellate Court. Another respondent 2(d), had also expired during the pendency of the appeal in the lower appellate Court and the appellants-applicants were exempted from substitution of her legal representatives vide order passed on 2nd August, 2017. However, her name also reflects in the impugned judgment and decree. As a matter of fact, the same should have been deleted. The trial Court record, as such, is defective. It has been held so by this Court in ***Jaswant Singh*** versus ***State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674*** while placing reliance on the ratio of the judgments rendered by Co-ordinate Benches of this Court in ***Jagan Nath and others*** v. ***Ishwari Devi, 1988(2) Shim.L.C. 273*** and ***Karam Chand and others*** v. ***Bakshi Ram and others, 2002(1) Shim.L.C. 9***.

2. Not only this, but the apex Court in ***Gurnam Singh*** (dead) by legal representatives and others versus ***Gurbachan Kaur*** (dead) by legal representatives (***2017) 13 SCC 414,*** has reiterated the legal principles already settled further by holding that a decision in favour and/or against a dead person renders the same as nullity. The Apex Court has went one step further by holding that the decree passed without taking note of the death of a party to the *lis* or deciding the question of abatement and substitution of legal representatives could have been challenged at any time including at its execution stage. This judgment reads as follows:

> 15) The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons. In our considered opinion, it is a nullity. The reasons are not far to seek.
>
> 16) It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure,1908 (for short, 'the Code') for bringing their names on record in place of the dead persons to enable them to continue the lis.
>
> 17) The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".
>
> 18) Order 22 Rule 3(2) which applies in the case of the death of plaintiff/appellant and Order 22 Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal 6 representatives by the parties concerned within the time prescribed. These provisions read as under:-
>
> **Order 22 Rule 3(2)**
>
> "Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."
>
> **Order 22 Rule 4(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."
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> 21) It is a fundamental principle of law laid down by this court in Kiran Singh case, that a decree passed by the court, if it is a nullity, its validity can be questioned in any proceeding including in execution

proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the Court in passing such decree and goes to the root of the case. The principle, in our considered opinion, squarely applied to this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a 'nullity'."

3. Mr. Thakur, learned counsel representing the respondents-defendants though has made an effort to persuade this Court to take a different view of the matter that the present is not a decree either in favour or against the deceased respondents, however, unsuccessfully because Sitara Begum was one of the legal heirs of original defendant No.2 Fateh Deen. Once, she along with other legal representatives of the said defendant were ordered to be brought on record of learned trial Court on an application filed for the purpose, it cannot be said that she has no interest in the property in dispute. The question of granting exemption from substitution of her legal representatives is also to be considered by lower appellate Court where the *lis* was pending at the time of her death. Being so, the judgment and decree under challenge in the main appeal against the deceased respondents-defendants is nullity hence in view of the judgment of the Hon'ble Apex Court cited supra is quashed and set aside. The parties through learned Counsel representing them are directed to appear before learned lower appellate Court on 28.11.2018. The parties shall also ensure that the name of deceased Sitara Begum, respondent No.2(d) qua her exemption from substitution as already granted by lower appellate Court is not reflected in the judgment and decree to be so passed. The record be sent back so as to reach in the lower appellate Court well before the date fixed.

4. The appeal stands disposed of accordingly. All pending applications shall also stand disposed of.

An authenticated copy of this judgment be sent to learned lower appellate Court for compliance.

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

Babu Ram ....Petitioner.

Versus

Achhru (deceased) through LRs Smt. Kanku Devi & others ....Respondents.

Civil Revision No. 172 of 2017
Decided on : 26.9.2018.

Code of Civil Procedure, 1908- Section 151- Order XXI Rule 32- Decree of permanent prohibitory injunction – Execution- Death of Judgment Debtor (J.D) – Executing Court dismissing application of Decree Holder (D.H) seeking substitution of his legal representatives (L.Rs) – Petition against – L.Rs contending that after demise of original J.D., decree becomes unexecutable and cannot be executed against them nor against his assets falling into their hands – Held, decree under execution held JD as 'Karta' and suit property ancestral in his hand - Further decree restrained him from alienating suit property without consent of D.H. –Therefore, property which stood transmitted to his legal representatives continues to retain its character after demise of J.D. – In view of allegations of willful

disobedience of decree, LRs required to be impleaded – Petition allowed – Order of executing court set aside. (Paras- 4 and 5).

For the petitioner: Mr. B.R. Verma, Advocate.

For the respondents: Mr. Inderjeet Singh Narwal, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

A conclusive, and, binding decree of injunction, stands, pronounced, against, the defendant one Achhru Ram, whereunder, he was, declared to be, a, Karta of the suit property, and, was restrained, to, alienate, create and change the suit property, without, the consent of the decree holder/plaintiff. During the pendency of the Execution Petition, before the learned Executing Court, the afore judgment debtor Achhru Ram, died, and the decree holder, for further progressing, the, execution petition, hence instituted an application, for, begetting the, substitution of deceased judgment debtor, Achhru Ram, by his LR(s), and, the afore application was dismissed, hence standing aggrieved therefrom, the decree holder, has, extantly cast a challenge, upon, the impugned verdict.

2. The relevant provisions, as applicable, qua the instant petition, are, borne in Order 21 Rule 32, sub-Section (1) CPC, provisions whereof, are, extracted hereunder:-

> "Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both."

3. And a reading, of, the afore extracted provisions, make imminent upsurgings qua evident willful violation of the decree of injunction, by the litigant concerned, rather hence rendering him amenable to face, the, statutory ill-consequences, of, his being ordered to be detained in civil prison or his property being ordered to be attached.

4. The learned counsel for the respondents has submitted with much vigor (i) that the afore manner of execution of, a, decree of injunction, upon, its evident disobedience, during his lifetime, by the errant litigant, and, vis-a-vis, him rather being forbidden upon his demise to be amenable for execution, upon, his LRs nor hence any order for substitution, of, the errant deceased litigant, by his LRs being renderable, and, for strengthening the afore submission, (ii) he further contends that the afore statutory manner of execution, of, a decree of injunction, against, the errant litigant, rather being personally executable against the errant litigant, and, upon his demise, it being not hence executable personally against any of his legal representatives, nor against the assets' of the deceased litigant, assets whereof, upon the latters' demise, hence, fall into their hands.

5. However, the aforesaid contention is frail, and, cannot be accepted by this Court, as it emanates from a gross misreading, of, the hereat rendered decree of injunction. A deep reading of the hereat rendered decree of injunction rather unveils (i) qua the deceased judgment debtor one Achhru Ram, being declared a Karta of, the, joint hindu ancestral coparcenary property, and, further also his thereunder being barred to alienate, it, without the consent of the decree holder, petitioner herein. The counsel appearing for the respondents before this Court, does not hold any contest, vis-a-vis, the deceased judgment

debtor, one Achhru Ram, during his lifetime, despite holding an opportunity to obey, the, decree of injunction, his rather, wilfully disobeying it, (ii) now, given the afore deceased errant litigant being declared a Karta, and, with the suit property being, a, joint hindu ancestral coparcenary property, and, with the plaintiff-decree holder, prima facie, hence holding an indefeasible interest therein, as a coparcenar, (iii) further, when upon demise of deceased judgment debtor, Achhru Ram, the ancestral coparcenary property prima facie, continues to retain its above character, and, prima facie hence, it stands, transmitted into the hands of his legal representative, latter whereof, upon the demise of, the, errant litigant, prima facie inherit the latters' share, in the residual ancestral coparcenary property, (iv) consequently, given the afore imminent evidence, existing on record, thereupon when the LRs, of, the deceased errant litigant, prima facie inherited the share of the latter, in the residual, of, the ancestral coparcenary property. (v) thereupon, they, are required to be impleaded in his place, in the array, of, judgment debtors, (vi) importantly when hence the manner of execution of, a, decree of injunction, upon, its evident disobedience, by their predecessor-in-interest, though, would not render them to face the ill-consequences of theirs being ordered, to be detained in civil prison, whereas, rather would render the residual of the ancestral coparcenary property, hence being, ordered to be attached, (vii) also hence constrains this Court to allow the instant petition, rather, for enabling efficacious execution of the apt decree, and, in the afore manner.

6. In aftermath, the impugned order, suffers, from a gross perversity and absurdity. Accordingly, the petition is allowed, and, the impugned order is quashed and set aside. The learned Executing Court is directed to permit the decree holder to bring on record the legal heirs of deceased judgment debtor late Achhru Ram, in, the pending execution petition, and, proceed further in accordance with law. All pending applications, also stand disposed of.

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

Hemant Kumar ...Appellant.
Versus
Sher Singh ...Respondent.

Cr. Appeal No. 301 of 2018
Decided on: 27.09.2018.

Code of Criminal Procedure, 1973– Section 256- Dismissal of complaint – Permissibility- Circumstances explained – Complaint transferred to court from another court – Transferee Court dismissing complaint by holding that complainant not present despite personal service of notice upon him of the said date of hearing and acquitting accused – Appeal against – High Court found observations made in impugned order factually wrong – No notice for date on which complaint dismissed was actually issued to complainant – Other observation of Judicial Magistrate that complainant is not interested in case, also found factually incorrect – Held, on facts, Magistrate not justified in dismissing complaint in default – Appeal allowed – Impugned order set aside – Complaint ordered to be restored for regular hearing. (Paras-19 to 21 and 28).

Cases referred:
Vinay Kumar versus State of U.P. & Anr., 2007 Cri.L.J. 3161

N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. & another, 2008 (2) Latest HLJ 1249
Associated Cement Co. Ltd. versus Keshvanand, (1998) 1 Supreme Court Cases 687
Mohd. Azeem versus A. Venkatesh and another, (2002) 7 Supreme Court Cases 726
S. Anand versus Vasumathi Chandrasekar, (2008) 4 Supreme Court Cases 67
Boby versus Vineet Kumar, Latest HLJ 2009 (HP) 723,
Dole Raj Thakur versus Pankaj Prashar, Latest HLJ 2018(HP) 266
Dole Raj Thakur versus Jagdish Shishodia, Latest HLJ 2018 (HP) 296

For the appellant: Mr. G.R. Palsra, Advocate,
For the respondent: Mr. Goldy Kumar, Advocate, vice Mr. Arush Matlotia, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

Instant appeal has been filed against impugned order, dated 17th July, 2017, passed by learned Judicial Magistrate 1st Class, Court No. 2, Mandi (hereinafter referred to as "Magistrate") in Criminal Case No. 430-III/17/10, whereby the complaint filed by appellant-Hemant Kumar against respondent-Sher Singh under Section 138 of the Negotiable Instruments Act (hereinafter referred to as "NI Act"), came to be dismissed in default for want of prosecution on behalf of the complainant when the case was listed for presence of complainant after transfer of the case from Court No. 4 to Court No. 2.

2. It is apt to reproduce relevant portion of the impugned order herein:

" xxx xxx xxx

Called again after lunch.

17.07.2017

Present: None.

Case has been repeatedly called since morning but neither complainant nor his counsel has put in appearance in the Court. The present complaint was filed by complainant Hemant Kumar Gupta under Section 138 of Negotiable Instruments Act. The case file was received by way of transfer in this court and thereafter notice was issued to complainant to put in his appearance in the Court. A perusal of case file shows that the case has been fixed up for service of accused since 21.08.2014 wherein, the counsel for the complainant was directed to file PF for issuance of NBWs to the accused but he failed to do so despite adjournments. The absence of complainant in the court despite being duly served shows that he is not interested in continuing with the present complaint.

In view of above factors, and left with no other option but to proceed further. As a result, the present complaint is dismissed in default for want of prosecution on behalf of complainant. File after due completion be consigned to record room.

Sd/-

Judicial Magistrate 1st Class

Court No. 2, Mandi, HP"

3. In view of Section 143 of the NI Act, offence under Section 138 of the NI Act is to be tried summarily and accordingly, procedure for summons case provided in Chapter XX of the Code of Criminal Procedure (hereinafter referred to as "CrPC") is applicable during the trial initiated on filing a complaint under Section 138 of the NI Act. In this Chapter, Section 256 CrPC deals with a situation of non-appearance or death of complainant.

4. Applicability of Section 256 CrPC in a complaint filed under Section 138 of the NI Act has also been endorsed in the judgment passed by Allahabad High Court in case titled as **Vinay Kumar versus State of U.P. & Anr.,** reported in **2007 Cri.L.J. 3161,** and another judgment passed by co-ordinate Bench of this Court in case titled as **N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. & another,** reported in **2008 (2) Latest HLJ 1249.**

5. I deem it proper to reproduce Section 256 CrPC herein:

> *"**256. Non-appearance or death of complainant.** - (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*
>
> *Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.*
>
> *(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."*

6. Section 256 CrPC provides discretion to the Magistrate either to acquit the accused or to adjourn the case for some other day, if he thinks it proper. Proviso to this Section also empowers the Magistrate to dispense with the complainant from his personal attendance if it is found not necessary and to proceed with the case. Also, when the complainant is represented by a pleader or by the officer conducting the prosecution, the Magistrate may proceed with the case in absence of the complainant.

7. When the Magistrate, in a summons case, dismisses the complaint and acquits the accused due to absence of complainant on the date of hearing, it becomes final and it cannot be restored in view of Section 362 CrPC, which reads as under:

> *"**362. Court not to alter judgment.** - 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."*

8. Keeping in view the effect of dismissal of complaint under Section 138 of the NI Act, the apex Court in case titled as **Associated Cement Co. Ltd. versus Keshvanand,** reported in **(1998) 1 Supreme Court Cases 687,** after discussing the object and scope of Section 256 CrPC, has held that, though, the Section affords protection to an accused against dilatory tactics on the part of the complainant, but, at the same time, it does not mean that if the complainant is absent, the Court has duty to acquit the accused in invitum. It has further been held in the said judgment that the discretion under Section 256 CrPC must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

9. Similarly, the apex Court in case titled as **Mohd. Azeem versus A. Venkatesh and another,** reported in **(2002) 7 Supreme Court Cases 726,** has considered dismissal of the complaint on account of one singular default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice.

10. Also in case titled as **S. Anand versus Vasumathi Chandrasekar,** reported in **(2008) 4 Supreme Court Cases 67,** wherein the complaint under Section 138 of the NI Act was dismissed by the trial Court exercising the power under Section 256 CrPC on failure of the complainant or her power of attorney or the lawyer appointed by her to appear in Court on the date of hearing fixed for examination of witnesses on behalf of the defence, the apex Court has considered as to whether provisions of Section 256 CrPC, providing for disposal of a complaint in default, could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined and it has been held that in such a situation, particularly, when the accused had been examined under Section 313 CrPC, the Court was required to pass a judgment on merit in the matter.

11. This Court in **N.K. Sharma's case (supra)** also**,** relying upon in **Associated Cement Co. Ltd.'s case (supra),** has held that when the Court notices that complainant is absent on a particular day, the Court must consider whether the personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason and if the situation does not justify the case being adjourned, then only Court is free to dismiss the complaint and acquit the accused, but if the presence of complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of power envisaged under Section 256 CrPC.

12. This Court in another case titled as **Boby versus Vineet Kumar,** reported in **Latest HLJ 2009 (HP) 723,** has reiterated ratio of law laid down in **N.K. Sharma' case (supra),** again relying upon in **Associated Cement Co. Ltd.'s case (supra).**

13. Coordinate Bench of this Court in **Criminal Appeal No. 367 of 2015,** titled as **Vinod Kumar Verma versus Ranjeet Singh Rathore,** decided on 6th May, 2016 and **Criminal Appeal No. 559 of 2017,** titled as **Harpal Singh versus Lajwanti,** decided on 13th October, 2017, has held that dismissal of the complaint in default for non-appearance of the complainant on the date fixed without affording him even a single opportunity is unjustified.

14. The same principle has been reiterated by this Court in cases titled **Dole Raj Thakur versus Pankaj Prashar,** reported in **Latest HLJ 2018(HP) 266;** and **Dole Raj Thakur versus Jagdish Shishodia,** reported in **Latest HLJ 2018 (HP) 296.**

15. Relying upon **N.K. Sharma's case (supra),** learned counsel representing the respondent has contended that the trial Court was empowered to dismiss the complaint on failure of complainant to appear in the Court on a day fixed and in present case, the complainant and his counsel had failed to appear on the date fixed without any reason and, therefore, the Magistrate was having no option other than to dismiss the complaint.

16. It is true that Magistrate has a discretion to dismiss the complaint for default resulting into acquittal of the accused. However, in present case, for the discussions made hereinafter, I am not in agreement with the contention of the learned counsel for the respondent.

17. Keeping in view the effect of dismissal in default, the Magistrate is supposed to exercise his discretion with care and caution clearly mentioning in the order that there was no reason for him to think it proper to adjourn the hearing of the case to some other day.

18. In present case, complaint was filed on 8th June, 2010, whereafter till 2017, though respondent was served, but, on different occasions, the case was transferred from one Court to another whereafter complaint was again pending for service of the respondent. For the first time, the case was transferred from the Court of JMIC, Court No. 1 to Special Judicial Magistrate on 11th March, 2013. Thereafter, on 30th May, 2015, the case again transferred from Special Judicial Magistrate to JMIC, Court No. 3. Thirdly, on 6th January, 2017, the case as transferred from Court No. 3 to Court No. 4. On that date, counsel for the complainant was present in the Court, but, as the Magistrate was not vested with the powers of JMIC, the case was adjourned for 26th April, 2017. On 26th April, 2017, instead of Court No. 4, the case was listed in Court No. 2, causing no representation on behalf of the parties, resulting into issuance of notice, however, notice was issued to the complainant only for his presence for 17th July, 2017.

19. It is apt to record herein that though, the Dealing Hand has reported on order sheet that summon was issued on 6.7.2017 and reported service thereof on 15.7.2017 and in impugned order, dated 17th July, 2017 also, it has been stated that summons issued to the complainant was received back duly served, but, perusal of record depicts that no such notice issued and served upon the complainant for the said date is available on the record.

20. It has further been observed in the order that case is pending for service of accused since 21st August, 2014 directing the counsel for the complainant to file PF for issuance of non-bailable warrants to the accused, but, despite granting adjournments, no steps have been taken, and, thus, it is inferred that complainant is not interested in pursuing the complaint. This observation in the impugned order is also factually incorrect.

21. It is true that the complainant was directed to file PF for issuance of non-bailable warrants against the respondent vide order, dated 21st August, 2014, however, the fact remains that in pursuance to order, dated 3rd July, 2014, on filing process fee by the complainant, non-bailable warrant was issued to respondent for 21st August, 2014, but, could not be executed for want of availability of respondent at home and subsequent thereto, in compliance of order, dated 12th March, 2015, complainant had filed requisite process fee on the same day for service of respondent through non-bailable warrant for 30th May, 2015, but, there is no non-bailable warrant on record issued against respondent for the said date, rather, on that day, case was not listed before Special Judicial Magistrate, but, was listed before JMIC, Court No. 3 as the case was transferred from Special Judicial Magistrate to Court No. 3 on 30th May, 2015, resulting into absence of parties and issuance of notice to parties for 26th September, 2015, which, as per report of the Dealing Hand, were not received back. However, complainant appeared on 12th January, 2016 on service of summon upon him and subsequent thereto, notice issued to respondent vide order, dated 19th April, 2016 for 5th August, 2016 was served upon the wife of the respondent, however, for want of proper service, fresh summons were directed to be issued for 6th January, 2017, on which date, the case was listed before JMIC, Court No. 4, as it was again transferred from Court No. 3 to Court No. 4, but, it was adjourned for 26th April, 2017, as Judicial Magistrate posted in Court No. 4 was not vested with the power to adjudicate the same. But, on 26th April, 2017, case was listed before JMIC, Court No. 2, instead of Judicial Magistrate, Court No. 4, without any notice to parties causing absence of complainant and thus, notice was ordered to be issued to the complainant for 17th July, 2017 and as referred hereinabove, ultimately, on that day, the complaint stands dismissed in default for non-prosecution.

22. In aforesaid facts, particularly when the case was transferred four times from one Court to another and complainant continued himself to be represented either through

counsel or in person, the observation of the Magistrate that complainant was not interested in continuing with the complaint is contrary to the record.

23. Further, as per record, the observation of the Magistrate that despite service, complainant was not present on 17th July, 2017, is also contrary to record as it is not established from record that complainant or his counsel was served for that date.

24. So far as steps for service of respondent are concerned, the complainant cannot be said to be uninterested for service of respondent, but, the steps were to be taken by the counsel engaged by the complainant and in any case, if there was delay in the year 2014 in taking the steps for issuance of non-bailable warrants against the respondent on the part of counsel for the complainant, the complainant cannot be punished for that, that too, when the case was being transferred repeatedly from one Court to another and steps for issuance of notice were taken by complainant on numerous occasions and subsequent thereto, a notice issued to the respondent for 5th August, 2016 was served, but, his service was not considered to be proper service as it was served upon the wife of the respondent. It would also be pertinent to record herein that notices as well as non-bailable warrants issued against respondent for various dates, except summon issued for 30th April, 2011, had been received back with reports, like, he being a contractor was staying at Mandi Town, house found locked, not residing in his home and/or working as contractor at Jahu, Sarkaghat side, etc. It appears that the respondent had been evading his service deliberately.

25. In normal circumstances, no complainant will be disinterested in pursuing his complaint without any reason, particularly, when he was appearing before different Court on transfer of the case since June, 2010.

26. In the given circumstances, it was a fit case for the Magistrate to exercise her discretion to adjourn the case for a subsequent date.

27. In view of the aforesaid facts and circumstances and the ratio of law laid down by the apex Court and High Courts including this Court, I am of the opinion that the Magistrate was not justified in dismissing the complaint in default for absence of complainant coupled with failure of his counsel to attend the case on that date, particularly, when there is no document/notice on record to establish that the complainant was served for that date after transfer of the case from Court No. 4 to Court No. 2.

28. For aforesaid discussion, I am of the considered opinion that there is merit in the appeal and the same deserves to be allowed. Accordingly, the appeal is allowed and impugned order, dated 17th July, 2017, passed by Judicial Magistrate 1st Class, Court No. 2, Mandi in Criminal Case No. 430-III/17/10 is set aside and complaint before Judicial Magistrate 1st Class, Court No. 2, Mandi is ordered to be restored to its original number and directed to be decided in accordance with law.

29. Parties are directed to appear before the Magistrate on **23rd October, 2018.**

30. Appeal is allowed in above terms alongwith all pending applications, if any.

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

Manoj Jamwal .....Petitioner.

Versus

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

Cr.MMO No.164 of 2016.
Decided on: 27.9.2018.

Code of Criminal Procedure, 1973- Section 482-inherent powers- Exercise of - Quashing of FIR – Matrimonial dispute – FIR registered on allegations of cruelty against husband and husband's relatives – Allegations prima facie make out cognizable case against petitioner, an elder brother of husband of complainant – No malafide intention of complainant to launch proceedings against petitioner with ulterior motive – Held, FIR cannot be quashed – Petition dismissed. (Paras- 10 to 11).

Case referred:
State of Haryana and others versus Ch. Bhajan Lal and others, AIR 1992 Supreme Court 604

For the petitioner:	Mr. Vinod Thakur, Advocate.
For the respondents:	Mr. R.P. Singh and Mr. Kunal Thakur, Dy. Advocate Generals for respondent No.1. Mr. N.S. Chandel, Advocate for respondent No.2.

The following judgment of the Court was delivered:

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

Petitioner, in this petition, is an accused in FIR No.191 registered on 22.7.2015 in Police Station, Kangra, under Section 498-A read with Section 34 IPC. Remaining co-accused are his brother Mukesh Kumar, father Bihari Lal, mother Kamlesh and sister-in-law (***Nanad***) Anuradha. Allegations against them are that after her marriage with accused Mukesh Kumar on 28.11.2013, they started quarreling with her at the pretext of dowry. Allegations that she is a woman of bad character were also being levelled against her. They have also been abusing her as well as her parents. On being fed up from such behavior of the accused persons, she filed a complaint under Section 156 Cr. P.C. in the Court of Judicial Magistrate, Kangra, District Kangra, H.P. The same was forwarded to the Police of Police Station, Kangra and the report was sought to be filed in the court on or before 7.9.2015. It is on the basis of the order passed by the Court, the FIR came to be registered against the accused-petitioner and his co-accused.

2. Police conducted investigation and filed report under Section 173 Cr. P.C. in the court of learned Additional Chief Judicial Magistrate, Kangra, District Kangra, H.P. Besides the complainant-respondent No.2 and her brother Sudhir Keshav, former Pardhan Gram Panchayat, Jogipur; Secretary, Gram Panchayat Gabli Dari; Up Pardhan Gram Panchayat Dari; Ward Panch Gram Panchayat, Dari and other persons, including the police officials, were also associated during the investigation conducted in the matter. The complaints made to SHO, Police Station, Kangra, Presiding Officer, Women Cell, Dharamshala and to Pardhan Gram Panchayat, Dari, have also been obtained and added in the police file. The documents showing that in Women Police Station, respondent No.2-complainant had arrived at a compromise, have also been taken on record. The investigation conducted further reveals that no amicable settlement could be arrived at in the complaint made by her to local Gram Panchayat.

3. The record further reveals prima-facie that respondent No.2-complainant, with a view to save her married life made all possible efforts to patch up the differences, but to no avail. Ultimately, she approached learned trial court by way of complaint under

Section 156 Cr. P.C. and it is on the direction of the Court, the FIR came to be registered against the accused petitioner.

4. Accused-petitioner Manoj Jamwal being elder brother of accused Mukesh Kumar is ***Jeth*** (brother-in-law) of respondent No.2-complainant Garima Kashyap. The evidence prima-facie reveals that the house where the family resides belongs to him. In the proceedings having taken place before the Gram Panchayat, the respondent-complainant had refused to reside in the said house and rather decided to live in the rented accommodation along with accused Mukesh Kumar and her newly born child.

5. Allegations against the accused-petitioner in a nut-shell are that in the first week of April, 2014, the accused persons called the parents of the respondent-complainant to their house at Dari. Before their arrival, the accused-petitioner and accused Anuradha had beaten up her and thereafter the accused-petitioner left the house along with his family for Udhampur. Further allegations are that the accused persons misbehaved with her parents and brother also. No doubt such complaint was withdrawn by her, however, on the assurance of the accused-persons that they will settle all disputes by negotiation across the table.

6. Mr. Vinod Thakur, learned counsel representing the accused-petitioner has strenuously contended that nothing tangible has come on record to show that the accused-petitioner has tortured and harassed the respondent-complainant. While pointing out the statement under Section 161 Cr. P.C. of her father Sudhir Keshav recorded by the police, it is submitted that had the relations of the respondent-complainant and her husband Mukesh Kumar been strained, she would have not accompanied him to Ladbharol, his place of posting on 5/6th April, 2014. He has further submitted that on 20.4.2014, when as per the statement of Sudhir Keshav aforesaid she was left by her husband accused Mukesh Kumar outside his house, the accused-petitioner had already returned to his Unit in the Army.

7. Mr. N.S. Chandel, learned counsel representing the respondent-complainant and Mr. Kunal Thakur, learned Deputy Advocate General have argued from the record that there is ample evidence which connect the accused-petitioner with the commission of offence.

8. Although at this stage, it would not be proper to make any observation, touching the merits of the case of either party, yet suffice would it to say that the differences between the respondent-Complainant and accused persons could not be sorted out and as a result thereof she has launched prosecution against them.

9. Before coming to the rival submissions, it is desirable to refer to the legal principles applicable to a case of this nature, as settled by the Hon'ble Apex Court in ***State of Haryana and others versus Ch. Bhajan Lal and others, AIR 1992 Supreme Court 604***. The relevant portion of this judgment reads as follow:

> "108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to given an exhaustive list of myriad kind of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
4. Where, the allegations in the F.I.R do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding in instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
7. 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."

10. As discussed hereinabove, the allegations made in the FIR and the investigation conducted in the matter are not of such a nature so as to infer that if taken as it is, do not constitute commission of any offence, even prima-facie or make out a case against the accused petitioner. The same rather disclose the commission of a cognizable offence. It is also not a case where the allegations levelled by the respondent-complainant, if taken as it is, no conclusion that sufficient grounds for proceeding further against the accused-petitioner are not made out, can be drawn. The present is also not a case where it can be said, even prima-facie, that the respondent-complainant has levelled the allegations with malafide intention to launch criminal proceedings against the accused petitioner maliciously with ulterior motive or to take revenge against him for the reason that she is a doctor by profession hence, an educated lady.

11. As noticed supra, prima-facie she made all efforts to save her married life, because after making complaints against the accused petitioner, on being persuaded by elderly placed, including the Pradhan, Gram Panchayat, she had withdrawn such complaints also. Not only this, but during conciliation proceedings, she opted for residing along with her husband-accused Mukesh Kumar and had also undertaken to maintain her

mother-in-law and father-in-law, in the rented accommodation which was proposed to be hired by her.

12. In view of what has been said hereinabove, no case is made out to exercise the inherent jurisdiction vested in this Court under Section 482 Cr. P.C. to quash and set aside the FIR and also the criminal proceedings, now pending disposal in the Court of Additional Chief Judicial Magistrate, Kangra, District Kangra, H.P. This petition as such is dismissed. Pending application(s), if any, shall also stand disposed of and the interim order dated 6.6.2016 vacated.

The parties through learned counsel representing them are directed to appear before learned trial Court on 29.10.2018. The trial Court shall proceed further in the matter, in accordance with law, after securing the presence of the remaining accused persons. The record of the trial Court be sent back along with a copy of this judgment, so as to reach there well before the date fixed.

An authenticated copy of this order be sent to learned Sessions Judge, Kangra at Dharamshala, for compliance.

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

Sanjay Kashyap & ors. .....Petitioners.

Versus

State of H.P. & anr. .....Respondents.

Cr.MMO No. 123 of 2018.
Date of decision: September 27, 2018.

Code of Criminal Procedure, 1973– Section 482- Inherent powers- Exercise of- Quashing of FIR – Held, exercise of jurisdiction to quash complaint or FIR pursuant to compromise between victim and accused depends upon facts and circumstances of each case – No exhaustive elaboration of principles can be formulated – Motor Accident taking place because of rash driving of both the drivers of vehicles – Motor accidents have serious impact upon society as a whole, pedestrian and other road users – Violation of traffic Rules and laws by drivers now common phenomenon and there is no traffic sense on roads – Quashing of FIR declined notwithstanding compromise between accused and victim of offence – Petition dismissed. (Para- 5 to 8).

Case referred:
Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and another, (2017) 9 Supreme Court Cases 641

For the petitioners Mr. Suresh Kumar Thakur, Advocate.

For the respondents Mr. R.P. Singh and Mr. Kunal Thakur, Dy. AGs, for respondent No. 1- State.
Respondent No. 2 in person.

The following judgment of the Court was delivered:

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

Learned Deputy Advocate General has placed on record the fresh status report and the I.O. ASI Anirudh of Police Station, Kangra has produced the record.

2. Petitioner No.1 Sanjay Kashyap herein is an accused in FIR No. 227/2017 registered under Sections 279, 337, 338 IPC and Section 181 of Motor Vehicle Act in Police Station, Kangra on 6.8.2017. He allegedly was driving Car bearing registration No. HP-39B-0538. His co-accused is respondent No. 2 Vijay Kumar who was on the wheel of the offending HRTC bus bearing registration No. HP-68-6286. Petitioners No. 2 to 4 herein are the victims of the accident. As per the investigation conducted by the police in this case both accused were driving their respective vehicles in a rash and negligent manner. The investigating agency has formed such opinion keeping in view the circumstances such as no skid mark etc. available on the spot during its inspection conducted by the I.O. immediately after the accident. The other evidence suggesting prima facie that they both were driving the car and offending bus in a rash and negligent manner has also been collected by the investigating agency. The challan stand filed and the case presently is at the stage of consideration of charge by learned Additional Chief Judicial Magistrate, Kangra, HP.

3. This petition has been filed on the grounds, inter alia, that the victims of the accident i.e. petitioners No. 2 to 4 have compromised the matter with both the accused and they are not interested to prosecute them any further.

4. As a matter of fact, in the case in hand the machinery has been put in motion not by the victims of the accident but by the police itself as the FIR has been registered on the basis of the rukka sent to police station by HC Raksh Pal, the Investigating officer of this case. Otherwise also, the Apex Court in ***Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others*** versus ***State of Gujarat and another, (2017) 9 Supreme Court Cases 641*** has settled broad principles to be taken into consideration at the time of consideration of an application under Section 482 Cr.P.C. filed with a prayer to quash the FIR/complaint/criminal proceedings by the High Court in the exercise of its inherent jurisdiction. The legal principles so laid down relevant for the purpose of this petition are reproduced as under:

> "**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."

5. It is, therefore, well settled that quashing of FIR on the basis of the compromise between the victim of the occurrence and accused persons depends upon the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated. Also that the trial Court must have due regard to the nature and gravity of the offences. The Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity should not be quashed even if the victim or the family of the victim have settled the dispute with the accused being not private in nature but have serious impact upon the society. Of course, the criminal cases having element of civil dispute and stood on distinct footing should be quashed in exercise of the inherent power vested in the Act.

6. Now if coming to the case in hand, both accused-drivers, prima faice, were rash and negligent while driving their respective vehicles. The vehicle driven by respondent-accused Vijay Kumar was HRTC bus, whereas by petitioner No.1-accused Sanjay Kashyap, Maruti car. An offence if found to be committed under Section 279 IPC not only cause loss and injury to the victims but also has its impact on the society as a whole i.e. the pedestrian and other road users. It become more serious keeping in view the increase in road accidents. As a matter of fact, the violation of the traffic rules and laws by the drivers driving the vehicles on road is now a common phenomenon. There is no traffic sense on the road. Therefore, an offence of this nature in the present time has become more heinous and grievous in nature. True it is that in appropriate cases the jurisdiction vested can be exercised but not in each and every case.

7. The present, as such, is an exceptional case because respondent-accused Vijay Kumar who had been driving the HRTC bus and a public servant was expected to have observed more care and caution while driving the bus on the road. It was also expected from accused-petitioner No. 1 Sanjay Kashyap to have driven the car by observing the traffic rules and taking all precautions. The victims of the accidents (petitioners No. 2 to 4) may have settled the matter with the accused persons, however, the present in view of the discussion hereinabove is not a fit case where the FIR should be quashed. The criminal proceedings against both accused, therefore, need to be taken to its logical end.

8. For all the reasons hereinabove, there is no merit in this petition and the same is accordingly dismissed.

9. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case.

10. The petition stands disposed of accordingly, so also the pending application(s), if any.

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

Dildar Singh .....Appellant/defendant.
Versus
Jagdev Singh & others .....Respondents/plaintiffs

RSA No. 519 of 2006
Reserved on : 20th September, 2018.
Decided on : 28th September, 2018.

Specific Relief Act, 1963- Sections 14 and 23- Specific performance of contract – Grant of- Principles, discussed – Agreement to sell in question also providing for refund of double of earnest money – Plaintiff filing suit for specific performance and in alternative also seeking recovery of double of earnest money with interest – Trial court granting primary relief of specific performance – Appellate court dismissing appeal of defendant – RSA- Defendant submitting that plaintiff had prayed for refund of earnest money with interest, as such, he could not have been granted decree of specific performance of agreement – Held, Grant of decree of specific performance of agreement is in discretionary jurisdiction of Court – It cannot be curtailed by merely fixing payment of pecuniary sums as liquidated damages- Regular Second Appeal dismissed. (Para- 11)

Cases referred:
Dadarao and another versus Rarao and others, reported in 2001(1) Cur. L. J. (C.C.R) SC, 18
M.L. Devender Singh and others vs. Syed Khaja, reported in 1973(2) SCC 515
Asia Begum (died per L.Rs vs. Mahmuda Begum, reported in 2010(2) Civil Court Cases 391 (A.P.)

For the Appellant: Mr. Rajesh Kumar, Advocate.
For Respondent No.1 & 2: Mr. Shanti Swaroop, Advocate.
For other respondents: Nemo.

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, whereunder, the plaintiff's suit for rendition, of, a decree for specific performance of agreement to sell, stood hence decreed, in the affirmative.

2. Briefly stated the facts of the case are that the on 1.12.1997, defendant No.1 has agreed to sell land comprising khata No.90/171 and 134/208, Khasra Nos. 25R19/2 being ½ share, 25R/19/4, and, 22/1 being ¼ share, situated in village Bathu, Sub Tehsil Haroli, District Una, H.P., for total consideration of Rs.30,000/-, and, a sum of Rs.15,000/- was paid as earnest money and an agreement was reduced into writing. Defendant No.1 agreed to execute the sale deed on or before 31.3.1998 and it was also agreed that in case of default the defendant would be liable to pay double of the amount having been received by the defendant as earnest money. The plaintiffs are ready and willing to perform their part of contract after paying the balance amount of Rs.15,000/- as per agreement. The plaintiffs have come to know that defendant No.1 is going to sell the suit land to defendant No.2 Sh. Rasil Singh in order to defraud and frustrate the agreement dated 1.12.1997. The plaintiffs served the notice through registered post upon the defendants to get sale deed executed and registered in favour of the plaintiffs after receiving the balance amount by 5.12.1997 and not entering into an agreement with defendant No.2, but defendants refused to receive the notice. Thus, the plaintiff prayed for the decree of specific performance of contract dated 1.12.1997 and also for consequential relief of permanent injunction restraining defendant No.1 from alienating the suit land to defendant

No.2 or some other persons and in the alternative the decree for recovery of Rs.30,000/- along with interest.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objection qua maintainability and the suit being premature. On merits, the defendants have alleged that the agreement of 1.12.1997 is not valid and does not require any performance. Defendant No.1 was not competent to execute the said agreement and to dispose of the property thereafter as the same is joint Hindu Family coparcenary property acquire from common ancestor. Defendant No.1 is "Karta" of the joint Hindu Family coparcenary property and is custodian on behalf of his two minor coparceners Mohit Kumar and Sandeep Kumar, which cannot be sold without legal necessity. The defendant is ready to return the earnest money received by him.

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

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

1. Whether the plaintiffs are entitled for relief of specific performance of contract on the basis of agreement to sell dated 1.12.1997, as alleged? OPP.

2. Whether the suit of the plaintiffs is not maintainable being premature, as alleged?OPD.

3. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom, by, the defendant/appellant herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the judgment and decree recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 29.11.2006, 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:-

g) Whether the lower courts committed a mistake of law in passing the decree for specific performance, though no cause of action had arisen to the respondents?

h) Whether the decrees passed are against the provisions of Section 14 of the Specific Relief Act?

Substantial questions of Law No.1 and 2:

8. The litigating parties do not rear any contest, vis-a-vis, the valid execution, of, the apposite agreement to sell, borne in Ex.PW1/A. The learned counsel appearing for the aggrieved defendant has contended with much vigour before this Court (i) that with, a, prescription occurring therein, vis-a-vis, the defendant agreeing to, upto 31st March, 1998, hence execute a registered deed of conveyance, vis-a-vis, the property disclosed therein, (ii) whereas, the apt suit being instituted much earlier therefrom hence, no enlivened cause of action accrued, vis-a-vis, the plaintiff nor the apt cause of action has hence ripened, (iii)

hence, he contends that the suit is premature, and, warrants rather its being dismissed, than, its being decreed. The afore reared ground would carry immense weight, and, formidability, (iv) upon, evidence making clear evincings qua the aggrieved defendant's conduct, not, rearing any genuine apprehension, in the mind of the plaintiffs, that, unless a insistence, is, made by the latter, for, preponing, the, execution of the registered deed of conveyance in purusuance, of, Ex.PW1/A, (v) thereupon, there being every likelihood qua the defendant, alienating it, to some other persons, (vi) and, also hence, the, preponing, of, the institution of the suit, rather would not attract the casualty, of it, containing an un-enlivened, and, an unripened cause of action. However, a perusal of Ex.PW1/B, issued on 3.12.1997, hence, much earlier, than, the period prescribed in the apt agreement, to sell, though stood sent through a registered AD, yet, with an endorsement occurring, on face thereof, revealing, qua the addressee thereof, rather refusing to accept it, does, rear inferences of (a) the refusal on the part of defendant Rasil Singh to receive it, given its addressee being a counsel, rather ex facie emanating from it containing a notice, from, the plaintiff, for, an insistence upon him, to execute a registered deed of conveyance, vis-a-vis, the property in respect whereof Ex.PW1/A, hence stood drawn. Issuance of notice, borne in Ex.PW1/B, appears to be genuinely issued or well founded, upon, an unillusory apprehension, given, the defendants' hence executing prior thereto, on, 9.12.1997, a registered deed of conveyance, vis-a-vis, the other half share of the suit property, vis-a-vis, the vendee named therein, (b) and, reiteratedly hence the plaintiffs being prodded to insist, for, preponment, of, execution, of, the registered deed of conveyance qua the property, in respect whereof, Ex.PW1/A was drawn, and, when reiteratedly the apt notice was dispatched, under, a registered cover to the defendants, and, when on the face, of, the registered letter, an endorsement, is, made by the postman concerned, qua the addressee defendant Rasil Singh, rather refusing to receive it, (c) thereupon, the plaintiffs' apprehension being squarely firmed up, and, with theirs instituting, the suit in sequel thereof, though, prior to the deadline set forth in the agreement to sell, borne in Ex.PW1/A, (d) rather begets, an inference qua the plaintiffs' suit being not construable to be premature, and, nor it can be construed, that, hence no ripened or enlivened cause of action, in contemporaneity thereto hence accruing, vis-a-vis, the plaintiff. Contrarily, an inference, is, engendered therefrom qua the defendant, rather being unwilling to perform his part of contract or his obligation, as, encumbered upon him under Ex.PW1/A.

9. The learned counsel appearing for the aggrieved defendant/appellant, has, with much vigour while laying much emphasis, upon, the statutory provisions, as, borne in Section 14 of the Specific Relief Act, (i) hence contended that with the plaintiff claiming, apart from, the primary relief of rendition of, a, decree, of, specific performance, vis-a-vis, the contract of sale, embodied in Ex.PW1/A, (ii) rather an alternative thereto relief, of rendition, of, a decree of recovery of a sum of Rs.30,000/- alongwith interest, (iii) thereupon, hence, it constitutes the apt abandonment(s) by the plaintiff, vis-a-vis, the rendition, of, the primary decree of specific performance, (iv) rather, hence it was enjoined, upon, both the learned Courts below, to, hence adjudge a reasonable compensation amount, in, substitution of rendition, of, the primary decree of specific performance of contract, vis-a-vis, the plaintiff.

10. The learned counsel appearing for the appellant/defendant has further contended, with much vehemence, that (a) the learned Courts below in granting the primary relief of specific performance, of ,the apt contract, and, rather theirs not proceeding to grant the alternative relief qua the plaintiff, have hence visibly committed a gross legal fallacy, (b) fallacy whereof, ingraining the judgment and decree, is, espoused to stand, comprised in the learned courts below, while rendering the aforesaid decree, theirs not adhering to the mandate encapsulated, in, a verdict rendered by the Hon'ble Apex Court, in a case titled as

Dadarao and another versus Rarao and others, reported in ***2001(1) Cur. L. J. (C.C.R) SC, 18***, relevant portion whereof stand extracted hereinafter:-

> "Specific Relief Act, 1963, Sections 14 and 16- Specific Performance- If the agreement had not stipulated as to what is to happen in the event of the sale not going through, the plaintiff could have asked the court for a decree of specific performance- Here the parties to the engagement had agreed to even if the seller did not want to execute the sale deed, he would only be required to refund the amount to complete the sale transaction."

The afore contention is misfounded, (c) given the hereinbefore extracted paragraph only appertaining, vis-a-vis, the recitals, borne in the contract, of sale wherewith the Hon'ble Apex Court thereat, hence, stood seized, (d) and, wherein stood embodied a specific clause qua, upon, in the event of apt breaches, (e) thereupon, only damages being defrayable by the errant contracting party to the opposite party, (f) and, also a specific recital being borne therein qua hence no primary relief for specific performance, of, contract being claimable nor validly renderable; (g) besides AND also for reasons ascribed hereinafter, he miscontends, that, the aforesaid apt pointed distinguishing fact, as, borne, in, Dadarao's case (supra), hence visibly, is, *per incuriam,* vis-a-vis, the decision rendered by the Hon'ble Apex Court in a case titled as ***M.L. Devender Singh and others vs. Syed Khaja***, reported in ***1973(2) SCC 515***., wherein, rather a trite mandate is borne, for, rendition, of, a primary decee, of specific performance of contract.

11. Be that as it may, hereinafter it is, the, predominant duty of this Court, to, analyse the verdict rendered by the Hon'ble Apex Court, in, M.L. Devender Singh's case (supra), (a) wherein, the Hon'ble Apex Court had after analysing, the, provisions of Section 10, of, the Specific Relief Act, and, the provisions of Section 23 of the Specific Relief Act, hence squared, the, trite conclusion (b) qua with the errant defendant therein being placed, in, a position, to, rather exploit the need of the plaintiff, whereas, the plaintiff acting fairly and bonafidely, with, the errant defendant, (c) thereupon, hence recorded a conclusion, qua, the plaintiff being entitled, to, the primary decree of specific performance of contract, and, the according of the alternative relief of damages or refunds, by the learned trial Court, in consonance with the apt recitals borne therein, in the contract of sale, (d) rather emanating from the learned trial Court, not, exercising its discretion, in accordance with law. Even if, the Hon'ble Appex Court in M.L. Devender's Case (supra), has in paragraph No.19 thereof, para whereof stands extracted hereinafter:-

> "19. A reference to Section 22 of the old Act, (the corresponding provision is Section 20 of the Act of 1963) would show that the jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds "guided by judicial principles and capable of correction by the Court of appeal". This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. This is made perfectly clear by the provisions of Section 20 of the old Act (corresponding to Section 23 of the Act of 1963) so that the Court has to determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted."

(I) mandated qua the jurisdiction, of, Civil Courts, to render a primary decree, of, specific performance of contract, though, being discretionary, (ii) yet its exercise being founded, upon, sound and reasonable principles, (iii) and, also expostulations, stand borne therein, qua the afore apt jurisdiction of the Civil Courts, being not amenable for curtailment, merely by fixing pecuniary, sums, as, liquidated damages, yet obviously reading thereof does not foist any rigid principle of law qua (iv) it being always incumbent, upon, the civil courts to

render, a, primary decree, of specific performance of contract of sale, (v) and, the alternative thereto contemplated relief, of, refund of money, hence, by the errant contracting party, to, the opposite party, being throughout rather grossly impermissible; (vi) thereupon, for want of fixity of, a, rigid principle, and, further when the plaintiff herein, in, consonance with the apt recitals borne, in Ex.PW1/A, and, with a clear contemplation borne therein, vis-a-vis, upon the defendant hence breaching the obligations cast therein, upon him, his, being enjoined to refund the moneys contemplated therein, (vii) hence espousing, in, substitution of the primary relief of rendition, of, a decree of specific performance of contract of sale, rather qua the apt contemplated refunds, is rather a valid espousable, and, decreeable relief, being made qua him, (ix) paramountly, when a reading, of, the verdict of the Hon'ble Apex Court, rendered, in M.L. Devender's case (supra), does not reflect (x) that the plaintiff in the afore case hence making an alike espousal, (xi) thereupon, when hereat the apt alternative relief, is, espoused by the plaintiff, thereupon, prima facie, he is estopped, given his hence purportedly waiving and abandoning, the primary relief to hence claim qua a compliant decree, in consonance therewith, being rendered.

12. Be that as it may, even though the afore conclusion, for the reasons ascribed hereinafter, make upsurgings, vis-a-vis, the plaintiff's afore purported willful abandonments, and, waivers, whereupon, his espousal for claiming rendition, of, the primary decree of specific performance, of contract of sale, being pronounced qua him, is, may be per se oustable, (a) also reiteratedly given the plaintiff, in, M.L. Devender Singh's case (supra), contra-distinctively, vis-a-vis the plaintiff hereat, not rearing espousals in alternative, to the according, of, the apt primary decree, (b) yet the vigour of the aforesaid inference does get prima facie scuttled, by the Andhra Pradesh High Court, in a verdict, rendered in a case titled as ***Asia Begum (died per L.Rs vs. Mahmuda Begum***, reported in ***2010(2) Civil Court Cases 391 (A.P.)*** (c) rendering a clear mandate, qua, even with, the plaintiff pleading a relief alternative, to his, espousing for rendition, of, a primary decree for specific performance of contract of sale, (d) thereupon, unless evidence makes emergences, vis-a-vis, the defendant being not ready or willing to perform his part of obligation, (e) thereupon, it being incumbent, upon, the civil courts to rather proceed to render the primary decree, of specific performance of contract, of, sale. However, for the reasons to be assigned hereinafter, even the aforesaid verdict, is, grossly inapplicable hereat. Nonetheless, before proceeding to assign apt reasons, it is worthwhile, to extract hereinafter, the, provisions of Sections 10, 16, 14 and 23 of the Specific Relief Act, provisions whereof read as under:-

> "***10. Cases in which specific performance of contract enforceable***.—Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced—
>
> (a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or
>
> (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Explanation.—Unless and until the contrary is proved, the court shall presume—
>
> (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and
>
> (ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

14. Contracts not specifically enforceable.—

(1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lendor is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in persuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

23. Liquidation of damages not a bar to specific performance.—

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

The opening underlined apt portion of Section 10, of, the Specific Relief Act, make clear statutory expostulations, qua excepting, the, provisions to the contrary, standing, borne in the Act, thereupon, the civil court concerned, being enjoined to render a decree for specific performance of contract of sale, (a) upon, want of standard evidence for ascertaining, the, actual apt damages as may ensue, upon, the plaintiff, and, as arises, from, the apt contractual breaches, by the errant vendor; (b) or upon evidence making upsurging, qua the mandated compensation, for, apt breaches, rather hence not adequately and satisfactorily, hence recompensing, the, non derelicting contracting party. Furthermore, the provisions of Section 14 of the Specific Relief Act, make trite underlinings (i) qua, upon, the plaintiff demonstrably acting in fraud of the contract, and, with the coinage "except as otherwise" occurring in Section 10 of the Act, rather excluding, the, mandate, of, the thereunderneath borne, the afore referred statutory expostulation(s), comprised, in the coinage, "when the act agreed to be done is such that compensation in money for its non-performance would

not afford adequate relief", (ii) upon , contra therewith provisions, hence, standing borne in a chapter similar, vis-a-vis, wherein Section 23 stands borne, (iii) thereupon with Section 23, of, the Act, being borne in a chapter similar, wherewithin, Section 10 is borne, (iv) and, with hence the provisions, of, Section 23 of the Act, rather acquiring, the, excepting therewith, rather apt overwhelming clout, and, operation, vis-a-vis, the provisions borne in Section 10 of the Act, (v) and, with theirs making a candid statutory expostulation, against, any decree, vis-a-vis, liquidation of damages or decreeable recitals in consonance therewith, as, borne in the apt agreement, per se, not operating as a bar, upon, the civil court concerned, to render the primary relief, of, specific performance, of, contract of sale, (vi) unless, apt satisfaction, stands drawn, by the Civil Court, that, the contemplated sums of money aptly refundable to the non derelicting contracting party, being recited therein only for the purpose, of securing the performance, of, the contract, and, not for the purpose, giving the defaulting party an option of, paying money, in, lieu of specific performance of contract. However, in, the drawing, of, the aforesaid satisfaction, by, the Civil Court concerned, it is, enjoined to mete deference to the requisite terms, of, the contract, and, also to other attending therewith circumstances. Consequently, while proceeding to draw a conclusion qua the sums of money contemplated in the purported contract of sale, borne in Ex.PW1/A, and, sums of money whereof, were purportedly contracted, to be refunded by the errant/derelicting contracting party, to the non derelicting contracting party, upon, the former breaching the obligations cast upon him, (vii) rather being contemplated, only, for the purpose of securing the performance of contract, and, not for the purpose of giving an option to the party, in default, to, pay money in lieu, of, specific performance of contract, (viii) and, when for making the aforesaid fathomings therefrom, this Court, is, also enjoined to mete apposite deference, to, the terms of the contract, and, other attending circumstances, (ix) thereupon, this Court is enjoined, to, not only comprehend ad nauseam, all the apt recitals, borne in the purported agreement to sell, borne in Ex.PW1/A, (x) AND in consonance wherewith, the, relief alternative, to the relief of primary decree of specific performance of contract, stood, espoused, (xi) for, hence thereafter determining whether the decree in respect of the specific performance, of, contract, as, rendered, by the learned first Appellate Court, being well founded or otherwise.

13. A perusal of Ex.PW1/A makes, a, disclosure qua it not carrying any recital with respect to refund of money, rather it carries specific recitals qua the defendant handing over the possession of the suit land, borne in Ex.PW1/A to the plaintiffs. It is also carries recitals of the defendant relinquishing all his rights over suit property, vis-a-vis, the plaintiffs, (i) thereupon, the defendants, are, rather estopped, to, contend that both the learned courts, were, enjoined to accord, the, alternative relief, as prayed for, by the plaintiff than to, the, render primary decree of specific performance of contract, (ii) dehors any purported waivers or abandonments made by the plaintiff, (iii) more so when no evidence stands adduced for ascertaining, the actual apt damages as may ensue, upon, the plaintiff, and as arise from the apt contractual breaches, by the errant vendor, (iv) nor qua the mandated compensation, for, apt breaches, rather hence or not adequately and satisfactorily hence recompensing, the non derelicting contracting party. Consequently, the aforesaid recitals borne in Ex.PW1/A, does constrain this Court, to unflinchingly galvanise, a candid conclusion qua the plaintiff being entitled to the primary relief of rendition, of, a decree for specific performance of contract.

14. The above discussion, unfolds, that the conclusions as arrived by both the learned Courts below being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned courts below have not excluded germane and apposite material from consideration. Accordingly, the substantial questions

of law are answered in favour of the respondents/plaintiffs, and, against the appellant/defendant.

15. In view of the above discussion, there is no merit in the present Regular Second Appeal and it is dismissed accordingly. In sequel, the concurrent 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. Records be sent back forthwith.

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

Jaswant Singh & Ors. ..Appellants/Petitioners.

Versus

State of H.P. & Ors. ..Respondents.

RFA No.456 of 2012 along with RFA Nos. 457 of 2012, 458 of 2012, 459 of 2012, 460 of 2012, 461 of 2012, 462 of 2012 and 466 of 2012.
Reserved on : 24th September, 2018.
Decided on : 28th September, 2018.

Land Acquisition Act, 1894- Section 18- Reference – Market value – Determination – Exemplar sale deed – Appreciation- Held, sale deed can be taken into consideration only when (i) it is contemporaneous to date of notification and (ii) pertains to area or area close to that where land is acquired. (Para-2).

Land Acquisition Act, 1894- Section 18- Reference – Market value– Determination – Exemplar sale - Deductions therefrom – Permissibility – District Judge making 50% deduction from sale amount mentioned in exemplar sale deed and assessing market value on amount so assessed, on ground that exemplar sale pertains to small area- Appeal against – Held, it is not an absolute proposition that large area of land cannot fetch price at same time at which small plots are sold – If large tract of land because of advantageous position capable of being used for purpose for which smaller plots used and also situated in developed area with little or no requirement of further development, principle of deduction of value not warranted – Land acquired for construction of road – No development charges involved – Acquiring authority not to get any profit by construction of road – Further held- deduction of 50% of value specified in exemplar sale unwarranted – Appeal partly allowed – Market value at uniform rate irrespective of classification of land given (Paras-4 and 5).

Cases referred:

Bhagwathula Samanna and others vs. Special Tahsildar and Land Acquisition Officer, AIR 1992 SC 2298

G.M. Norther Railway vs. Gulzar Singh and others, 2014(3) Shim. LC 1356

For the Appellant(s): Mr. Sanjay Bahrdwaj, Advocate vice Mr. J.L. Bhardwaj, Advocate in all appeals.

For the Respondents: Mr. Hemant Vaid, Addl. Advocate General with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. Advocate Generals in all appeal.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, all the aforementioned appeals, arise from, a common verdict, pronounced by the learned District Judge, Mandi, upon, respectively constituted therebefore reference petitions, by the appellants herein/landowners concerned, hence, all the aforesaid RFAs, are, amenable for a common verdict, being renderable thereon.

2. The appellants/landowners' land, stood, acquired for construction, of, Sundernagar-Palahi Dharanda via Khilra road. The learned counsel appearing for the appellants/landowners, has, contended with much vigour (i) that the learned reference Court has committed, a, gross impropriety, in, not meteing deference to Ex.PA, (ii) exhibit whereof, comprises a valid, and, reckonable sale examplar, vis-a-vis, the land borne in Mauza Khilra, mauza whereof is proximate to mauza Kalhaud. However, the aforesaid contention reared before this Court by the learned counsel appearing for the appellants, would, hold tenacity, upon, cogent evidence standing adduced, with a vivid display therein, (iii) qua, the, land borne in Ex.PA, standing located in proximity, vis-a-vis, the land brought to acquisition; (iv) the execution of Ex.PA occurring in contemporaneity, vis-a-vis, issuance of the apt statutory notification. However, a perusal, of, the testification rendered by PW-3, in, land Reference Petition No. 66 of 2008, and, witness whereof, rather tendered into evidence Ex.PA, omits to make any palpable display therein, vis-a-vis, the afore trite parameters hence begetting their apt satiation, (v) whereas, meteing(s) of satiation thereto, was imperative, for, hence, Ex. PA being construable, to, constitute, a, reckonable sale exemplar, for, on its anvil, hence both just and reasonable compensation, being assessed, vis-a-vis, the land of the appellants/landowners concerned. Consequently, the discarding, by the learned reference Court, of, the sale exemplar, borne in Ex.PA, is not unmeritworthy.

3. Be that as it may, the learned counsel appearing for the appellants contended (a) that the meteing, of, 50% deduction, by the learned Reference Court, vis-a-vis, the compensation amount determined, on anvil of sale exemplar, borne in Ex.PB, being ridden with, a, gross impropriety. The afore submission carries immense weight or vigour, (b) given this Court while relying, upon, para 13 occurring, in, a judgment, of, the Hon'ble Apex Court, rendered in a case titled as ***Bhagwathula Samanna and others vs. Special Tahsildar and Land Acquisition Officer***, ***AIR 1992 SC 2298***, proceeding, to, in paragraphs No.10 to 14, of, a judgment rendered in a case titled as ***G.M. Norther Railway vs. Gulzar Singh and others,*** reported in ***2014(3) Shim. LC 1356,*** (c) hence making a conclusion, that, it being not an inflexible proposition of law, that, on anvil of market value, of small tracts of land, hence, compensation being not assessable, vis-a-vis, large tracts of land, (d) importantly when evidence surges forth, vis-a-vis, the acquisition of large tracts of land, in their entirety, being evidently advantageous or capable of being used, for the very purpose for which the small tracts of land are used, and, also when they stand situated in a developed area, with, little or no requirement for further development. It has also been therein held (e) that, if, there is no cogent and reliable evidence on record, for, proving that each part of the large tracts of land or the wide expanse of land, subjected to acquisition, rather not holding either potentiality or market value, equivalent to the smaller tracts, comprised in Ex.PW1/C,, thereupon deductions being not meteable. Bearing in mind the afore expostulation of law, and when hereat, no evidence, in consonance therewith hence emerges, vis-a-vis Ex.PW1/C, comprising an inapt sale exemplar, thereupon the meteings, of, deductions, vis-a-vis the compensation amount, is hence rather concomitantly, rendered unjust, (i) rather it can, hence, be concluded, that, consequently, given the location, of, large

tracts of land, in, the vicinity of a developed area, and, hence were holding, the, potentiality, to fetch, a, price equivalent to the small tracts, of land, borne in Ex.PW1/C, whereupon, too, the meteings, of, deduction(s), is also rendered impermissible. The relevant paragraphs No. 10 to 14, of, the verdict of this Court in ***G.M. Norther Railway vs. Gulzar Singh and others, reported in 2014(3) Shim. LC 1356,*** read as under:-

> "10. Even previously in judgments reported, in 1997 (2) SLC 229 and 1998 (2) All India Land Acquisition Act LACC (1) SC, it has been mandated that when the purpose of acquisition is common, the award of compensation at a uniform rate for different classification/categories of land,is, tenable. Hence, it can be forthrightly concluded, that, the award of a uniform rate of compensation by the learned Additional District Judge Una for different lands bearing different classifications/categories, is, not legally infirm, especially when on acquisition they acquire a uniform potentiality.
>
> 11. The learned counsel appearing for the appellant has concerted, to also espouse before this Court, that even though, reliance upon Ex. PW1/C by the learned Court below,is not misplaced, in as much, as it fulfilled the relevant enshrined legal parameter for its invocation/applicability, in as much, as (i) it being proximate to the land subjected to acquisition, as also (ii) its execution being contemporaneous to the issuance of the notification under Section 4 of the Land Acquisition Act. Nonetheless, he has canvassed that (i) given the largeness or expanse and immensity/immenseness of size of the land subjected to acquisition vis-à-vis the area of the land sold, comprised in Ex.PW 1/C, the market value of the land comprised in Ex.PW1/C could not have been, as a whole applied to the entire land subjected to the acquisition, unless, deductions for developmental costs as warranted and mandated by the decisions relied upon by him had been made/accorded. Since, the learned Additional District Judge, Una omitted to give/make deductions from the total compensation arrived at/worked out on the basis of the value of the land sold/comprised in Ex.PW1/C, whereas, he was enjoined to do so, he has committed a grave legal error necessitating interference by this Court.
>
> 12.While proceeding to gauge the sinew of the above contention canvassed before this Court, it is necessary to bear in mind that the judgments cited in support of the above view espoused by the learned counsel for the appellant, are distinguishable, vis-à-vis, the facts at hand, hence, in the humble view of this Court, not reliable as (a) all the judgments relied upon by the learned counsel for the appellant, concert to marshal the view, of, deductions from the lump sum compensation assessed qua a large tract of land on the score of market value of a small/minimal piece of land being made. In other words, the emphasis in the aforesaid citations, is that, for the market value of small a tract of land to be comprising an admissible parameter, for, on its strength working out the compensation for a large tract of land, it is, imperative that deductions towards development costs is made. However, distinguishably in the citations aforesaid, the acquisition was made for the development of sites for allotment for housing purpose or for construction of a housing colony or the purpose of acquisition had an inherent profiteering motive. Therefore, given the purpose for which the land was acquired, in, the cases relied upon by the learned counsel for the appellant, deductions were enjoined to be imperative or necessary, as, the entity for whom the land was brought under acquisition, would be entailed/obliged, to,make the land fit for the purpose for which it was acquired, in as much, as, such an entity concomitantly being driven to incur exorbitant

expenses, towards its development for rendering it fit for use. As such, given the magnified increase in the scale of economies or given the ultimate manifold increase, in, the scale of economies or such incurring of exorbitant expenses on development, hence, acquiring the capacity to proportionately reduce their profit, as such, rendering the project for which the land was acquired financially viable, or, to obviate the losses accruing from the steep rates of compensation as may be awarded that deductions were permitted. In other words, deduction from compensation mandated to not render the venture and the purpose for which the land was acquired, in the aforesaid citations relied upon by the learned counsel for the appellant, to be financially un-whole some, as well as, unviable. More so, when the land is acquired for State holdings, building/housing agency(ies) or the agencies carrying out and engaged in profiteering work. However, in contradistinction, to the facts of the judgments, as relied upon by the learned counsel for the appellant, in the instant case, the land has been subjected to acquisition, for the purpose of construction of a railway track. In the appellant engaging itself in the construction of a railway track, it has assumed the role of doing so, as, a welfare measure and not as a profiteering measure. The railway track would continue to be owned by the appellant, in distinction to the facts of the judgments relied upon by the learned counsel for the appellant, where the agency for whom the land was subjected to acquisition, would on developing the land, sell it further or gain profit. (b) The appellant has omitted to adduce cogent evidence on record displaying the fact that each of the land holder, whose land was subjected to acquisition was holding a vast expanse of land. Omission to adduce into evidence such proof demonstrative of each of the land holders, whose land was subjected to acquisition owing a wide expanse or a large sized holding, vis-à-vis, the sale transaction comprised in Ex. PW1/C, a firm conclusion can be formed, that, the size of the holding or the size of the land of the each of the land holders, whose land was subjected to acquisition was more or less equal to or not disproportionately larger in size to the area of the land comprised in Ex.PW1/C. Hence, there was no jurisdictional error, on the part of the learned Additional District Judge, Una, in not affording deduction, given the smallness in size of the land comprised, in, Ex.PW1/C, vis-à-vis, the lands of each of the individual land owners, whose land was subjected to acquisition. Besides, it has also not been cogently proved by the appellant that any part of the land owned by each of the land owners and subjected to acquisition did not bear potentiality nor would have commanded a market value, lesser than the value earned by the expanse of land comprised in Ex.PW1/C. It appears, that, given the proximity of the acquired land, as deposed by PW-4 Gulzar Singh and PW-3 Gurbachan Singh, to educational institution, temple and abadi of the villagers it enjoyed or commanded immense market value. Therefore, when each parcel of the land subjected to acquisition bore a market value, equivalent to the land subjected to acquisition, hence, there was, no, legal error committed by the learned Additional District Judge in relying upon for the market value depicted,in, Ex.PW1/C and applying it to the entire tracts of the land subjected to acquisition even, when it was smaller in size vis-à-vis the land subjected to the acquisition.

13.It is also significant here to refer to the judgment reported in Bhagwathula Samanna and others v. Special Tahsildar and Land Acquisition Officer AIR 1992 SC 2298, wherein the Hon'ble Apex Court has mandated:-

> "13.The proposition that large area of land cannot possibly fetch a price at the same rate at which small plots are sold is not absolute proposition and in given circumstances it would be permissible to take into account the price fetched by the small plots of land. If the larger tract of land because of advantageous position is capable of being used for the purpose for which the smaller plots are used and is also situated in a developed area with little or no requirement of further development, the principle of deduction of the value for purpose of comparison is not warranted. With regard to the nature of the plots involved in these two cases, it has been satisfactorily shown on the evidence on record that the land has facilities of road and other amenities and is adjacent to a developed colony and in such circumstances it is possible to utilise the entire area in question as house sites. In respect of the land acquired for the road, the same advantages are available and it did not require any further development. We are, therefore, of the view that the High Court has erred in applying the principle of deduction; and reducing the fair market value of land from Rs. 10 per sq. yard to Rs. 6.50 paise per sq. yard. In our opinion, no such deduction is justified in the facts and circumstances of these cases. The appellants, therefore, succeed."

14. The citation aforesaid enshrines the principle that it is not a absolute proposition of law that on the score of market value of small tracts of land the compensation for large tracts of land, is, impermissible. For assessing compensation for large tracts of land, the market value of smaller tracts of land can be relied upon, in case a larger tracts of land in its entirety, is advantageous or capable of being used for the purpose for which the smaller tracts are used and, is, also situated in a developed area, with litter or no requirement of further development. Besides, the principle of deduction need not be applied, when this Court, has, held that there is no cogent and reliable evidence on record to prove that each part of the large tracts of the land or the wide expanse of land subjected to acquisition, does not have either potentiality or market value equivalent to the smaller tracts, comprised in Ex.PW1/C, relied upon by the learned Additional District Judge for assessing compensation, it can, hence be concluded, that, consequently, given the location of the large tracts of land, in, the vicinity of a developed area, it, was fetching the price equivalent to the small tracts of land, hence, deduction was not permissible. More, so, when for reasons aforesaid deductions are not awardable."

4. Consequently, bearing in mind, the afore expostulation of law, occurring in paragraph No. 10 to 14 of the verdict of this Court, rendered in Gulzar Singh's case (supra), reiteratedly this Court furtherconcludes (a) qua when the purpose, of, acquisition, is, for construction a road, and, when hence the meteing of deductions, vis-a-vis, compensation assessed by the learned Reference Court, on anvil, of, the apposite sale exemplar, is rather validly meteable, (b) only for covering the apt exorbitant costs, accruable for developing the acquired lands, for theirs ultimately rearing hence handsome profits, vis-a-vis, the authority, whereformwhom, the acquisition is made, (c) thereupon, the principle of meteing of deductions, when rather is squarely attracted and applicable, vis-a-vis, the afore scenario, and, is obviously in applicable, vis-a-vis, construction(s), of, road, (d) thereupon hence, the meteing of deduction by the learned reference court, vis-a-vis, compensation amount, as assessed in respect, of, the lands of the landowners/appellants herein, on anvil, of, the sale exemplar borne in Ex.PB, rather, is, rendered legally frail.

5. For the foregoing reasons, the instant appeal is partly allowed and the market value of the acquired land is assessed at Rs.5,00,000/- per bigha, irrespective of the kind, and, nature of the land, at the time of notification issued under Section 4 of the Act, and, the appellants/landowners are also held entitled, to all the statutory benefits, under the Act as adjudged by the learned reference Court, on the aforesaid adjudged market value of the land . Consequently, the impugned award is modified to the above extent only. All pending applications also stand disposed of. No order as to costs.

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

Sh. Kamal Kumar .....Petitioner.
Versus
The HPSEB limited & another ....Respondents.

CWP No. 9722 of 2012.
Reserved on : 25.09.2018.
Decided on : 28th September, 2018.

Industrial Disputes Act, 1947- Section 25(f)- Disengagement – Reinstatement, when impermissible- Circumstances – Petitioner seeking reinstatement – Labour Court deciding reference in negative by holding that petitioner had not completed continuous service of 240 days – Petition against – Though petitioner had not completed 240 days of continuous service yet department found to have not issued any notice to petitioner to join his duties – Held, workman totally dependent upon daily wages cannot be inferred to have abandoned his job – However, in circumstances, reinstatement not permissible-Compensation in sum of Rs. 2 Lacs awarded – Petition allowed – Award set aside. (Paras-4 and 5)

Case referred:

Bharat Sanchar Nigam Ltd. vs. Man Singh, 2012(3) SLR 344 (S.C.)

For the Petitioner: Mr. A.K. Gupta, Advocate.
For the Respondents: Mr. Vikrant Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition, is, directed by the aggrieved workman, against, the disaffirmative findings recorded by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, upon, the hereinafter extracted reference:-

> "Whether the plea of the Executive Engineer, HPSEB (E) Division Nahan that Shri Kamal Kumar s/o Sh. Sansar Singh had left the job of his own accord after 20.3.1992 is justified? If not, what seniority, service benefit and relief Shri Kamal Kumar s/o Shri Sansar Singh is entitled to?"

2. A perusal of the musterolls, maintained by the employer, vis-a-vis, the workman, and, embodied in Ex. RA and RB, makes, a disclosure qua (i) the workman not completing the mandatorily contemplated period of 240 days, of, continuous service, in the

year immediately preceding, the, stage of his purportedly abandoning his job; (b) nor hence, thereupon, it was incumbent upon the employer to mete, the, apt mandatory statutory compliance(s), vis-a-vis, the mandate enshrined in Section 25(f), of, the Industrial Disputes Act.

3. Be that as it may, the learned counsel appearing for the petitioner, has, contended with much vigour before this Court, (a) that with the respondents/employers, rather enacting the HPSEB Industrial Establishment Standing Orders, orders whereof, stand, embodied in Annexure P-2, appended with the writ petition, (b) AND, with sub clause (2) to Clause 14 thereof rather hence carving an exception, vis-a-vis, the prior thereto provisions bearing analogity, vis-a-vis, the provisions cast in Section 25(f) of the Industrial Disputes Act, (c) besides with a prescription standing embodied therein, vis-a-vis, even where any workman rather renders service, for a period, less than one year, yet his services being not amenable for termination, (d) unless, the order of termination is preceded by a 30 days' notice in writing, along with pay and allowance in lieu thereof, (e) thereupon, he contends that hence when RW-1, in his deposition, as, occurring in his cross-examination, has rendered acquiescences, that, in consonance therewith no notice nor compensation being purveyed to the workman, at the time of his purportedly abandoning, his job, (f) thereupon, evident non compliance with the mandatory afore provisions, hence renders the disengagement from service of the workman, to be both, illegal and unlawful. However, the aforesaid submission addressed before this Court also cannot be accepted, in view of the decision, of this Court, rendered in ***CWP No. 1383 of 2005***, in a case titled as ***Executive Engineer Joginder Nagar and Sanju son of Sh. Gantu Ram, Village Dalana, PO Ballhjoli, Tehsil Jogindernagar, District Mandi, H.P. and Presiding Officer, Labour Court-cum-Industrial Tribunal, Dharamshala,*** wherein this Court, has set-forth, the, hereinafter extracted trite expostulation of law:-

> "The H.P. State Electricity Board shall be exempted from all the provisions of standing Orders Act, and thereafter no 10 days notice is required to be given under Standing Orders to the employee. Admittedly, the employees had not completed 240 days and the Tribunal could not come to the rescue of the employee"

A reading whereof makes ex-facie, unfoldings, qua the H.P. State Electricity Board, standing exempted from applying, vis-a-vis, any workmen engaged by it, the provisions embodied in Standing Orders Act, (i) and, also an expostulation of law, rather stands embodied therein qua thereafter no 10 days' notice, in consonance with sub clause (2) of Clause 14, of, the standing orders, hence warranting its issuance upon the workman, importantly preceding his purported disengagement, from service. Consequently, the afore reared ground does not carry any tenacity, given, the hereinabove extracted mandate, embodied in the afore verdict of this Court, verdict whereof, hereat too, also holds the apt operation and sway.

4. Be that as it may, the afore rendered valid conclusion, occurring, in, the impugned award, ex-facie, yet cannot underscore any further conclusion, qua, the, Presiding Officer concerned, rather not wandering astray, from, the reference, made vis-a-vis, him, (i) reference whereof, rather enjoined a decision, being recorded, vis-a-vis, the workman, purportedly abandoning his job, on 28.3.1992. Consequently, dehors, the afore made valid conclusion, by the learned Industrial Tribunal, the latter was also enjoined to dwell into, and, focus, upon, the inner nuance of the reference made to it, of, the industrial dispute, as, arose, inter se the workman and the employer. However, under the impugned award, the learned Industrial Tribunal has while meteing an answer, upon, the referred issue appertaining, to the apt afore industrial dispute, which occurred inter se the workman, and, his employer, (ii) rather, has, entirely founded, it, upon the factum, of, the disengagement,

from, service of the workman not standing proven to be ingrained with any vice, of, any illegality, (iii) whereupon, reiteratedly,and, obviously, the core industrial dispute which emerged inter se the workman, and, the employer, remained not answered, in, segregation, vis-a-vis, the issue preceding therewith, whereas, it comprised, the apt issue, for rendition, of an answer thereon. The learned Industrial Tribunal had rested its conclusion, upon, issue No.2, merely, upon, a bald deposition existing in the examination-in-chief of RW-1, and, has omitted, to mete, the, appropriate deference, vis-a-vis, the deposition of RW-1, as, existing at the end of his cross-examination, wherein he echoes, qua no letter standing issued by the employer, vis-a-vis, the petitioner, with any request therein, for, his rejoining his duties. Apt emergences therefrom, are, when a daily wager, is, normally, rather wholly dependent upon the per diem wages, meted to him, by his employer, and, unless evidence was adduced, on record by the employer qua (a) his being gainfully employed elsewhere, (b) and, his holding sufficient agricultural property, wherefrom, he hence reared handsome pecuniary gains, (c) whereupon, he stood hence constrained to abandon his job, (d) thereupon, the employer was not enjoined to make any conclusion, merely, given his remaining absent from work, and, also when may be his absence, on certain days, may be engendered, from, his condonable ailment, qua hence the workman abandoning his job, (e) rather, it was incumbent, upon, the employer, to under an intimation to the workman, and, upon, availability of work, hence, make, a, request upon him to rejoin his duties, or when the absence of the workman from his work, stood sequelled by his condonable sickness, the employer was enjoined, to, on his rejoining his duties, rather permit him to mark his presence, in the musterolls. Even though, the workman has not pleaded qua his falling sick, preceding his purportedly abandoning his job, hence he may be precluded, to rear the aforesaid ground, in, explication, vis-a-vis, his purported absence, from his duty. Nonetheless, the employer was obliged, to adduce evidence that, vis-a-vis, the days whereat he was absent, work being available, and, also to adduce evidence, that, yet the workman, rather willfully, and, without any reasonable, and, condonable cause, hence, remaining absent, (f) and, its also enjoined, to adduce evidence, qua hence despite its preceding therewith issuing, a, request upon, him, for his rejoining the duties, his remaining unresponsive thereto. However, the aforesaid evidence remained unadduced, and, when the workman, for omission, of, afore referred evidence, is, hence concluded to be wholly dependent, upon, his per diem wages, hence, this Court, cannot, infer that he had purportedly abandoned his job. More so, reiteratedly when the employer has not adduced, any evidence qua, even after, his being requested, to rejoin his duty, his not meteing compliance therewith. In aftermath, it is to be concluded that the plea reared by the employer, vis-a-vis, the workman abandoning his job, is, a per se flimsy plea, and, does not warrant its being accepted by this Court. Consequently, the impugned award is set aside, and, the reference, is, answered in the affirmative.

5. However, the aggrieved workman, rendered less than 240 days of continuous service, preceding his being purportedly disengaged by his employer, and, also when his purported disengagement occurred in the year 1992, besides when the Hon'ble Apex Court in a judgment rendered ***Bharat Sanchar Nigam Ltd. vs. Man Singh***, reported in ***2012(3) SLR 344 (S.C.),*** the relevant paragraph No.6 whereof stands extracted hereinafter:

> "6. In view of the aforementioned legal position and the fact that the respondents-workmen were engaged as 'daily wagers' and they had merely worked for more than 240 days, in our considered view, relief of reinstatement cannot be said to be justified and instead, monetary compensation would meet ends of justice."

(a)has , upon the afore factual scenario held, that, it would be unjustifiable to afford relief of reinstatement, rather the affording of relief of monetary compensation, being the befitting

remedy. Consequently, while applying, the mandate thereof, the relief of reinstatement is declined, vis-a-vis, the petitioner, whereas, relief of monetary compensation, comprised, in a sum of Rs.2,00,000/- (Rs. Two lacs only), is awarded, vis-a-vis, the aggrieved workman/petitioner herein. The aforesaid amount shall be disbursed, to the petitioner/workman, by his employer, within, a period of six weeks from today, and, in case failure of disbursement thereof, to, the aggrieved workman/petitioner, it shall carry interest @ 12 % per annum commencing, from, six weeks hereafter till realization thereof.

6. For the foregoing reasons, the award impugned before this Court, is set aside, and, the instant petition stands disposed, of, in the manner aforesaid. All the pending applications also stand disposed of. Records be sent back forthwith.

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

FAO No. 197 of 2018 along
with FAO No. 366 of 2018.
Reserved on: 20th September, 2018.
Decided on : 28th September, 2018.

1. FAO No. 197 of 2018.

Keshav Kapil .....Appellant.
Versus
Santosh Kumar & Others ....Respondents.

2. FAO No.366 of 2018.

Mohinder Singh .....Appellant.
Versus
Santosh Kumar & Others ....Respondents.

Motor Vehicles Act, 1988- Sections 147 and 149- Insurance – Payment of premium through cheque – Dishonour of cheque – Cancellation of contract of insurance - Intimation of cancellation to insured, whether necessary ? – Cover note clearly indicating that in event of dishonour of premium cheque, Insurance contract would stand automatically cancelled 'abinitio' – Claims Tribunal fixing liability on owner and driver to indemnify award and absolving Insurance Company from liability – RFA – Owner contending before High Court that no intimation qua cancellation of insurance contract given to him therefore, insurer cannot avoid its liability – Held, As evident from cover note, ipso facto, upon dishonour of premium cheque, contract of insurance automatically suffered cancellation or rescission – Insurance contract rendered void abinitio – No intimation required to be given to insured – Award of Tribunal upheld – Appeals dismissed - ***Deddappa and Ors. v. The Branch Manager, National Insurance Co. Ltd.***, reported in ***2007 AIR SCW 7948 (*** distinguished). (Paras-3 and 4)

Cases referred:

Deddappa and Ors. v. The Branch Manager, National Insurance Co. Ltd., 2007 AIR SCW 7948

Vikram Greentech (I) Ltd. vs. New India Assurance Co. Ltd., (2009)5 SCC 599

For the Appellant(s):	Mr. Ramakant Sharma, Advocate for appellants in FAO No.197 of 2018 and Mr. SanjayJ aswal, Advocate for the appellant in FAO No. 366 of 2018.
For Respondent No. 1:	Mr. V.S. Thakur, Vice counsel in both appeals.
For Respondent No.2:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Subhash Advocate in Cr. Appeal No. 197 of 2018. Mr. Ramakant Sharma, Advocate, for respondent No.2 in Cr. Appeal No. 366 of 2018.
For Respondent No.3:	Mr. Sanjay Jaswal, Advocate in Cr. Appeal No. 197 of 2018. Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Subhash Advocate in Cr. Appeal No. 366 of 2018.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned Motor Accidents Claims Tribunal-II, Hamirpur, H.P., had, vis-a-vis the injured-claimant Santosh Kumar, hence, computed compensation, borne in a sum of Rs.2,82,391/-, along with interest, at, the rate of 7.5% per annum, from, the date of institution of petition, till its final realization. The indemnificatory liability thereof, was, burdened jointly and severally, upon, the owner and driver, of, the offending vehicle. The owner, and, the driver of the offending vehicle, are, aggrieved by the award pronounced by the learned Tribunal in MAC Petition No. 17/13 RBT No.10/13, 55/14, hence, they respectively institute, the aforesaid appeals, before this Court.

2. The learned counsel(s) appearing, for the appellants, whereonwhom, the apt indemnificatory liability stands fastened, contend with much vigour, (i) that the fastening of the apt indemnificatory liability being stained with a gross vice, of, fallibility, and, further rest their submission(s), upon, (ii) with the Hon'ble Apex Court, in, a case titled as ***Deddappa and Ors. v. The Branch Manager, National Insurance Co. Ltd.***, reported in ***2007 AIR SCW 7948***, the relevant paragraph No. 26 whereof, stands extracted hereinafter:-

> "26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been canceled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim."

(iii) expostulating therein, a, clear principle of law, that, even upon cancellation, of, the contract of insurance, arising from dishonour of premium cheque, (iv) thereupon, also the insurer being amenable to stand fastened with the apt indemnificatory liability, upon, cogent evidence being adduced, vis-a-vis, the insured being not intimated, vis-a-vis, dishonour, of, premium cheque. On anvil of the afore citation, he contends, that, in consonance therewith, (v) the insurer is enjoined to adduce evidence qua preceding the apposite rescission, or cancellation, of, the contract of insurance, arising, from want, of, the dishonour, of, premium cheque, its making an apt intimation, vis-a-vis, the insured. He contends that evidence, in consonance, with, the afore trite expostulation of law, embodied in the judgment supra, rendered by the Hon'ble Apex Court, is, grossly amiss hereat. Their submission(s) are well anchored, (vi) as, a reading of the testification, occurring in the cross-

examination of RW-3, underscores qua his acquiescing to a suggestion, vis-a-vis, the record appertaining, to the AD covers, as, appended with the registered letter, whereunderthrough, the apt information was purportedly purveyed to the insured, rather being destroyed, and, his also acquiescing, vis-a-vis, a suggestion qua the apt register containing the aforesaid information, being, also destroyed. Even if, the afore occurrence, of, afore destruction(s) hence disabled the insurer, to adduce evidence, vis-a-vis, the apt intimation being rather well within time hence purveyed to the insured. (viii) Yet, this Court would not be constrained to accept the afore exculpatory espousal, reared by the insured, given the authorised officer, of, the insurer while rendering his testification, omitting, to, produce before the learned Tribunal, the apt list of destruction, especially when hence his afore exculpatory testification, vis-a-vis, its afore disability, to hence adduce evidence qua the apt intimation, rather would acquire both immense succor, and, fortification. Want thereof, rather renders, it, to hence founder.

3. Be that as it may, the apt indemnificatory liability of the insurer qua the offending vehicle, rather would remain intact, and, would not be axed, merely upon apt cogent evidence remaining unadduced by it, vis-a-vis, purveying, of, intimation, to the insured, vis-a-vis, the dishonour, of, premium cheque, (i) upon evidence surging forth, vis-a-vis, the memo, of, dishonour, as issued by the bank, whereat the insured maintained his accounts, rather standing falsified by fortified and formidable evidence. Ex.RW2/A is proven by RW-2. RW-2 is the official of the bank concerned, whereat the insured maintain(s) his account(s), for, ensuring the realization(s) therefrom the amount borne in cheque Ex.RW2/A. Ex.RW2/B was prepared, on 19.07.2011, and, in case, it, purportedly stands ingrained with false recitals, thereupon, the apposite statement of accounts, as, embodied, in mark R-1, (ii) hence was enjoined to make a candid display, that, on 19.07.2011, funds sufficient for honouring Ex.RW2/A, rather occurred therein. However, a perusal of Ex. R-1, makes a disclosure that on 19.07.2011, funds rather not being available therein, for, ensuring, hence, realization therefrom, of, the amount, embodied in Ex. RW2/A, (iii) thereupon, for the afore assigned reasons, it is to be rather concluded, that dehors, any apt intimation being purveyed by the insurer to the insured, vis-a-vis, the dishonouring, of, premium cheque, yet want thereof, rather not coaxing any conclusion from this Court, that the indemnificatory liability, vis-a-vis, the compensation amount hence being fastenable upon the insurer, (iv) importantly when apt wants ,of, liquidation, by the insurer, of, consideration, vis-a-vis, the contract, of, insurance, qua, the insured, it begets, an apt nullifcatory effect.

4. Be that as it may, even otherwise, a perusal of the insurance cover, borne in Ex.RW3/A, unfolds qua its carrying therein, the hereinafter extracted warranty:

> "WARRANTED THAT IN CASE OF DISHONOUR OF THE PREMUM CHEQUE. THIS DOCUMENT STANDS AUTOMATICALLY CANCELLED 'ABINITO'."

A closest incisive reading, and, perusal thereof hence discloses that *ipso facto*, upon, the dishonour of the premium cheque, rather entailing, the ill consequence qua per se, thereupon, the contract of insurance, automatically suffering cancellation or rescission, (a) given the contracting insured, breaching the enjoined term, of, his liquidating, the, premium, vis-a-vis, the insurer, (b) whereas, for a contract of insurance, for its, rather being inferable, to, hold subsistence, and, longevity, is, enjoined to be proven, for, liquidated consideration, (c) contrarily any apt contract, upon, being provenly, to be, without consideration rather hence *ipso facto* is construable, to, be, void, nor it comes into being, nor it holds any subsistence or longevity. The afore extracted warranty, as, occurring in Ex.RW3/A, would suffer diminution or dilution, vis-a-vis, its vigour, upon, a reading of the verdicts, rendered by Hon'ble Apex Court, reported in 2007 AIR SCW 7948, and, the verdicts

of this Court reported in HLJ 20149H0) 1140, United India Insurance Company vs. Smt. Sanjna Kumari, Latest HLJ 2014 (HP) Supplementary 468 Raj Kumar Vs. The New India Assurance Company and 2016 ACJ 2401 National Insurance Company Ltd. vs. Bimla Ben and others, (d) all manifestly propounding therein, the, trite expostulation of law that unless proven intimation is given, vis-a-vis, the dishonour of premium cheque, thereupon, the apt indemnificatory liability, (e) rather also being fastenable upon the insurer, rather carrying narrations qua the Hon'ble Apex Court also therein rather dealing with the impact, of, the afore extacted warranty, as, visibly occurs, in, the extant cover note, issued by the insurer, vis-a-vis, the insured. However, an incisive reading of the afore verdicts, rendered by the Hon'ble Apex Court, omits to make any display, qua, therein the Hon'ble Apex Court, hence, dealing with the impact, of, any alike hereat afore warranty. The effect thereof, (f) is, that the afore verdicts rendered by the Hon'ble Apex Court not either diluting or undermining, the effect of the afore warranty, (g) and, further corollary thereof, is that when, upon, dishonour, of, premium cheque, it stands mandated therein, qua, the apt contract of insurance, appertaining, vis-a-vis, the offending vehicle, ipso facto begetting, the ill consequence of cancellation, (h) and, therefrom it is to be also concluded that hence in the extant contract, there was no obligation fastened, upon, the insurer to make, an, apt intimation, vis-a-vis, the dishonour of the premium cheque, qua the insured. Even otherwise , in a judgment rendered by the Hon'ble Apex Court, in a case, titled as ***Vikram Greentech (I) Ltd. vs. New India Assurance Co. Ltd.***, reported in ***(2009)5 SCC 599***, the relevant paragraph whereof stand extracted hereinafter:-

> "16. An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of uberrima fides i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance an any other contract."

(i) it stands propounded, that, the contract of insurance, being amenable, to, be strictly construed like any other contract, and, deference being meted to the terms, and, conditions, as, embodied therein. The afore warranty, embodied in Ex. RW3/A, hence, is, enjoined to be strictly construed, thereupon, the mere factum, of, dishonour of Ex.RW2/A, by the Kangra Cooperative Bank, immediately ipso facto brought, the, ill consequence, qua, the apt contract rather standing cancelled or rescinded, dehors any intimation, vis-a-vis, the dishonour of the premium cheque hence being purveyed by the insurer, to, the Insured.

5. For the foregoing reasons, there is no merit in the instant appeals and they are dismissed accordingly. In sequel, the impugned award is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

M/s Naina Cold and Retreading Works, Darla .....Appellant.

Versus

H.P. Financial Corporation, Shimla and another .....Respondents.

FAO No. 360 of 2015.
Reserved on :20.09.2018.
Decided on : 28th September, 2018.

Code of Civil Procedure, 1908- Order XXI Rule 66(2)- Proclamation of sale – Requirements – Held, Provision of Order XXI Rule 66(2) of Code are peremptory in nature and must be adhered to. (Para-5).

Code of Civil Procedure, 1908- Order XXI Rule 66, Second proviso- Proclamation of sale – Requirements – Whether it is mandatory for Court to specify estimated value of property to be put to auction? – Held, Statutory obligation to specify estimated value of attached property in proclamation of sale arises only if estimates thereof are provided to Executing Court either by Decree Holder or Judgment Debtor – When no such estimates are given by parties, it is not obligatory for the Court to specify value of property in proclamation of sale. (Para-7).

For the Appellant:	Mr. Virender Singh Chauhan, Advocate.
For Respondent No.1:	Mr. Ashwani Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For Respondent No.2:	Mr. O.P. Sharma, Sr. Advocate with Mr. Naveen K. Dass, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the impugned verdict recorded on 24.12.2011, by the learned District Judge, Solan, upon, an application cast under the provisions, of, Order 21, Rule 90 of the Code of Civil Procedure, whereunder, the judgment debtor sought relief, for, setting aside the sale through public acution, vis-a-vis, its attached immovable properties, for, realization therefrom, the conclusive binding decretal sums of money.

2. During the pendency of the execution petition before the learned executing Court, objections stood reared therebefore, by certain objectors,namely, Geeta Devi, Neeta Devi, Smt. Reena, Miss Madhu, Miss Khema, Chetna, Girish, Smt. Nirmla, Sonu, Deepa, Ravi, wives, sons and daughters respectively of J.D. Nos. 1 and 2, against, the coercive realization, from, the immovable attached assets of the JDs, the decretal sums, given theirs therein holding the apt coparcenary interest. However, the afore objections stood dismissed under orders recorded on 22.06.2011, orders, whereof, uncontrovertedly acquire conclusivity. Furthermore, thereunder, the learned executing court, proceeded to order for issuance of a proclamation, setting forth therein, the, schedule for putting to sale through public auction, the, attached immovable assets of the JDs. The sale through public auction was ordered, thereunder to occur, on 23.8.2011, and, the apt report in respect thereof, was, ordered to be purveyed, vis-a-vis, it, on 31.08.2011. In pursuance thereof, the sale through public auction hence occurred, on 23.8.2011. The highest bidder in the apt sale of the attached immovable property(ies) of the JDs, was respondent No.2 herein, and, the bid amount, as, accepted by the auction bidder, is, comprised in a sum of Rs.1,05,000/-. The afore amount afforded, and, accepted by the person, hence holding the auction proceedings, is, contended to be grossly minimal, and, disproportionate, vis-a-vis, the genuine value, of, the attached immovable assets, of the JD, hence, the JD instituted an application, cast under the provisions of Order 21, Rule 90, hence for setting aside the auction sale conducted, on 23.8.2011. As aforestated, a disaffirmative verdict was recorded thereon, by the learned executing Court, and, being aggrieved therefrom, the JD has instituted the instant appeal before this Court.

3. The learned counsel appearing for the appellant, would succeed in his strivings, for ensuring the setting aside of the apt sale, of, the attached immovable property(ies), of, the JD, through, a public auction to respondent No.2 herein, (i) only upon, material on record making clear and candid evincings, qua, the mandate enshrined in Order 21, Rule 90 of the CPC, anchored, upon,evident material irregularity or fraud erupting, vis-a-vis, the publishing of proclamation or in, the, conducting, of, the auction sale, rather making palpable surfacings, (ii) besides the appellant would succeed, upon, its establishing qua the ingredients borne in sub-section (2) of Order 21, Rule 90 of the CPC, encapsulating the factum qua proven substantial injury, hence ensuing, vis-a-vis, the JD, in sequel to any irregularity or fraud rather making apt surfacings, in the apt sale, through public auction, of the apt attached immovable property.

4. The learned counsel appearing for the appellant in making the afore strivings, has laid much emphasis, upon, the second proviso, vis-a-vis, Order 22, Rule 66 of the CPC, and, provisions whereof stand extracted hereinafter:-

> "66. Proclamation of sales by public auction.- (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.
>
> (2) Such proclamation shall be drawn up after notice to the decree holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-
>
> (a) the property to be sold (or, where a part of the property would be sufficient to satisfy the decree, such part);
>
> (b) the revenue assessed upon the estate or part of the state, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
>
> (c) any incumbrance to which the property is liable;
>
> (d) the amount for the recovery which the sale is ordered; and
>
> (e) every other thing which the Court considers material for a purchaser to know in order to judge of the jature and value of the property:
>
> [Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs;
>
> Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties.}.."

On his reading, the statuory coinage "but the proclamation shall include the estimate, if any, given by either or both of the parties", occurring therein, he submits that it holds, the, connotation, (i) qua it being imperative for the executing Court to include, in the apposite proclamation, the estimate, if any, given by either or both of the parties, (ii) and, he further submits that even, if, neither the JD, or the decree holder purveys, vis-a-vis, the executing Court, the estimate of the value, of, the apt attached immovable assets, (iii) nonetheless, the coinage " but the proclamation shall include the estimate, if any, given by either or both of the parties", rather making it obligatory, upon, the executing Court, to, yet insist, for, purveyings, by, the JD or the decree holder, the estimate, of, the value, of, the apt attached

immovable assets or property. However, the aforesaid submission cannot be accepted, (iv) as, it is founded, upon, a gross misreading, of the afore phrase, occurring in the second proviso, vis-a-vis, Order 21, Rule 66 of the CPC, (v) misreading whereof, is, visible, from the fact, that, the statutory obligation cast, upon, the executing court, to imperatively hence include in the proclamation of sale, the estimate, of, the value of the attached assets/immovable property, arises, only upon estimates thereof being purveyed either by the JD or by the decree holder, (vi) and, obviously upon non purveying thereof, it being not obligatory, upon, the executing court to include in the proclamation of sale, the, value of the attached assets/immovable property. Uncontrovertedly, since neither the JD nor the decree holder purveyed, vis-a-vis, the learned executing Court, the estimates, of, the value, of, the attached assets/immovable property of the JD, thereupon, it was not incumbent, upon, the executing Court, to, include in the proclamation of sale, the value(s) thereof.

5. Be that as it may, a perusal of the records also ought to make, a, clear disclosure qua the ingredients, borne, in, clause (e) to sub-rule (2) of Rule 66 of Order 21 of the CPC, provisions whereof, stand extracted hereinabove, also evidently standing meted apt satiation, (i) given, the, mandatory language, wherewithin, sub-rule (2) of Rule 66 of Order 22 of the CPC, is cast, given the occurrence of word "shall" therein, and, its standing succeeded by the thereunderneath hence various clauses, (ii) thereupon, hence a, mandatory obligation, stood fastened, upon, the learned executing Court, to mete the fullest, and, the absolutest compliance, with, the trite applicable hereat provisions, of clause (e) thereof. The peremptoriness of adherence, vis-a-vis, the mandate of clause (e) to sub-rule (2) of Order 21, Rule 66 of the CPC, by the learned executing Court, (iii) concomitantly enjoined it, to include in the apt proclamation, every material aspect, for rather enabling the auction purchaser, to discern therefrom, the nature and the value of the property, in respect whereof, he or they make their bids, in, the apt auction proceedings. The holistic, and, salutary purpose for peremptory insistence(s), for, rather strict compliance therewith being hence meted, is, two fold, (a) to enable the auction bidder to make an offer not less, than, the amount mentioned in the proclamation; (b) for enabling the JD to ensure that it holds, the, appropriate valuation, and, in case, its valuation is higher than the amount sought to be realised, through, sale of the attached properties, in, the public auction, and, the accepted bid, is, equivalent thereto, (c) thereupon, the amount exceeding the decretal amount, being refundable to the JD, hence, visiting, of, any substantial injury, qua him being forestalled, also any ensuable prejudice being encumbered, vis-a-vis, the judgment debtor also being thwarted

6. In fathoming, whether the afore strict compliance with, the mandate of clause (e) of sub-rule (2) of Order 21, Rule 66 of the CPC, is, provenly established, (i) a glance, vis-a-vis, the order setting forth, the schedule for putting to sale through public auction, the attached immovable properties, of the JD, drawn on 22.06.2011 is imperative, besides an allusion is imperative, to, the proclamation notice. However, an allusion, to, the orders drawn on 22.06.2011, whereunder, the schedule for putting, to, sale through public action, the apt attached immovable assets/properties of the JD,stands delineated, (ii) and, an allusion to the proclamation notice issued, in pursuance thereto, rather unravels qua no strict mandatory compliance, vis-a-vis, the mandate of clause (3) to sub-rule (2) of Order 21, Rule 66 of the CPC, being meted, by the learned executing Court. The effect thereof, is, qua even though sub-rule (2) of Order 21, Rule 90 of the CPC, forbids, the, setting aside of sale, on, the ground of irregularity or fraud, in, the publishing, of, notice or in the conducting of auction proceedings, but, with an exception thereto, being cast therein, (i) comprised, in, upon the Court being satisfied qua the applicant being visisted with substantial injury, by reason , of, any irregularity or fraud, thereupon, given as afore referred, with no strict compliance, vis-a-vis, the mandatory provisions, borne in clause (e) of sub-rule (2) of Order

21, Rule 66 of the CPC, being meted, (ii) also when, the, afore holistic and salutary purpose behind its engraftement, is, defeated, (iii) thereupon, when substantial injury has ensued, vis-a-vis, the JD, hence, render(s), within the ambit of sub-rule (2), of, Order 21, Rule 90 of the CPC, the sale through public auction of the attached immovable property of the JD, vis-a-vis, respondent No.2 herein, to stand vitiated, and, also warrants it being quashed and set aside.

7. During the pendency of the instant appeal before this Court, an application, cast under the provisions of Section 151 of the CPC, stands instituted, by the appellant/applicant herein, wherethrough, the appellant/applicant has strived, to place on record, the, value of the attached assets/immovable property of the JD, and, as comprised in a sum of Rs.4,51,200/-, (i) therefrom, he has made an endeavour, to establish, that, hence substantial financial injury, standing visited upon him, given, the, meager amount being fetched, in the sale, through, public auction, vis-a-vis, the attached immovable property(ies) of the JD, (ii) whereas, upon, strict compliance, being meted, vis-a-vis, clause (e) to sub-rule (2) of Order 22, Rule 66 of the CPC, thereupon, the aforesaid prejudice or the afore substantial injury, rather would stand mitigated. The aforesaid valuation is just and essential, for, enabling the learned executing Court, to, after the impugned verdict, being quashed and set aide, and, its receiving the extant lis, on remand, and, after it being tendered therebefore, to hence incorporate, it, in the proclamation of sale, of the attached assets/immovable properties of the JD, (iii) hence, the leave is accorded to the JD, to, place on record the valuation report aforesaid, whereunder, the value of the attached immovable property of the JD, hence, stand assessed, in a sum of Rs.4,51,200/-, (iv) and, the learned executing Court shall grant an opportunity to the DH to adduce evidence, in rebuttal thereof.

8. The upshot of the above discussion is that the instant appeal is allowed, and, the impugned order is quashed and set aside. In sequel, the sale of the attached immovable property of the JD, through public auction is set aside, and, the matter is remanded to the learned executing Court, to, redraw the sale proceedings, through, publication, after bearing in mind the afore leave being granted to the JD, to, tender therebefore, the aforesaid valuation report, of, the attached property of the JD. The parties are directed to appear before the learned executing Court, on, 25th October, 2018. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Rajesh Kumar and another .....Appellants/Plaintiffs.

Versus

Sita Ram (since deceased) through his legal heirs Shri Tek Chand and others.

.....Respondents/defendants.

RSA No. 345 of 2004.
Reserved on :25th September, 2018.
Date of Decision: 28th September, 2018.

Code of Civil Procedure, 1908- Order XIV Rules 1 & 2- Non-framing of issues – Effect – Trial Court decreeing counter-claim without there being any such issue framed by it – First Appellate Court dismissing plaintiff's appeal- Regular Second Appeal- Held, plaintiff knew about defendants counter-claim filed against him- Also allowed them to adduce evidence

qua counter-claim in shape of demarcation report – Plaintiff cannot be said to have been prejudiced or taken by surprise by non-striking of any issue qua counter-claim- RSA dismissed – Decree of lower court upheld. (Paras-10 to 12).

For the Appellants: Mr. Surender Saklani, Advocate.
For the Respondents: Mr. Sandeep K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs, are, aggrieved by concurrently recorded verdicts, by, both the learned Courts below, whereunder, the plaintiffs' suit for rendition of a decree for permanent prohibitory injunction was dismissed, rather the defendants'/counter-claimants', counterclaim was decreed.

2. Briefly stated the facts of the case are that the plaintiffs had filed a suit against the respondents for rendition of a decree for permanent prohibitory injunction vis-a-vis, the land comprised in Khata No.44/46 red, Khatauni No. 78, Khasra No. 256/1, measuring 0-23-50 hects, situated at Mohal Lajot, Mauza Basnoor, Teh. Sahpur, District Kangra H.P., and, if in the alternative, the defendants succeed to get possession of the same int hat event for possession. The plaintiffs alleged that they are in peaceful possession of the suit land as exclusive owners thereof. The suit land is alleged to be allotted to Shri Parma Ram in the year 1972 as Patta by the State Government. Shri Parma Ram died issueless and he bequeathed the suit land to the plaintiffs, and, so the plaintiffs are the successors-in-interest in the estate of late Shri Parma Ram, on the basis of Will. It is the case of the plaintiffs that the defendants are also allottee of the land comprised in Khasra NO. 254/1, adjoining to the suit land and in order to grab the above mentioned suit land, they are attempting to forcibly occupy a portion of the suit land, as the defendants are proclaiming in open to forcibly occupy the suit land by all means. Hence the suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections in ter alia, maintainability, cause of action, locus standi etc. On merits, sit is submitted that the land was originally allotted to Parma Ram and not to the plaintiffs, who grabbed the same by divesting original owner in possession of the suit land, and, he made the land cultivable, but, as the plaintiffs had bad eyes on the same and after the demise of the original allottee, they grabed the land. It is submitted that Khasra No.254/1 is allotted to the defendants. The plaintiffs being greedy persons, in order to grab the land of the defendants allotted in Khasra No.254/1, has filed the instant suit. It is their case that the land was demarcated, but the plaintiffs uprooted the fence as fixed by the revenue department in presence of the respectable persons. The defendants also filed the counterclaim to the extent that the defendants are owners in possession of Khasra No.254/1 and the plaintiffs be restrained from interfering in Khasra No.254/1.

4. The plaintiffs filed replication to the written statement of the defendant(s), as well as written statement to the counterclaim, 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 plaintiffs are entitled for the relief of permanent prohibitory injunction or in the alternative for the possession against the defendants, as prayed for?OPP.

2. Whether the suit is not maintainable in the present form?OPD.

3. Whether the suit of the plaintiff is misconceived and prematured?OPD.

4. Whether the plaintiffs have no cause of action?OPD.

5. Whether the plaintiffs have no locus standi to file the present suit?OPD

6. Whether the suit of the plaintiffs is malafide?OPD.

7. Whether the plaintiffs are estopped by their act and conduct to file the present suit?OPD.

8. Whether the suit is barred by limitation?OPD.

9. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the latter Court, hence, dismissed the plaintiffs' suit, whereas, it decreed the defendants' counterclaim. 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 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 04.03.2005, 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 the two courts below are justified in granting the decree of permanent injunction in favour of the defendants/respondents by allowing their counter claim when no issue was framed and no evidence was led qua the said counter claim?

b) Whether the two courts below were justified in holding the plaintiffs/appellants in possession of excess area and also restraining them from interfering in the same area?

Substantial question of Law No.1 and 2:

8. The learned counsel appearing for the aggrieved plaintiffs has contended with much vigour before this Court, (i) qua both the learned courts below committing a grave misdemeanor in decreeing, the defendants'/counter-claimants' counterclaim, despite, no issue in consonance therewith being framed, (ii) whereas, the framing of an apt issue in consonance therewith, was vital,f or, validating the impugned verdict(s), hence decreeing the counterclaim, (iii) and, thereafter he contends that the afore omission, vitiates the trial of the suit, and, begets, the, concomitant effect, vis-a-vis, the verdicts challenged before this Court, also hence acquiring an akin taint. The aforesaid submission addressed before this Court by the learned counsel appearing for the aggrieved plaintiffs, would stand validated by this Court, upon, (a) the material on record making, a, display, with utmost candour qua the aggrieved plaintiffs, throughout, the trial of the suit hence being forbidden to participate therein, nor theirs adducing any evidence, in, rebuttal, vis-a-vis, the defendants' counterclaim, (b) whereupon, it may be inferable that the non striking, of, the afore issue, hence, prejudicing the plaintiffs, whereafter, it may also be concludable, qua hence, the trial of the suit being vitiated, and, concomitantly the impugned verdicts hence warranting theirs

being quashed, and, set aside, and, the lis being directed, to, for the apt purpose, hence, remanded, vis-a-vis, the learned Court.

9. For making the apt fathomings, vis-a-vis, the afore facets, the apt crucial evidence, is, comprised in the report of the demarcating officer, borne in Ex.PW4/A, wherewith, tatima borne in Ex.PW4/B, stood appended, with, unfoldments occurring therein, qua encroachments being made by the plaintiff, upon, the defendants/counter-claimants' land, as, adjoins thereto. Ex.DW4/A, and, the tatima appended therewith, borne in Ex.DW4/B, would, suffer invalidation, upon, DW-4, while being subjected, to, an ordeal, of, a scathing cross-examination by the learned counsel, for the plaintiffs, his making acquiescences, vis-a-vis, (a) at the relevant time his not carrying the apt musabi, (b) and, his not adhering to the apt canons prescribed, for his conducting, the, demarcation of the adjoining estates, of the contesting litigants. However, a reading of the cross-examination of DW-4, displays, qua thereat, the counsel for the plaintiff, rather meteing suggestion(s) to him (i) qua prior to his holding demarcation, his making an intimation, to, the contesting litigants; (ii) qua before his proceeding to carry measurements, his enabling the contesting litigants, to verify the 'jareb'; (c) none of the contesting litigants rearing before him any objections, vis-a-vis, pacca points, as, determined by him, for, his therefrom, hence carrying demarcation, of, the adjoining estates, of, the contesting litigants. All the aforesaid affirmative, suggestions, hence, stood answered in the affirmative by DW-4. The effect thereof, being (d) qua the counsel for the plaintiff, while, holding DW-4 for cross-examination, obviously failing to make appropriate unearthings from him, vis-a-vis, non adherence by the aforesaid witness, vis-a-vis, the apt prescribed canons, in, his conducting the demarcation of the adjoining estates, of, the contesting litigants, (e) and further effect thereof, is, qua both Ex.PW4/A, and, Ex.PW4/B, hence acquiring an aura of validity, and, solemnity, (f) rendering hence unnecessary for the learned courts below, to, pronounce any decision upon the objections, if any, reared therebefore, by the contesting litigants, vis-a-vis, the demarcation report, borne in Ex.DW4/A.

10. Furthermore, given the afore effects, emanating from, the afore acquiescences, being meted by DW-4, to the afore suggestions, meted to him, by the learned counsel for the plaintiffs, while holding him to cross-examination, (i) also rather enables this Court to mobilise, an inference, that the plaintiffs were not taken by surprise, vis-a-vis, the adversarial findings, borne in Ex.DW4/A, and, in the appended therewith tatima, as, borne in Ex.DW4/B, (ii) nor hence when he made the aforesaid omissions, in, his hence beffitingly striving to tear apart, the sanctity of Ex.DW4/A, and, of, Ex.DW4/B, thereupon, there was no imperative necessity cast, upon, the learned trial Court to strike any issue in consonance, with, the defendants' counterclaim, (iii) emphatically when hence he had rather for all afore reasons hence acquiesced, vis-a-vis, the defendants/counter-claimants' propagation, nor hence, it can be concluded that the plaintiffs were taken, by surprise or theirs being prejudiced, nor the non striking, of, any issue qua therewith, hence, vitiates the impugned verdicts.

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 questions of law are answered in favour of the defendants/respondents, and, against the appellants/ plaintiffs.

12. In view of the above discussion, there is no merit in the present 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.

Suman Bala .....Petitioner/tenant.
Versus
Rakesh Sood ....Respondent/landlord.

CMPMO No. 250 of 2018.
Reserved on : 20.09.2018.
Date of Decision: 28th September, 2018.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- **Code of Civil Procedure, 1908-** Order VII Rule 14(3)- **Indian Evidence Act, 1872 (Act)-** Section 45- Expert report – Whether can be filed at subsequent stage with leave of Court? – Held, opinion of an expert may emanate even during course of progress of suit or rent petition – It falls within ambit of Section 45 of Act – There is no proviso engrafted in Order VII Rule 14 of Code which bars tendering of such report prepared at subsequent stage into evidence, but with leave of court. (Para-3).

For the Petitioner: Mr. B. Nandan Vashishta, Advocate.
For the Respondent: Mr. Y. P. Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner herein/tenant, standing, aggrieved by an affirmative order pronounced by the learned Rent Controller, upon, the landlord's application, cast, under the provisions of Order 7, Rule 14 (3) of the CPC, hence, has instituted the instant petition before this Court.

2. The landlord/respondent herein, had instituted a petition, seeking therein eviction, of, the tenant/petitioner herein, from, the demised premises, (i) and, the ground reared in the apposite eviction petition, is, embodied in the factum, of it, being bonafidely required, for, the personal use, of, the landlord/petitioner therein. During the pendency of the rent petition before the learned Rent Controller, an application, cast under the provisions of Order 7, Rule 14(3) CPC, stood instituted therebefore, by the landlord, (ii) wherein, leave was sought for placing on record, a report, prepared by one Sh. B.R. Sharma, Civil Engineer, (iii) with clear description(s), vis-a-vis, the location, of, the premises concerned, and, thereafter, in the application, it stands contended that upon leave being granted, vis-a-vis, the report of the Civil Engineer, (iv) thereupon, the learned Rent Controller, being facilitated, to pronounce, a, just decision, vis-a-vis, the afore ground of eviction, constituted in the rent petition. The apt application was contested by the tenant/petitioner herein, and, she contended that the mandate, of, Order 7, Rule 14 (3) of the CPC, provisions whereof stand extracted hereinafter:-

"Order 7 Rule 14: Production of document on which plaintiff sues or relies

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

(v) enjoined, upon, the applicant/respondent/landlord, to, acquire the satisfaction of the learned Rent Controller, vis-a-vis, (a) the document in respect whereof the leave, is, espoused, not being within his knowledge earlier; (b) his being disabled to procure it, at the appropriate stage, despite exercise of due diligence, (vi) and, therefrom he contends that, with, the report of the afore expert, standing prepared subsequent to the institution, of, the rent petition, (vii) thereupon, per se when the parlance gained by the statutory coinage "that the said documents were earlier not within the party's knowledge", is, qua the apposite document, rather imperatively existing in contemporaneity, vis-a-vis, institution, of, the rent petition, (viii) rather, hence, rendering capsized the endeavour of the applicant/respondent/landlord, reiteratedly, given its standing starkly manifested, qua, its preparation evidently occurring subsequent, to the institution of the rent petition, (ix) and, also he contends that the further statutory phrase occurring therein "or could not be produced at the appropriate time in spite of due diligence", as embodied, in the apt provisions also being, insistive, qua the existence of the apt documents,rather occurring, in, contemporaneity or prior to the institution of the rent petition, (x) thereupon, the plea of theirs being bonafidely, omitted to, despite exercise of due diligence, hence stand appended with the rent petition or remaining unrecited in the list, of, documents, appended with the petition, rather being unavailable for espousal by the applicant/landlord. He further contends that given the reply meted to the apt application, wherein, a contention, is ventilated qua, the, original approved map, of the building standing already appended, with the rent petition, rather therefrom, the, apt gauging(s) being amenable to be made by the landlord, and, hence the apt leave being not affordable. In making the initial submission, the learned counsel appearing for the petitioner/tenant has placed reliance, upon, a judgment rendered by the Hon'ble High Court of Delhi, in, a case titled as ***J.K. Kashuap vs. Rajiv Gupta and others, IA Nos. 4595 of 2012 and 2742 of 2012 in CS (OS) 2156 of 2007***, the relevant paragraph No.8 whereof stand extracted hereinafter:

> "8. As already mentioned above the main objective of the plaintiff is to introduce the said three letters through the present amendment application as well as application filed by the plaintiff under Order 7, Rule 14 CPC. Under Order 13 Rule 1 CPC it is incumbent upon both the parties to produce the original documents before the settlement of issues in a case. Order 7, Rule 14 CPC also obligates the plaintiff to produce document upon which he has relied upon at the time of the presentation of the plaint and if not produced at that stage then such a document can be received in evidence only with the leave of the Court and not otherwise. For seeking leave of the Court the parties seeking to produce documents at a belated stage must satisfy the Court, that the said documents were not within his knowledge earlier or could not be produced by him at the

appropriate time in spite of exercise of due diligence. In the facts of the present case the plaintiff has not given any reasons for not having produced the said documents at the time of the presentation of plaint or even before the settlement of issues. The plaintiff has also not referred to exchange of any such communication between him and Jamila Gupta either in the plaint or in the replication. Out of three letters two letters were alleged to have been received by the plaintiff from the Jamila Gupta and, therefore, it cannot be said that they were not in possession and power of the plaintiff. While dealing with the scope of Order 7 Rule 14 CPC this Court in the case of *Gold Rock World Trade Ltd. Vs Veejay Lakshmi Engineering Works Ltd. Reported in (2008)149 PLR 40* held as under:

> "Consequently, before leave of court can be granted for receiving documents in evidence at a belated stage, the party seeking to produce the documents must satisfy the court that the said documents were earlier not within Party's knowledge or could not be produced at the appropriate time in spite of due diligence. Conditions necessary before leave of court can be granted have been satisfied. It cannot be said that the plaintiff was not aware of the documents earlier, or that the same could not be produced in spite of due diligence on the part of the plaintiff. As the plaintiff was not diligent enough at that point of time, this Court is left with no alternative but to reject its request."

3. However, for the reasons to be assigned hereinafter, this Court cannot be coaxed, to, accept the aforesaid submission(s), as addressed before this Court, by the learned counsel appearing for the petitioner/tenant, given (a) even if, assumingly the afore parlance, is, acquired by the afore statutory coinage, as, occurring, in, the provisions of Order 7, Rule 14 of the CPC, and, also, hence meteing thereto, of a *stricto sensu* construction, may be warranted, (b) and, with the apposite document(s), rather not, in contemporaneity with the institution of the rent petition, being in existence, and, per se thereupon, the apt leave for its being tendered into evidence, rather was not accordable, (c) nonetheless, neither the factum of its subsequent preparation not its concomitant emergence, yet, cannot coax this Court, to, decline the apt leave for its being tendered into evidence, in its exercising, the apt discretion vested in it, under, the mandate engrafted in Order 7, Rule 14 of the CPC, (d) given its author, being averred in the apposite application, to be an expert, and, when hence the opinion of an expert, as, may emanate, even during the course of progress of a suit or of a rent petition, rather falls within the ambit of Section 45, of, the Indian Evidence Act, (e) and, when there is no proviso engrafted, underneath the provisions of Order 7, Rule 14 of the CPC, for, barring the opinion rendered by an expert, and, as embodied in his report, hence being permitted to be tendered into evidence, even when its emergence occurs subsequent, to, the institution of a petition or a suit, (f) thereupon, for want of afore statutory provisions, standing, borne in Order 7, Rule 14 of the CPC, for, hence, ousting the apt applicability, of the provisions, of Section 45 of the Indian Evidence Act, (g) therefrom, a firm conclusion, is, erectable qua hence the opinion or the report of an expert, even if emerges during the course of trial of a suit or of a rent petition, rather being permitted, to, with the leave of the court hence adduced into evidence or taken on record, (h) it being just and essential for resting the imperative factum probandum, as, in the extant case, is, the one appertaining to the apt bonafide requirement of the landlord, to, on anvil thereof, hence strive to receive an order of eviction of the tenant, from the demised premises.

4. Even if assumingly, the original building plan hence stands appended with rent petition, yet when it may not disclose with, the, utmost precision, and, with ultra

specificity, as may, hence stand disclosed in the report, of, the expert, the utmost necessity, of, the landlord/respondent herein, hence, bonafidely requiring it, for personally using it, upon, its being vacated, under, order(s), of, eviction being rendered by the learned Rent Controller, (i) thereupon also when, the expert's report, upon, its adduction, may also hence support the utmost necessity of the landlord, and, further may enable, the, emergence, of, best evidence, vis-a-vis, his bonafide(s), in, seeking, the, eviction of the tenant/petitioner herein, therefrom, (ii) whereupon, the apt leave is granted, for its being tendered into evidence, given its affording, being concomitantly both just and essential, for resting the apt controversy.

5. Be that as it may, even otherwise, the courts of law, are, expected to lean towards granting the apt leave, dehors any afore *stricto sensu*, construction being meted to the afore coinage hence occurring in the aforesaid statutory provisions, (i) unless demonstrable prejudice would ensue, to the petitioner/tenant or unless the discretion exercised, by the courts, in, permitting its/theirs being tendered into evidence, is, visibly rather grossly flawed, (ii) given courts, upon, discerning, from, the pleadings, the, necessity of its/their adduction, hence, for resting a clear clinching finding, upon the apt issue, thereupon, may being constrained, to validly conclude qua the apt leave being rather accordable. Significantly, hereat when for reasons aforestated, the afore report of the expert, is both, just and essential, for enabling the applicant/landlord, to, prove the apt ground, and, when the petitioner herein/tenant, would also hold the right, to cross-examine him, and, when hence no palpable prejudice would stand encumbered, upon, the non-applicant/petitioner/ tenant, thereupon, this Court is constrained, to affirm the impugned order.

6. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed accordingly. In sequel, the impugned order is maintained and affirmed. The parties are directed to appear before the learned trial Court, on 12th October, 2018. All pending applications also stand disposed of. Records be sent back forthwith.

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

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

Cr.MMO No. 321 of 2017
Decided on: 01.10.2018.

Code of Criminal Procedure, 1973- Section 173- Cancellation report – Procedure- Held, On receiving cancellation report court has to issue notice to complainant inviting his objection thereto, and then either to accept or reject but only after evaluating material collected by investigating officer in course of investigation – Order of Court taking cognizance without evaluating material filed in support of cancellation report is illegal. (Para-4).

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
Hardeep Singh V. State of Punjab AIR 2009 SC 483

For the Petitioner	:	Mr. T.S. Chauhan, Advocate.
For the Respondent	:	Mr. S.C. Sharma and Mr. Dinesh Thakur, Additional Advocate Generals with Mr. Amit Kumar Dhumal Deputy Advocate General, for the State.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 482 Cr.PC, prayer has been made on behalf of the petitioner for quashing of orders dated 10.12.2014 and 4.7.2017, passed by the learned Chief Judicial Magistrate, Chamba, H.P., in FIR No. 37 of 2011, titled State of H.P. v. Janam Singh, whereby direction has been issued to issue non-bailable warrants to the petitioner for commission of offences punishable under Sections 452, 323, 427, 376 and 511 of IPC. Vide aforesaid order, court below also directed the Investigating Officer to file proper challan.

2. Facts, as emerge from the record are that aforesaid FIR came to be lodged against the petitioner at the behest of the complainant-prosecutrix, who vide written complaint made to SDM Pangi, alleged that on 12.12.2011, at about 9:15 AM, petitioner-accused namely Janam Singh, came to her house and taking undue advantage of her loneliness, tried to molest her and also slapped her. Complainant-prosecutrix also reported in her complaint that with great difficulty, she was able to rescue herself from the clutches of the accused, but accused while leaving the spot, extended threats to kill her by proclaiming that he is a person of BJP. Aforesaid written complaint subsequently came to be forwarded to SHO Pangi, on the basis of which, FIR, as taken note herein above, came to be registered at P.S. Pangi, against the accused for having committed offences punishable under Sections 452, 427, 376 and 511 of IPC. During investigation, police found the accused to have committed offence only under Section 323 IPC, which is non-cognizable and accordingly, prepared cancellation report qua the other offences under Sections 452, 427, 376 and 511 of IPC and submitted the same before the competent court of law for acceptance.

3. Record further reveals that learned CJM Chamba, after having received cancellation report, issued notice to the complainant, who filed objections to the cancellation report on 18.8.2012. Learned CJM Chamba, having perused objections filed by the complainant sent the case back to SHO P.S. Pangi, for further investigation and called for the report on 21.11.2013. SHO P.S. Pangi, submitted report on 24.10.2014, reiterating that nothing has emerged against the accused as far as commission of offence under Sections 452, 427, 376 and 511 of IPC is concerned. Court below having recorded the statement of complainant, declined to accept the cancellation report submitted by the police and directly took cognizance against the accused for having commission of offence punishable under Sections 452, 323, 427, 376 and 511 of IPC and issued non-bailable warrants against the accused. Vide aforesaid order, learned court below also directed the Investigating Officer to file the proper challan. In the aforesaid background, petitioner-accused has approached this Court in the instant proceedings praying therein for quashment of FIR as well as consequent proceedings pending before the competent court of law.

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

5. At this stage, it may be noticed that prior to proceedings at hand, accused had approached this Court earlier by way of Cr.MMO No. 345 of 2015, praying therein to quash the FIR as well as consequent proceedings since nothing concrete had emerged against the accused, however, this Court, having taken note of the reply filed by the respondent-State, wherein it was categorically stated that police has already filed cancellation report in the FIR on the basis of statement of witnesses as well as evidence collected by the Investigating Agency, disposed of the aforesaid petition vide judgment dated 26.5.2017, with a direction to the court below to take final decision on the cancellation report having been filed by the police in FIR supra.

6. On 4.7.2017, CJM, Chamba, after having received aforesaid order passed by this Court in Cr.MMO No. 345 of 2015, passed fresh order stating therein that since his predecessor has already declined to accept the cancellation report vide order dated 10.12.2014, he has no occasion to pass fresh order upon the same cancellation report in terms of order dated 26.5.2017, passed by this Court in Cr.MMO No. 345 of 2015. Careful perusal of material available on record, reveals that that prior to passing of order dated 26.5.2017, passed by this Court in Cr.MMO No. 345 of 2015, learned court below had already passed order dated 10.12.2014, declining therein request of Investigating Officer to accept the cancellation report.

7. Before adverting to the factual matrix of the case, 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. From the bare perusal of 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 in the light of the aforesaid exposition of law, this Court shall make an endeavor to examine the material available on record vis-à-vis impugned order to arrive at conclusion that whether facts of the case warrant exercise of power by this court under Section 482 Cr.PC for quashing of FIR or not.

12. Having heard learned counsel for the parties and perused impugned order dated 10.12.2014, whereby the learned court below while rejecting the cancellation report filed on behalf of the Investigating Agency, issued non-bailable warrants to the accused for having committed offences Sections 452, 323, 427, 376 and 511 of IPC, this Court is persuaded to agree with the contention of Mr. T.S. Chauhan, learned counsel representing the petitioner that court below while passing order dated 10.12.2014, not only exceeded its jurisdiction, rather caused great prejudice to the accused by issuing non-bailable warrants to the accused.

13. The question whether court below while passing impugned order had actually evaluated the material placed before it by Investigating Officer vis-à-vis objections filed by the complainant-prosecutrix to the cancellation report, shall be considered and dealt with in the later part of the judgment. At this stage, if even if it is presumed that learned court below having perused objections filed by the complainant-prosecutrix to the cancellation report was satisfied that police did not carry out investigation in proper manner and caused prejudice to the prosecutrix, definitely, in that eventuality, court below while rejecting the cancelation report had definitely no authority or jurisdiction to issue non-bailable warrants to the accused. Rather court below in the given circumstances was under obligation to issue notice to the accused specifying therein that why proceedings for having committed offences under aforesaid provisions of law be not initiated against him. Otherwise also, after the issuance of notice and having supplied the copies of challan/cancellation report in terms of Section 207 Cr.PC, court below having taken note of offences allegedly committed by the accused, under Sections 452, 323, 427, 376 and 511 of IPC, ought to have committed the matter under Section 209 Cr.PC, to the learned Sessions Judge. But in the case at hand, as is quite apparent from the impugned order dated 10.12.2014, learned court below, while declining the cancellation report, directly issued

non-bailable warrants to the accused for having committed offences punishable under Sections 452, 323, 427, 376 and 511 of IPC, which ought not to have been done by the court below in any eventuality that too without affording opportunity of being heard at that stage to the accused.

14. In the case at hand, court below committed another illegality by directing the Investigating Officer to file proper challan, having received cancellation report, court had two options; first, to issue notice to the complainant inviting objections, if any; second, after having received objections, either to accept the cancellation report or reject the same but after having evaluated the material adduced on record by the Investigating Officer in support of cancellation report. But in the instant case, this Court having carefully gone through the impugned order dated 10.12.2014, has no hesitation to conclude that there is no evaluation, if any, of material placed on record by the Investigating Agency along with cancellation report by the court below while declining the request for accepting the cancellation report. Interestingly, court below while passing order dated 10.12.2014, only stated that Investigating Officer has given his final report as if he was adjudicating upon the present case. Needless to say, as per Section 173 (2) Cr.PC, police is only required to submit report on the basis of material available on record so as to find whether any offence has been committed or not. There cannot be any quarrel with the finding /observation made by the court below in the impugned order that under Section 173 (2) Cr.PC, Investigating Officer is only to place on record material along with report and final decision, if any, with regard to acceptance/rejection of cancellation report is definitely to be taken by the court concerned. Having carefully perused cancellation report (Annexure P-1 at page 11) submitted by the Investigating Officer, this Court finds that court below erred in recording that Investigating Officer gave his final report concluding therein that no case is made out against the accused under Sections 452, 427, 376 and 511 of IPC.

15. Bare perusal of cancellation report reveals that Investigating Officer, after having recorded statement of witnesses, complainant-prosecutrix and perused other material, arrived at a conclusion that only case under Section 323 IPC is made out against the accused and no case is made out against other provisions of law i.e. Sections 452, 427, 376 and 511 of IPC. Investigating Officer in his report has nowhere stated that accused be acquitted of offences alleged to be committed by him under Sections 452, 323, 427, 376 and 511 of IPC, rather he while simply presenting the cancellation report in the competent court of law has stated that no case is made out against the accused under the aforesaid provisions of law. This Court has no hesitation to conclude that while passing order dated 10.12.2014, court below has failed to apply its mind and has not taken the trouble of analyzing/appreciating the material adduced on record by the Investigating Agency in support of cancellation report.

16. In normal circumstances, though this Court having taken note of aforesaid illegality committed by the court below, would have remanded the case back to the court below for passing fresh order, but taking note of the fact that matter is hanging fire since 2011, this Court deemed it proper to evaluate the material itself to arrive at a conclusion whether there is sufficient material, if any, available on record to proceed against the accused or not. This Court finds from the record that investigation was carried out by the Investigating Agency on two occasions, wherein repeatedly, it was found that accused had only given beatings to the complainant-prosecutrix and at no point of time, offence, if any, was committed by him under Sections 452, 323, 427, 376 and 511 of IPC and as such, this Court sees no reason to allow the further prosecution of the accused in terms of order dated 10.12.2014, which otherwise is illegal as has been discussed herein above.

17. Even respondent-State in para-2 of the reply filed before this Court has reiterated that petitioner was found to have committed offence punishable under Section 323 IPC and offences under Sections 452, 427, 376 & 511 of IPC have not been proved on the basis of statements of witnesses as well as evidence collected during the course of the investigation. Para 2 of the reply is reproduced herein below:-

> *2. That the contents of Para No.2 of the petition are admitted to the extent that petitioner was found to have committed offence punishable under Section 323 IPC and offences under section 452, 427, 376 & 511 of IPC has not been proved on the basis of statements of witnesses as well as evidences collected during the course of investigation. Thus, cancellation report was prepared and submitted in the Ld. Court of Chief Judicial magistrate Chamba."*

It has also come in the investigation, which has been further disclosed to this Court by the respondent-State by way of reply, that during the investigation, it has come that there was a property dispute between the family of the petitioner and the complainant and on account of such dispute, FIR detailed herein above, came to be lodged against the accused at the behest of the complainant.

18. Reliance placed by the learned court below on the judgment passed by the Hon'ble Apex Court in *Hardeep Singh V. State of Punjab AIR 2009 SC 483*, while passing impugned order, is wholly mis-placed. In the aforesaid judgment, Hon'ble Apex Court, has held that report contemplated by Section 173 should contain the information required by the said provision. The Investigating Officer is not expected to record findings of fact nor to give clean chit by exercising power of a Court or judicial authority. As has been discussed herein above, there cannot be any quarrel with the aforesaid proposition of law, but as has been noticed herein above, since court below has not applied its mind, it has given erroneous finding that Investigating Officer while presenting the cancellation report has recorded finding of fact or has given clean chit to the accused, rather careful perusal of cancellation report filed by the Investigating Officer clearly suggests that he after having investigated the matter arrived at a conclusion that no case, if any, is made out against the accused under Sections 452, 323, 427, 376 and 511 of IPC and accordingly, presented cancellation report without expressing his opinion and decision in this regard was ultimately required to be taken by the court that too after evaluating the material placed on record by the Investigating Agency.

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. 37/11 dated 14.12.2011, registered at PS Pangi, District Chamba, HP, under Sections 452, 427, 376 and 511 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 CHANDER BHUSAN BAROWALIA, J.

Kuldeep Singh .....Appellant.

Versus

Milap Chand & another .....Respondents.

Cr. Appeal No. 201 of 2007
Reserved on: 19.09.2018
Decided on: 01.10.2018

Indian Penal Code, 1860- Sections 323, 325 and 506 read with 34- Grievous hurt and criminal intimidation-Proof- Accused tried on complaint that they made assault on complainant and uprooted his two incisors – Incident alleged to have been seen by 'G' and 'R' – Trial Court acquitting accused of all charges – Appeal against – High Court found that (i) there was unexplained delay in filing complaint, (ii) though incisors of complainant were missing but there was no corresponding injury on lips or gums, (iii) Medical Officer clearly reporting that oral hygiene of complainant was very poor and loss of teeth could be on account of gross corrosion, (iv) complainant himself admitting loss of some other teeth due to disease, (v) case against complainant and others instituted by accused party already pending in Court, (vi) 'R' appeared to be a procured witness – Held, complainant miserably failed in establishing his case against accused – Trial Court justified in acquitting accused – Appeal dismissed. (Paras- 8 to 15 & 18)

For the appellant: Mr. Ashok Kumar Thakur, Advocate.
For the respondents: Mr. Anoop Rattan and Ms. Ritika Jassal, Advocates.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/complainant (hereinafter referred to as "the complainant") laying challenge to judgment dated 29.03.2006, passed by learned Judicial Magistrate 1st Class, Court No. 2, Dehra, District Kangra, H.P., in Criminal Case No. 260-II/2000, whereby the respondents/accused (hereinafter referred to as "the accused persons") were acquitted for the offences under Sections 323, 325, 500 and 506 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The background facts giving rise to culmination of the case against the accused persons can tersely be summarized as under:

As per the complainant, the accused persons used to abuse him during his visits to his home. He has further contended that on 22.10.2000, around 9/10:00 a.m., when he was working in his fields, the accused persons came and asked him as to what he was doing. The accused persons gave beatings to him with stick, slippers and fist blows. The complainant was rescued by his wife when he raised hue and cry. In the interregnum, accused Milap Chand gave a fist blow on his mouth and upper side teeth of the complainant got broken. As per the complainant, two passers by also witnessed the occurrence. The accused persons also threatened the complainant to do away with his life. The complainant was shifted to Civil Hospital, Garli, where he was admitted and treated. The police was intimated telephonically, however, police did not take any action. On the subsequent day, the complainant and his father-in-law visited the police station, however, again police did not take any action and in turn police took complainant's signatures on some blank papers. They were informed by the police to apply for bail of complainant, his wife and son, in a case registered against them. They were frequently called to the police station, on the pretext that a case will be registered against the accused persons. Ultimately, the complainant filed a complaint before the learned Trial Court. The learned Trial Court, after examining the preliminary evidence found existence of *prima facie* case against the accused persons.

3. The complainant, in order to prove his case, examined as many as five witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty. In defence evidence, the accused persons produced Ex. D-1 to Ex. D6, however, no defence witness was examined.

4. The learned Trial Court, vide impugned judgment dated 29.03.2006, acquitted the accused persons for the offences punishable under Sections 323, 325, 500 and 506 IPC read with Section 34 IPC, hence the present appeal is preferred by the appellant/complainant.

5. The learned counsel for the appellant has argued that the learned Trial Court did not appreciate the evidence correctly and the accused persons have been acquitted on the basis of surmises and conjectures. He has further argued that the learned Trial Court has not correctly applied the law. The complainant has proved the guilt of the accused persons beyond the shadow of reasonable doubt. Conversely, the learned counsel for the accused persons has argued that the learned Trial Court has correctly appreciated the evidence and the judgment of acquittal is well reasoned. He has further argued that there is nothing on record which could remotely establish the guilt of the accused persons. He has argued that the judgment of acquittal needs no interference, so the appeal, filed by the complainant, be dismissed.

6. In rebuttal, the learned counsel for the appellant has argued that the accused persons be convicted after re-appreciating the evidence, as the learned Trial Court has failed to appreciate the evidence correctly.

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

8. In the case in hand, the testimony of the complainant is very important. He was examined as CW-3 and he, in his examination-in-chief, tried to fortify his case. As per his deposition, Shri Gian Chand and Shri Ramesh were also present on the spot of occurrence. This witness has further deposed that he sustained stick injuries on his back and his wife telephonically informed police of Police Station, Jawalamukhi. However, no report was written and his medical was retained by the police. He has further deposed that his broken incisors are with the doctor of Garli, Hospital. The complainant, in his cross-examination, has deposed that he, through an application, reported the matter to Gram Panchayat qua the occurrence. He denied that the occurrence took place near the road. As per him, the occurrence took place on the land adjacent to the house. His in-laws reside at Garli, which is 10/12 kilo meters from his house. He has further deposed that Police Station, Jawalamukhi, is 5 kilo meters away from his house. He admitted that there is dispute qua partition of the joint land. He denied that on 22.10.2000, at about 09:30 a.m., he, his father-in-law, brother-in-law Balbir and wife Sudesh thrashed accused Milap Chand, qua which the matter was reported by Milap Chand to the police. He denied that his teeth fell due to disease and his complaint is defence plea. He did not give any application to the police qua breaking of his teeth.

9. In the instant case, the statements of medical experts is very vital. CW-1, Dr. Harminder Mahajan, deposed that on 22.10.2000, around 03:15 p.m., he examined the complainant and found injuries on his person, which are detailed in medico legal certificate, Ex. PW-1/A, issued by him. As per this witness, probable duration of injuries is within 12 hours and he referred the complainant for dental opinion. After dental opinion, injury No. 1 was opined to be grievous in nature. He has further deposed that these injuries were caused with blunt weapon. The injuries sustained by the complainant could be possible with fist blows. This witness, in his cross-examination, deposed that he did not inform the police. He categorically deposed that he cannot say whether tooth, Ex. PW-1/B, fell due to disease. As per this witness, there was no corresponding injury on the lips of the complainant. He has further deposed that the injuries sustained by the complainant could be possible in a fall. He issued medico legal certificate and advised the complainant to go to

Police Station, Jawalamukhi. He handed over the broken tooth to Dr. Zalam Sandhu, Incharge, Civil Hospital, Garli.

10. CW-2, Dr. Monika Mahajan, deposed that on 22.10.2000, she examined the complainant, as he was referred to her. As per this witness, dental injury No. 1 could be possible with fist blows. This witness, in her cross-examination, has deposed that she did not conduct any X-ray of the patient. She has also deposed that there was no corresponding injury on the lips of the patient and there was laceration of the gums. As per this witness, oral hygiene of the patient was poor and the tooth, Ex. PW-1/B, could possibly be broken by gross corrosion. This witness admitted that such type of tooth could also fall on its own due to poor hygiene condition. As per this witness, there was no fresh bleeding from the gums when she examined the patient. According to this witness, the injury sustained by the complainant, could be possible due to fall.

11. CW-4, Smt. Sudesh Kumari (wife of the complainant) deposed that on hearing the shouts of her husband, she rushed to the spot. This witness, through her version, supported the complainant's case. She, in her cross-examination, has deposed that police station is about 5/6 kilo meters from their house and Chambapatan is at a distance of 7/8 kilo meters. This witness deposed that she does not know other two witnesses, who are from her village. As per this witness, some blood stains were on the clothes of her husband. CW-4 denied the counter story of the defence and feigned her ignorance that Milap Chand (accused No. 1) was medically examined. She admitted that there is a trial pending against them for beating Milap Chand. As per this witness, considerable blood oozed from the lips of her husband.

12. Lastly, the complainant examined Shri Ramesh Chand, as CW-5. He has deposed that on 22.10.2000, around 9/10:00 a.m. he alongwith Shri Gian Chand came to Amb for purchasing bullocks and when they were returning, they saw the accused persons thrashing the complainant. As per this witness, teeth of the complainant were broken and accused Praveen Kumari gave beatings to the complainant with stick and slipper. This witness, in his cross-examination, deposed that he knows Nathu Ram and his daughter and Nathu asked him to depose in the Court.

13. After exhaustively discussing the entire evidence the same needs to be examined on the touch stone of veracity and truthfulness. In the case in hand, the evidence is very slippery and there are number of discrepancies in the statements of complainant's witnesses. The complainant, in his complaint himself stated that the police called him time and again and he specifically mentioned the dates on which he was called by the police. Surprisingly, the complainant, in his cross-examination, deposed that he went to the police station on the day subsequent to the occurrence and thereafter he did not go to the police station. Admittedly, the complaint is filed on 28.10.2000 and the occurrence is alleged to have taken place on 22.10.2000, thus there is delay of six days in filing the complaint, which clearly goes unexplained. As per the deposition of the complainant, initially he moved an application before the panchayat, however, no such application has seen the light of the day. Even the complaint, so filed be the complainant, before the learned Trial Court, did not mention about any such complaint filed by him before the learned Trial Court. If it is assumed for the sake of arguments that the complainant suffered injuries in the beatings given to him by the accused persons, then he could have reported the matter at Police Station, Jwalamukhi, which is only 5 kilo meters from his house, but he had chosen to firstly come to Garli Hospital, which is 10/12 kilo meters from his house. This also raises serious doubt about the veracity of the complainant's allegations. The complainant has deposed in his cross-examination that his 5/6 teeth were uprooted due to disease.

14. There are other material discrepancies in the evidence as well. CW-5, Shri Ramesh Chand, categorically deposed that he is deposing at the instance of Nathu (father-in-law of the complainant). This witness, in his preliminary evidence has deposed that he accompanied the complainant to Garli Hospital, but in his cross-examination he took a slew and deposed that he did not go to the hospital alongwith the complainant. This witness seems to have been made an eye witness of the occurrence deliberately and his deposition belittles the complainant's case.

15. Smt. Sudesh Kumari (CW-4), wife of the complainant, deposed that there were injuries on the lips of the complainant, but Dr. Harminder Mahajan (CW-1) clearly stated that there was no corresponding injury on the lips of the complainant. Further, CW-2, Dr. Monika Mahajan, deposed, in her cross-examination, that tooth of the complainant could possibly be broken by gross corrosion. She has further deposed that the tooth might have been broken itself due to poor hygiene.

16. There are other material discrepancies in the evidence. The complainant stated in his complaint that police was telephonically intimated, but CW-1, Dr. Haminder Mahajan, specifically denied that he telephonically informed the police. The complainant deposed that his wife telephonically informed the police, but wife of the complainant did not state so. The complainant specifically deposed that an application was moved before the Panchayat, whereas wife of the complainant feigned her ignorance to this fact.

17. The net result of the above discussion is that the complainant has miserably failed to prove his case against the accused persons, thus they cannot be convicted. The accused persons have been rightly acquitted by the learned trial Court and it is not possible to hold that the learned Trial Court's view is perverse. Hence, there is nothing to interfere with the well reasoned judgment of the learned Trial Court. Thus, on the basis of material, which has come on record, it is more than safe to hold that the complainant has failed to prove the guilt of the accused persons 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. Bail bonds are cancelled.

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

M/s Jalpa Mata HP Center ...Petitioner

Versus

Hindustan Petroleum Corporation Limited and others ...Respondents

Arb. Case No. 70 of 2018 alongwith
Arb. Cases No. 72, 73, 79 to 85
and 89 to 91 of 2018
Decided on: October 1, 2018.

Arbitration & Conciliation Act, 1996 (as Amended vide Arbitration and Conciliation (Amendment) Act, 2015)- Sections 9, 12(5) & 17- Interim orders & appointment of

arbitrators- Neutrality Principle – Applicability - Petitioner(s) praying for interim orders for restraining respondents (Hindustan Petroleum Corporation Limited and others) from effecting recovery and also from blacklisting petitioner(s) – Petitioners undertaking to take steps for appointment of arbitrator for adjudication of disputes – Agreement however empowering Appointing Authority of HPCL only either to act herself as sole arbitrator or nominate some sitting or retired officer of Corporation or Retired Officer of Govt. Company in oil sector of rank of Chief Manager or above etc. as arbitrator – Contractors having no choice in matter of appointment of arbitrator – Held, main purposefor effecting amendments in Statute is to provide for neutrality of Arbitrators – Any person whose relationship with party or counsel or subject matter of disputes falls under any categories specified in Schedule, he is ineligible to be appointed as Arbitrator – Agreement executed inter se party found violative of neutrality principle – Stipulation regarding appointment of person nominated by HPCL as Arbitrator held, illegal - High Court appointed retired Hon'ble Judge of High Court as arbitrator – Also directed respondents as interim measure not to take coercive measures till application filed under Section 17 of Act decided by arbitrator. (Paras- 12, 13 & 15).

Case referred:
Volestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665

For the Petitioner(s)	:	Mr. Suneet Goel, Advocate, in Arb. Cases No. 70, 72 and 73 of 2018. Mr. Yashveer Singh Rathore, Advocate, in Arb. Cases No. 79 to 82 of 2018. Mr. Rajiv Rai, Advocate, in Arb. Cases No. 83 to 85 and 89 to 91 of 2018.
For the Respondents	:	Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate, in all the petitions.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral)

Instant arbitration cases have been filed with similar relief and against same respondents, as such, with the consent of the learned counsel representing the parties, same were taken up together and are being disposed of by this common judgment.

2. By way of present petitions filed under Section 9 of the Arbitration & Conciliation Act, 1996 as amended upto date, prayer has been made on behalf of the petitioner(s) for grant of interim directions to the extent that execution and operation of orders of recovery and blacklisting their Companies, may be stayed. Aforesaid prayer has been made on behalf of the petitioners on the ground that since steps are being taken by them for appointment of arbitrator in terms of arbitration Clause 18 contained in the agreement entered into *inter se* parties, and as such, in the interregnum, respondents may be restrained from executing impugned orders, as has been taken note herein above. Detail of the orders impugned by way of present set of cases is as follows:

Sr. No.	Arb. Case No.	Title	Date of impugned order/annexure	Amount of recovery
1.	70 of 2018	M/s Jalpa Mata HP Center	22.8.2018 (Annexure P-6)	**11,83,517**
2.	72 of	M/s Amar Service	20.8.2018	**59,42,094**

	2018	Station, Chandigarh	(Annexure P-6)	
3.	73 of 2018	Harpreet Singh Sabharwal	22.8.2018 (Annexure P-5)	**11,14,839**
4.	79 of 2018	M/s Sharma Oil Carrier	22.8.2018 (Annexure P-6)	**12,46,438**
5.	80 of 2018	Shree Balaji Filling Station	16.8.2018 (Annexure P-6)	**3,63,353**
6.	81 of 2018	M/s Nirmal Pitamber HP Centre	16.8.2018 (Annexure P-6)	**8,48,672**
7.	82 of 2018	M/s Paunta HP Centre	16.8.2018 (Annexure P-6)	**3,87,502**
8.	83 of 2018	M/s Mohan Singh & Sons	16.8.2018 (Annexure P-8)	**10,63,923**
9.	84 of 2018	M/s Puri HP Centre	16.8.2018 (Annexure P-8)	**11,05,775**
10.	85 of 2018	M/s Snowline Filling Station	21.9.2018 (Annexure P-6) & 22.8.2018 (Annexure P-10)	**14,44,925**
11.	89 of 2018	M/s Hans Raj HP Centre	20.8.2018 (Annexure P-7)	**10.82,107**
12.	90 of 2018	M/s Saheed Raj Kumar Filling Station	10.9.2018 (Annexure P-7)	**11,31,529**
13.	91 of 2018	M/s Amit Oil Carrier	16.8.2018 (Annexure P-8)	**26,88,644**

3. Clause 18 of the agreement reads as under:

"18. **Arbitration**

All disputes and differences of whatsoever nature, whether existing or which shall at any time arise between the Parties hereto touching or concerning the agreement, meaning, operation or effect thereof or to the rights and liabilities of the Parties or arising out of or in relation thereto whether during or after completion of the contract or whether before after determination, foreclosure, termination or breach of the agreement (other than those in respect of which the decision of any person is, by the contract, expressed to be final and binding) shall, after written notice by either Party to the agreement to the other of them and to the Appointing Authority hereinafter mentioned, be referred for adjudication to the Sole Arbitrator to be appointed as hereinafter provided.

The appointing authority shall either herself act as the Sole Arbitrator or nominate some officer/retired officer of Hindustan Petroleum Corporation Limited (referred to as owner or HPCL) or a retired officer of any other Government Company in the Oil Sector of the rank of Ch. Manager & above or any retired officer of the Central Government not below the rank of a Director, to act as the Sole Arbitrator to adjudicate the disputes and differences between the Parties. The contractor/vendor shall not be entitled

to raise any objection to the appointment of such person as the Sole Arbitrator on the ground that the said person is/was an officer and/or shareholder of the owner, another Govt. Company or the Central Government or that he/she has to deal or had dealt with the matter to which the contract relates or that in the course of his/her duties, he/she has/had expressed views on all or any of the matters in dispute or difference. In the event of the Arbitrator to whom the matter is referred to, does not accept the appointment, or is unable or unwilling to act or resigns or vacates his office for any reasons whatsoever, the Appointing Authority aforesaid, shall nominate another person as aforesaid, to act as the Sole Arbitrator. Such another person nominated as the Sole Arbitrator shall be entitled to proceed with the arbitration from the stage at which it was left by his predecessor. It is expressly agreed between the Parties that no person other than the Appointing Authority or a person nominated by the Appointing Authority as aforesaid, shall act as an Arbitrator. The failure on the part of the Appointing Authority to make an appointment on time shall only give rise to a right to a Contractor to get such an appointment made and not to have any other person appointed as the Sole Arbitrator. The Award of the Sole Arbitrator shall be final and binding on the Parties to the Agreement. The work under the Contract shall, however, continue during the Arbitration proceedings, except in case of termination and no payment due or payable to the concerned Party shall be withheld (except to the extent disputed) on account of initiation, commencement or pendency of such proceedings. The Arbitrator may give a composite or separate Award(s) in respect of each dispute or difference referred to him and may also make interim award(s) if necessary. The fees of the Arbitrator and expenses of arbitration, if any, shall be borne equally by the Parties unless the Sole Arbitrator otherwise directs in his award with reasons. The lumpsum fees of the Arbitrator shall be Rs. 70,000/- per case for transportation contracts. Reasonable actual expenses for stenographer, etc. will be reimbursed. Fees shall be paid stagewise i.e. 25% on acceptance, 25% on completion of pleadings/documentation and balance 50% on receipt of award of the arbitrator. Subject to the aforesaid, the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder, shall apply to the Arbitration proceedings under this Clause. The Contract shall be governed by and constructed according to the laws in force in India. The Parties hereby submit to the exclusive jurisdiction of the Courts situated at Mumbai for all purposes. The Arbitration shall be held at Mumbai and conducted in English language. The Appointing Authority is the Functional Director of Hindustan Petroleum Corporation Limited."

4. Pursuant to notice issued by this Court, respondents have filed their reply in Arb. Case No. 70 of 2018, perusal thereof clearly suggests that Clause 18 of the agreement entered into *inter se* parties provides for arbitration in the event of dispute *inter se* parties.

5. Mr. B.C. Negi, learned Senior Advocate, on instructions of Mr. Gopal Dass, Chief General Manager, Hindustan Petroleum Corporation Limited, who is present in the court, states that the respondents are not averse, rather under obligation to appoint an arbitrator in terms of Clause 18 of the agreement, for adjudication of the dispute. He further states that bare perusal of order dated 9.1.2018 passed by Division Bench of this court, in CWP No. 301 of 2017 and other connected matters, clearly suggests that the Division Bench, while restraining respondents from taking any coercive action in the shape of recovery of

amount, had categorically directed the petitioner to file undertaking in the form of affidavit stating therein that in the event of writ petition being dismissed, it shall deposit the amount which stands adjudicated by the authorities within two weeks of the respondents having taken action against them, and as such, they may be asked to deposit the amount.

6. Mr. Suneet Goel, learned counsel representing the petitioner, while refuting aforesaid contention of Mr. B.C. Negi, learned Senior Advocate, invited attention of this Court to the judgment dated 9.7.2018 passed by the Hon'ble Division Bench of this Court in CWP No. 170 of 2017 titled **M/s Shri Balaji Filling Station** versus **Union of India & others**, and other connected matters, to demonstrate that the court, while passing final order/judgment dated 9.7.2018 categorically concluded that each one of the writ petitioners shall be bound by the undertaking furnished in this court in terms of order dated 9.1.2018 (supra), however, same shall be subject to petitioner's taking recourse to such remedies as would be otherwise available to it in accordance with law. Mr. Goel, contended that since interim order dated 9.1.2018, whereby petitioner was directed to file affidavit, has merged into final judgment rendered by the Division Bench of this court, contention having been raised by Mr.Negi, learned Senior Advocate has no force and deserves to be rejected.

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

8. Since parties are in agreement that dispute, if any, *inter se* parties is required to be adjudicated upon by the Arbitrator in terms of Clause 18 of the agreement executed *inter se* parties, petitions at hand, can be disposed of at this stage. As far as contention of Mr. Negi, learned Senior Advocate that the petitioners are under obligation to deposit the amount in terms of order dated 9.1.2018 is concerned, this court having carefully perused judgment dated 9.7.2018 (supra) is of the view that order dated 9.1.2018 has merged into judgment, wherein the Division Bench has categorically held that each one of the writ petitioners shall be bound by its undertaking furnished to this court in terms of order dated 9.1.2018, however, same shall be subject to petitioners' taking recourse to such remedies as would otherwise be available to it, in accordance with law. Now, since the petitioners have taken recourse to alternative remedy available to them, i.e. invocation of arbitration Clause 18 of the agreement, which enables them to invoke arbitration proceedings for adjudication of the dispute, petitioners are not under obligation to deposit amount, if any, at this stage. Leaving everything aside, question, if any, with regard to deposit, if any, in terms of order dated 9.1.2018, can be left open to be decided by the arbitrator, while deciding prayer, if any, made by petitioners, for grant of interim relief.

9. Before proceeding further, it may be noticed that the power has been delegated to this Court by the Hon'ble Chief Justice for appointment of arbitrators and as such joint prayer having been made by the parties for appointment of arbitrator can be considered by this court in the instant proceedings, especially when both the parties have jointly prayed for the appointment of an arbitrator.

10. Another question, which needs to be adjudicated at this stage is whether this court can appoint an arbitrator of its own, ignoring the stipulation contained in Clause 18 (supra) of the agreement which provides that the appointing authority shall either herself act as the Sole Arbitrator or nominate some officer/retired officer of Hindustan Petroleum Corporation Limited (referred to as owner or HPCL) or a retired officer of any other Government Company in the Oil Sector of the rank of Ch. Manager & above or any retired officer of the Central Government not below the rank of a Director, to act as the Sole Arbitrator to adjudicate the disputes and differences between the Parties. As per the agreement(s), the contractor(s)/vendor(s) shall not be entitled to raise any objection to the appointment of such person as the Sole Arbitrator on the ground that the said person

is/was an officer and/or shareholder of the owner, another Govt. Company or the Central Government or that he/she has to deal or had dealt with the matter to which the contract relates or that in the course of his/her duties, he/she has/had expressed views on all or any of the matters in dispute or difference.

11. Aforesaid question has duly been answered by the Hon'ble Apex Court in **Volestalpine Schienen GMBH** v. **Delhi Metro Rail Corporation Ltd**., (2017) 4 SCC 665, wherein it has been held as under:-

> "14. From the stand taken by the respective parties and noted above, it becomes clear that the moot question is as to whether panel of arbitrators prepared by the Respondent violates the amended provisions of Section 12 of the Act. Subsection (1) and Sub-section (5) of Section 12 as well as Seventh Schedule to the Act which are relevant for our purposes, may be reproduced below:
>
> 8. (i) for sub-section (1), the following Sub-section shall be substituted, namely
>
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances—
>
> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
>
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.
>
> Explanation 1.--The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
>
> Explanation 2.--The disclosure shall be made by such person in the form specified in the Sixth Schedule.;
>
> (ii) after Sub-section (4), the following Subsection shall be inserted, namely—
>
> (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this Sub-section by an express agreement in writing. (emphasis supplied)
>
> THE SEVENTH SCHEDULE
>
> Arbitrator's relationship with the parties or counsel
>
> 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom. Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case. Arbitrator's direct or indirect interest in the dispute.

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.---The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.--The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.--For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the Rules set out above. (emphasis supplied)

15. It is a well known fact that the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, inter alia, commercial arbitration and enforcement of foreign arbitral awards etc. It is also an accepted position that while enacting the said Act, basic structure of UNCITRAL Model Law was kept in mind. This became necessary in the wake of globalization and the adoption of policy of liberalisation of Indian economy by the Government of India in the early 90s. This model law of UNCITRAL provides the framework in order to achieve, to the maximum possible extent, uniform approach to the international commercial arbitration. Aim is to achieve convergence in arbitration law and avoid conflicting or varying provisions in the arbitration Acts enacted by various countries. Due to certain reasons, working of this Act witnessed some unpleasant developments and need was felt to smoothen out the rough edges encountered thereby. The Law Commission examined various shortcomings in the working of this Act and in its first Report, i.e., 176th Report made various suggestions for amending certain provisions of the Act. This exercise was again done by the Law Commission of India in its Report No. 246 in August, 2004 suggesting sweeping amendments touching upon various facets and acting upon most of these recommendations, Arbitration Amendment Act of 2015 was passed which came into effect from October 23, 2015.

16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of 'neutrality of arbitrators' and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

> NEUTRALITY of ARBITRATORS
>
> 53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. 54. In the Act, the test for neutrality is set out in Section 12(3) which provides
>
> > 12(3) An arbitrator may be challenged only if—
> >
> > (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality..."
>
> 55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test

is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia MANU/SC/0001/1983 : 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar MANU/SC/0435/1988 : 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr. MANU/SC/0197/1988 : 1988 (2) SCC 360; S. Rajan v. State of Kerala MANU/SC/0371/1992 : 1992 (3) SCC 608; Indian Drugs & Pharmaceuticals v. IndoSwiss Synthetics Germ Manufacturing Co. Ltd. MANU/SC/0139/1996 : 1996 (1) SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd. MANU/SC/7273/2007 : 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd. MANU/SC/1502/2009 : 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", and this exception was used by the Supreme Court in Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence MANU/SC/0010/2012 : AIR 2012 SC 817 and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. MANU/SC/0478/2012 : (2012) 6 SCC 384, to appoint an independent arbitrator Under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles-even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission

is of the opinion that, on this issue, there cannot be any distinction between State and non State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous-and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all/all

> other cases, the general Rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator. (emphasis supplied)

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the 'appearance of neutrality' is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term 'neutrality' used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term 'neutrality of arbitrators' is commonly used in this context as well.

18. Keeping in mind the afore-quoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality, i.e., when the arbitration Clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non-obstante Clause contained in Sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement."

12. In the aforesaid judgment, it has been categorically held by the Hon'ble Apex Court that main purpose for amending the provision was to provide for neutrality of arbitrators. Hon'ble Apex Court has further held that in order to achieve the neutrality, as referred above, Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person, whose relationship with the parties or counsel or subject matter of dispute falls under any of the categories specified in the schedule, he shall be ineligible to be appointed as an arbitrator. Learned counsel representing the parties fairly state before this Court that notwithstanding the agreement(s) arrived *inter se* parties, a neutral /impartial arbitrator is required to be appointed for the adjudication of the dispute(s) *inter se* parties.

13. At this stage, learned counsel representing the parties fairly state before this court that a single impartial/neutral arbitrator may be appointed by this court for adjudication of the dispute *inter se* parties, to avoid different verdicts on same issue and as such, on the joint request having been made by the learned counsel representing the parties, **Hon'ble Mr. Justice D.D. Sud (Retired)**, is appointed as an arbitrator. His consent/declaration under Section 11 (8) of the Act *ibid* may be obtained by the Registry and be placed on record. 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.

14. Needless to say, award(s) 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.

15. However, it may be clarified that till such time, application(s), if any, filed under Section 17 of the Act *ibid* praying therein for interim relief by the petitioner is/are decided by the learned arbitrator, interim relief granted by this court vide order dated 11.9.2018 in some of the arbitration cases shall remain in force and where such relief has not been granted, respondents shall not take any coercive action, till the decision of application under Section 17, if any, filed by the concerned party. Learned counsel representing the parties undertake to move appropriate application under Section 17 of the Act, within ten days of the arbitrator entering upon reference, failing which interim order granted by the court shall lose its efficacy.

16. Though bare perusal of agreement(s) suggests that place of arbitration in normal circumstances would be at Mumbai, but the learned counsel representing the parties state that they are agreeable for arbitration proceedings to be held at Shimla. Ordered accordingly.

17. The arbitration cases are disposed of.

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

The State of Himachal Pradesh .....Appellant.
Versus
Kuldeep Singh & others .....Respondent.

Cr. Appeal No. 275 of 2006
Reserved on:19.09.2018
Decided on: 01.10.2018

Indian Penal Code, 1860- Sections 323, 325 and 506 read with 34 - Grievous hurt and criminal intimidation - Proof – Informant alleging that accused made an assault and caused grievous injuries and his teeth were uprooted – Further alleging that accused also intimidated him and threatened to do away with his life – Accused acquitted by trial court – Appeal by State on ground that trial court did not appreciate evidence correctly – On facts, High Court found (1) complainant never alleged in his information to police that his teeth were uprooted (2) broken teeth were not produced before police or medical officer, (3) Injury on lips of complainant missing, (4) 'P', mother of complainant falsely stating qua knife injury on back of complainant, (5) Medical Officer deposing about possibility of removal of incisors earlier, (6) statements of other witnesses having serious flaws – Held, Trial Court rightly acquitted accused – Appeal dismissed – Judgment of trial court upheld. (Paras-10 to 16)

For the appellant: Mr. Ashwani Sharma, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer.

For the respondents: Mr. Ashok Kumar Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/State laying challenge to judgment dated 29.03.2006, passed by learned Judicial Magistrate 1st Class, Court No. 2, Dehra, District Kangra, H.P., in Criminal Case No. 205-II/2001, whereby the respondents/accused (hereinafter referred to as "the accused persons") were acquitted for the offences under Sections 325, 323 and 506 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The background facts giving rise for culmination of the case against the accused persons can tersely be summarized as under:

As per the prosecution story, on 22.10.2000 complainant, Shri Milap Chand, got recorded his statement with the police under Section 154 Cr.P.C. The complainant stated therein that on 21.10.2000 when he was on leave and in his house, his wife told him that complainant's brother, Kuldeep Singh, his wife Sudesh Kumari, Mulkh Raj (brother-in-law of Kuldeep Singh), Balbir Singh and Nathu Ram (the accused persons) are asking for him. The complainant has further averred that when he met the accused persons, accused Nathu Ram started beating him with a stick and other accused persons thrashed him with fist blows. On hearing the noise, wife of the complainant, Smt. Praveen Kumari, tried to rescue him, but she was also thrashed. The accused persons also threatened to eliminate the complainant. As per the complainant, the accused persons gave beatings to him and his wife owing to land dispute. On the anvil of the statement of the complainant, a case was registered by the police and the investigation ensued. Police recorded the statements of the witnesses and prepared the spot map. The complainant produced a blood stained shirt, which was taken into possession. The complainant was medically examined and his medico legal certificate and dental opinion was procured. After completion of the investigation, *challan* was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as eight witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty. The accused persons did not lead any evidence in their defence.

4. The learned Trial Court, vide impugned judgment dated 29.03.2006, acquitted the accused persons for the offences punishable under Sections 323, 325 and 506 IPC read with Section 34 IPC, hence the present appeal is preferred by the appellant/State.

5. The learned Additional Advocate General has argued that the learned Trial Court has not appreciated the evidence correctly and the accused persons have been acquitted on the basis of surmises and conjectures. He has further argued that the learned Trial Court has not correctly applied the law. The prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt. Conversely, the learned counsel for the accused persons has argued that the learned Trial Court has correctly appreciated the evidence and the judgment of acquittal is well reasoned. He has further argued that there is nothing on record which could remotely establish the guilt of the accused persons. He has argued that the judgment of acquittal needs no interference, so the appeal be dismissed.

6. In rebuttal, the learned Additional Advocate General has argued that the accused persons be convicted after re-appreciating the evidence, as the learned Trial Court has failed to appreciate the evidence correctly.

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

8. It is emanating from the records that PW-1, Dr. Sunita Kundu, medically examined the complainant. This witness noticed injuries on the person of the complainant and issued medico legal certificate, Ex. PW-1/A. As per this witness, the nature of weapon for inflicting injuries was blunt. She referred the complainant for Dental Surgeon, who opined that injuries No. 1 and 2 are grievous and the rest of the injuries are simple in nature. This witness has further deposed that injuries No. 1, 2 and 8 could be possible with fist blows. She has further deposed that injuries No. 3 and 7 can be possible if a person falls. This witness, in her cross-examination, has deposed that in case fist blow is give on mouth, then there is likelihood that the injury can be sustained on lips. She admitted that she did not mention, in the medico legal certificate, qua any injury on the lips of the complainant.

9. PW-2, Dr. Sandeep Sharma, deposed that on 22.10.2000 the complainant was medically examined by PW-1, Dr. Sunita Kundu, who referred the complainant to him for his dental examination. He, after examining the complainant, gave his dental opinion, Ex. PW-2/A. This witness, in his cross-examination, has deposed that injuries mentioned in Ex.PW-2/A could be possible due to fall. He has further deposed that the patient (complainant) was having poor dental hygiene. The police or the complainant did not produce any teeth before him.

10. The complainant examined himself as PW-3. He has deposed that on 22.10.2000, around 09:30 a.m., when he was sleeping in a room, his wife informed him that accused persons have come and they are asking for him. He has further deposed that when he came outside, accused Mulkh Raj gave a fist blow, resultantly his two teeth were broken. Accused Nathu ram gave a stick blow and other accused persons gave beatings to him. As per the complainant, his wife, Parveen Kumari and son, Adarsh, witnessed the occurrence. Subsequently, he got recorded FIR, Ex. PW-3/A, and he was medically examined. Police took into possession his blood stained shirt vide seizure memo, Ex. PW-3/B. He has deposed that the broken teeth could not be traced, so the same could not be handed over to the police. The complainant, in his cross-examination, has deposed that the house of the accused persons is at Garli, which is about 40 kilometers from his house. He has further deposed he and his brother have a joint house. He deposed that his son, Adarsh, rescued him, but he has not deposed so in his statement given to the police. He has further deposed that his teeth were broken, but again he did not state this fact before the police. The complainant seems to have exaggerated the facts and his version, if scrutinized meticulously, shows major improvements. He has deposed that the accused persons gave him beatings for half an hour. He deposed that the accused persons gagged his mouth. The complainant has himself deposed that his house is joint with his brother and the occurrence took place on the *verandha* of his house. Surprisingly, as per the complainant the accused persons gave beatings to him for half an hour, but no one from the house of his brother came to rescue him. He denied that on 22.10.2000, at about 09:10 a.m. his wife thrashed accused Kuldeep with slippers, as he was trying to cultivate complainant's land. He has further denied that he also hit accused with fist blows owing to his teeth were broken. He denied that accused Kuldeep was taken to hospital for medical examination. This witness denied the suggestion that he himself went to dentist and got uprooted his teeth. He further denied that he reported to the police the time of occurrence as 04:30 p.m. He feigned his

ignorance that accused Mulk Raj deposed against him in departmental inquiry, which was initiated by the department as he remained absent for 501 days.

11. The complainant's son, Adarsh (PW-4) is child witness. He deposed that on the day of occurrence he was playing in his courtyard, his mother was cooking and father was sleeping. He has further deposed that accused Mulkh Raj came and his mother called his father. When his father extended his hand for hand shake, accused Mulkh Raj gave a fist blow on the lips of his father and two incisors of his father got broken. Thereafter, all the accused persons started beating his father and his mother tried to rescue him. The accused persons took his father to a room and thrashed him. While leaving the house, the accused persons also threatened to eliminate his father. This witness has categorically deposed that accused Balbir Singh was carrying a knife in his hand. This witness, in his cross-examination, deposed that on the day of occurrence it was Sunday. He admitted that there is land dispute amongst his father and the accused persons. He deposed that he saw the broken teeth of his father.

12. PW-5, Smt. Pan Devi (mother of the complainant), deposed that the accused persons broke three teeth of the complainant and no one rescued him. This witness, in her cross-examination, further exaggerated the story by deposing that the back of the complainant was bleeding due to knife injury. She further deposed that she saw the broken teeth of the complainant, which was kept by him in his pocket. This witness has specifically admitted that she is deposing at the instance of the complainant.

13. PW-6, Shri Hoshiar Singh, admitted his signatures on seizure memo Ex. PW-3/B, but he denied as to whose shirt, Ex. PW-1, is. This witness was declared hostile and subject to cross-examination, however, nothing favourable to the prosecution could be elicited from him.

14. PW-7, HC Kuldeep Kumar, and PW-8, HC Suresh Kumar, are official prosecution witnesses. PW-8, HC Suresh Kumar, admits that during the course of investigation no case was made out against accused Balbir Singh and his name was falsely implicated. When accused Kuldeep was arrested, there was fresh injury on his mouth.

15. The case of the prosecution mainly revolves around the statements of complainant (PW-3), his son Adarsh (PW-4) and Smt. Pan Dei (PW-5, mother of the complainant). No doubt, all the above witnesses are interested witnesses. As noticed above there are major flaws in the testimonies of all these witnesses and all these witnesses have portrayed the occurrence differently. As per the prosecution case, the complainant sustained injury with fist blow due to which his two incisors were broken. However, if it is believed to correct that there must be corresponding injuries on the lips of the complainant. The doctor did not observe any injuries on the lips of the complainant. Conversely, the doctor has specifically deposed that the complainant was having poor dental hygiene and his incisors might have been removed earlier. There are major contradictions in the versions of the complainant and his mother qua the broken teeth. As per the complainant, he could not find his broken incisors, where as his mother stated that broken incisors were picked up and put by the complainant inside his pocket. The police did not recover any teeth and produce the same before the Court. As per the deposition of prosecution witnesses, one of the accused was having knife and he administered knife blow on the person of the complainant, however, the prosecution has failed to produce the said knife in the Court. The prosecution has further failed to prove knife injury on the person of the complainant.

16. The evidence, if read in juxtaposition with prosecution case, clearly shows that there are major discrepancies in the deposition of the prosecution witnesses, which cannot be made basis for convicting the accused persons. The versions of interested

prosecution witnesses have inconsistencies and in fact all these witnesses tried to make improvements through their depositions.

17. The net result of the above discussion is that the prosecution has miserably failed to prove the case against the accused persons, thus they cannot be convicted. The accused persons have been rightly acquitted by the learned trial Court and it is not possible to hold that the learned Trial Court's view is perverse. Hence, there is nothing to interfere with the well reasoned judgment of the learned Trial Court.

18. In view of the above, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused persons 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.

19. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of. Bail bonds are cancelled.

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

Shriram General Insurance Company Limited .....Appellant
Versus
Dinesh Kumar and others .....Respondents

FAO(MVA) No. 457 of 2017
Decided on: October 3, 2018.

Motor Vehicles Act- Accident 1988- Section 166- Motor Accident – Claim Application - Compensation – Permanent disability - Determination — Victim an Advocate suffering permanent disability of 22% in motor accident– Tribunal assessing monthly income of victim at Rs. 15,000/ and functional disability at 50%, and granting compensation accordingly – Appeal against by insurer – Held, loss of income as assessed by Tribunal is on higher side – Loss of income assessed at 35%- Award modified – Appeal partly allowed (Para- 9)

Motor Vehicles Act, 1988- Section 166 – Motor Accident – Claim application - Compensation for pain & suffering – Determination – Petitioner remained hospitalized for months together and had to undertake lengthy medical treatment – Tribunal awarding Rs.1,00,000/- towards pain & suffering – High Court reassessed compensation for pain and suffering at Rs. 2 lac. (Para- 14)

Motor Vehicles Act, 1988- Section 166- Motor Accident – Claim application - Compensation – Determination – Future income – Victim an advocate – Tribunal granting increase of 50% on established income towards future prospects – Appeal against – Held, Claimant not in permanent employment – Being self employed addition of 40% on established income allowed towards future prospects. (Paras-10 & 11)

Motor Vehicles Act, 1988- Section 166- Motor Accident – Claim application Compensation – Future discomfort and loss of amenities –Determination- Tribunal granting Rs.1,50,000/- as compensation towards future discomfort and loss of amenities – Appeal by insurer – On

facts, High Court enhancing amount to Rs, 2 Lac towards future discomfort and loss of amenities. (Para-15)

Case referred:
Chandra Wati V/s Tek Chand & others, Latest HLJ 2014 (HP) 288

For the Appellant	:	Mr. Jagdish Thakur, Advocate.
For the Respondents	:	Mr. Naresh K. Sharma, Advocate, for respondent No.1.
		Mr. Naveen Awasthi, Advocate, for respondent No.2.
		Mr. Manohar Lal Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of appeal at hand, appellant-Insurance Company has challenged Award dated 31.5.2017 passed by Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (camp at Bilaspur) in MAC No. 4-2 of 2014, whereby compensation to the tune of Rs. 26,30,000/- has been awarded in favour of respondent No.1-claimant (hereinafter, 'claimant') and against the appellant-Insurance Company (hereinafter, 'Insurance Company') with interest at the rate of 9% per annum from the date of filing of petition till realization of the entire amount.

2. Facts in brief, as are necessary for the adjudication of the appeal are that the claimant filed a claim petition under Section 166 of the Motor Vehicles Act before the learned Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (camp at Bilaspur), for grant of compensation on account of permanent disability suffered by him in an accident on 23.4.2013, while he was going on his scooter bearing registration No. PB10AY-2819 from Bilaspur to Ghumarwin. As per the claim petition filed under Section 166 of the Act *ibid*, when claimant reached near Village Kularu, truck bearing registration No. HP11C-1454 being driven by respondent No. 3 i.e. Rajender Singh alias Raju, in a rash and negligent manner and in high speed, came from the opposite direction and struck the scooter of claimant on wrong side, due to which claimant fell down and sustained multiple injuries on all parts of his body. Claimant was removed to Civil Hospital, Ghumarwin and then to District Hospital, Bilas;ur, from where he was further referred to IGMC, Shimla. Claimant remained admitted at IGMC Shimla with effect from 24.3.2013 to 4.6.2013 and was operated five times. Claimant claims to have spent more than Rs. 3,00,000/- on his treatment till the date of filing of the petition. It is also claimed that treatment is still going on. Claimant is a lawyer by profession. It is further claimed in the petition that claimant had also installed a poly-house and was earning more than Rs. 25,000/- per month from all sources. It is claimed that due to injuries suffered by claimant, he had become permanently disabled. It is also claimed that due to injuries to the internal parts of his body i.e. liver and kidney, claimant has been rendered incapable of carrying out routine activities. The claimant sought compensation to the tune of Rs. 50,00,000/- alongwith interest at the rate of 12% per annum from the date of accident till realisation of the amount.

3. That claim petition came to be resisted by respondents No. 2 and 3 by filing joint reply. Respondent No.3 filed a separate reply. Respondents No.1 and 2, in their defence raise a plea that the accident in question had taken place due to rash and negligent driving on the part of the claimant, who was under the influence of liquor at the relevant time. Amount of compensation was also stated to be highly exaggerated.

4. Respondent No.3 i.e. appellant-Insurance Company took preliminary objections of maintainability, suppression of material facts, petition being bad due to mis-joinder and non-joinder of parties. Accident was denied as also the liability of the appellant-Insurance Company on the ground that the offending vehicle i.e. Truck bearing registration No. HP11C-1454 was being plied in violation of the terms and conditions of the insurance policy. It was also claimed that the driver of the offending vehicle was also not holding a valid and effective driving licence to drive the vehicle in question at the time of accident.

5. Learned Tribunal below, on the basis of pleadings of the parties, framed following issues on 24.9.2015:

"1. Whether on 24.04.2013 at about 7:00 P.M. near Kularu, due to the rash and negligent driving of truck No. HP11C-1454 by respondent No.2, injuries were caused to the petitioner? OPP.

2. If issue No.1 is proved in affirmative, whether the petitioner is entitled to compensation and if so, to what amount and from whom? OPP.

3. Whether the petition is not maintainable? OPR-3

4. Whether the vehicle was being driven in contravention of the provisions of the Motor Vehicles Act? OPR-3

5. Whether the vehicle was being driven by a person who was not having an effective and valid driving licence at the time of accident? OPR-3

6. Whether the vehicle was being driven without valid documents? OPR-3

7. Whether the petition is bad for mis-joinder and non-joinder of necessary parties? OPR-3

8. Relief."

6. Learned Tribunal below, on the basis of evidence led on record by the respective parties, allowed the petition and awarded following amounts under different heads:

(a)	Loss of earning	**21,60,000**
(b)	Cost of medical treatment	**1,50,000**
(c)	Transportation expenses	**30,000**
(d)	Special diet	**20,000**
(e)	Attendant charges	**20,000**
(f)	Pain and suffering	**1,00,000**
(g)	Future discomfort and loss of amenities	**1,50,000**
	Total	**26,30,000**

7. Being aggrieved and dissatisfied with the compensation awarded by the learned Tribunal below, appellant-Insurance Company has approached this court in the instant proceedings, praying therein for modification and enhancement of the award.

8. It is not in dispute that the claimant has suffered 22% permanent disability on account of accident in question and as such, this certainly has affected the income of the claimant. Learned Tribunal below, while calculating the monthly income of the claimant

has relied upon guess work and has arrived at a conclusion that the monthly income of the claimant from the legal profession would be Rs. 15,000/-. However, income from other sources could not be proved by the claimant. Further, while assessing loss of income on account of 22% permanent disability, the learned Tribunal below has arrived at a conclusion that due to the aforesaid disability, claimant's monthly income has been reduced by 50%. Learned counsel appearing for the appellant-Insurance Company vehemently argued that by no stretch of imagination, it can be said that the claimant's income has been reduced by 50% due to the disability, rather, earning capacity of the claimant being an advocate has not been substantially affected and the loss of income arrived at by the learned Tribunal below is not correct and based merely on assumptions and presumptions.

9. Though the claimant has not led any material on record to prove his monthly income, but even if same is taken to be Rs. 15,000/-, it can not be said that the loss of income suffered by the claimant is 50% and as such, this court finds substance in the argument of Mr. Jagdish Thakur, learned counsel representing the appellant-Insurance Company that the learned Tribunal below has assessed the loss of income on higher side and as such, this court deems it fit to calculate the loss of income on account of disability suffered by claimant at 35%. Thus, after taking total income of claimant at Rs. 15,000/-, the loss of income suffered would be 15,000x35% = 5250.

10. Similarly, the learned counsel representing the appellant-Insurance Company has argued that the learned Tribunal below has awarded an addition of 50% to the established income of the claimant, which ought to have been 40% since the claimant was not in permanent employment and was self employed. This court finds sufficient force in the argument of the learned counsel representing the appellant-Insurance Company in view of the latest law laid down by Hon'ble Apex Court in **Mangla Ram Vs. The Oriental Insurance Company Ltd. & Ors.** [Civil Appeal Nos. 24992500 of 2018 arising out of SLP(Civil) Nos. 2814142 of 2017], decided on 6.4.2018. At this stage, it would be appropriate to take note of following paragraphs of judgment in **Mangla Ram**(supra):

> "25. The next question is about the quantum of compensation amount to be paid to the appellant. The Tribunal noted the claim of the appellant that he was getting Rs.1500/per month towards his salary and Rs.600/per month towards food allowance from Bhanwar Lal. The fact that the appellant had possessed heavy transport motor vehicle driving licence has not been doubted. The driving licence on record being valid for a limited period, cannot be the basis to belie the claim of the appellant duly supported by Bhanwar Lal, that the appellant was employed by him on his new truck.
>
> Besides the said income, the appellant claimed to have earning of Rs.1000/per month from farming fields. In other words, e find that the Tribunal has not analysed this evidence in proper perspective. The Tribunal, however, pegged the loss of monthly income to the appellant at Rs.520/per month while computing the compensation amount on the finding that there was no convincing evidence about complete nonemployability of the appellant.
>
> **Further, no provision has been made by the Tribunal towards future prospects. The Tribunal, therefore, should have computed the loss of income on that basis.** Additionally, the appellant because of amputation of his right leg would be forced to permanently use prosthetic leg during his life time. No provision has been made by the Tribunal in that regard. On these heads, the appellant is certainly entitled for enhanced compensation.

> 26. The next question is about the liability of insurer to pay the compensation amount. The Tribunal has absolve the insurance company on the finding that no premium was received by the insurance company nor any insurance policy was ever issued by the insurance company in relation to the offending vehicle. The respondents no. 2 and 3 had relied on a Cover Note which according to respondent No.1 – Insurance Company was fraudulently obtained from the then Development Officer, who was later on sacked by respondent No.1 Insurance Company. The possibility of misuse of some cover notes lying with him could not be ruled out. The respondent Nos. 2 & 3 have relied on the decision of this Court in Rule (supra).

11. In view of the law laid down above, compensation awarded on account of loss of future prospects needs to be reassessed i.e. loss of earning capacity at the rate of 35% of the established income (Rs. 15,000/-) = Rs.5250/- and 40% addition would be 5250x 40% =2100/- thus totaling to Rs. 7350/-, which would come to Rs. 88,200/- per annum and after applying multiplier of 16, the total loss of income comes to Rs. 14,11,200/-

12. This Court is in agreement with the contention raised by Mr. Jagdish Thakur, learned counsel representing the insurance company that amount awarded by the Tribunal below on account of hospitalization charges, attendant charges, transportation charges and in lieu of services rendered by helper, are strictly in terms of the evidence led on record, because assessment made by the Tribunal below is purely based upon the bills placed on record by the claimant as such, this Court sees no reason to interfere with the same. However, having taken note of the fact that the claimant has remained admitted in the hospital and had to take lengthy medical treatment, as stands duly proved on record, impugned award on account of pain and suffering i.e. Rs. 1,50,000/- and discomfort appears to be on lower side, especially when it stands duly proved on record that claimant suffered multiple injuries and remained admitted in hospital.

13. A Coordinate Bench of this Court in case **Smt. Chandra Wati V/s Tek Chand & others**, Latest HLJ 2014 (HP) 288, while dealing with the question as to how to grant compensation in injury cases, has held as under:

> 14. I have gone through the impugned award. The Tribunal has awarded a meager amount while ignoring the injuries suffered by the claimant/victim and affect of the said injuries, which has made her life miserable and dependant throughout her life. The said injuries also destroyed her matrimonial home, snatched the amenities and charm of her life and she has to be dependent on others throughout her life. She has undergone pain and suffering and has to undergo it forever. Not only this, it has also affected her privacy.
>
> 15. Now, the question is how to grant compensation in such injury cases. The concept of granting compensation is outcome of Law of Torts. The Tribunals, while examining a case of an injured and awarding compensation to him/her, have to do some guess work, sympathetically, keeping in view the fate and physical frame of the injured/victim.
>
> 16. The Apex Court in case titled as R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, reported in AIR 1995 SC 755, had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

“9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

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

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

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

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked

with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

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

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

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :- "Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

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

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

18. The Apex Court in case titled as Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, reported in 2011 AIR SCW 4787 also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.

9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

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

"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation is awarded in personal injury cases are the following: "Pecuniary damages (Special damages) (i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure. (ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (a) Loss of earning during the period of treatment; (b)

> Loss of future earnings on account of permanent disability. (iii) Future medical expenses. Non-pecuniary damages (General damages) (iv) Damages for pain, suffering and trauma as a consequence of the injuries. v) (Loss of amenities (and/or loss of prospects of marriage). (vi) Loss of expectation of life (shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."
>
> 17. .....
>
> 18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

20. Admittedly, the claimant/victim was a house wife, who was maintaining her family, domestic home, looking after cows and selling milk; her income was about Rs.5,000/- per month and was of the age of 55 years at the time of accident. This fact is not denied by the other side nor there is a rebuttal.

21. Even otherwise, a domestic wife is the backbone of a home, maintaining the domestic home and takes all steps to keep her husband, children and other family members united, in good health and joyous mood. If anyone has to engage a helper for domestic help, the minimum wages which has to pay, is not less than Rs.3,000/- per month plus clothing and food. She has not only been deprived of the income from domestic work, but also lost her income by maintaining cows and selling milk. It is unrebutted, as discussed by the Tribunal in the impugned award, that she has become permanently disabled, helpless, hapless and a burden on others, has to suffer 45% permanent disability throughout her life and has lost her income, which was about Rs.5,000/- per month. The Tribunal also held that due to her dependency on others, she engaged a helper, to whom she is paying Rs.1500/- per month. She has produced that lady Smt. Chinta as a witness, who has proved and stated that she is receiving Rs.1500/- per month from the claimant as wages.

22. The Tribunal awarded Rs.75,000/- under the head of pain and suffering, which is too meager, while taking the physical frame of the claimant and other factors in consideration and in view of the judgments of the Apex Court, referred hereinabove, read with the judgment of the Apex Court in

case titled as Nizam's Institute of Medical Sciences versus Prasanth S. Dhananka & others, reported in 2009 AIR SCW 3563."

14. Applying the ratio of law laid down in the judgment supra and parameters laid down, this Court deems it fit to enhance amount awarded under head of pain and suffering to Rs. 2,00,000/- instead of Rs. 1,00,000/-.

15. This Court can not lose sight of the fact that on account of the permanent disability suffered by claimant, he would not be able to lead a normal life and as such, this court is of the view that the learned Tribunal below ought to have awarded adequate compensation on account of future discomfort and loss of amenities. Hence, having perused facts of the case vis-à-vis evidence available on record, this Court has no hesitation to conclude that learned Tribunal below, while determining compensation, has failed to appreciate material evidence available on record, in its right perspective and as such erred in awarding Rs. 1,50,000/- on account of future discomfort and loss of amenities, resultantly, the amount on aforesaid account is enhanced to Rs. 2,00,000/-.

16. Besides the above, this court finds that the learned Tribunal below has rightly awarded amounts under other heads i.e. transportation charges, special diet charges and attendant charges, which are upheld.

17. Consequently, in view of aforesaid modification made herein above, appellant-claimant is held entitled to following amount under various heads:

1.	Loss of earning	**14,11,200**
2.	Cost of medical treatment	**1,50,000**
3.	Transportation expenses	**30,000**
4.	Special diet	**20,000**
5.	Attendant charges	**20,000**
6.	Pain and suffering	**2,00,000**
7.	Future discomfort and loss of amenities	**2,00,000**
	Total	**20,31,200**

18. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and as such, same is upheld.

19. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is allowed and Award dated 31.5.2017 passed by Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (camp at Bilaspur) in MAC No. 4-2 of 2014, is modified to the above extent only. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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

State of H.P. .....Appellant.

Versus

Gurcharan Singh .....Respondent

Cr. Appeal No. 217 of 2008
Decided on: 03.10.2018.

Indian Penal Code, 1860- Sections 279, 337 and 338- **Motor Vehicles Act, 1988**- Section 187- Rash and Negligent Driving and grievous injuries to victim –Proof- Acquittal by Trial Court – Appeal against – Offending tanker went to extreme right side of road and hit injured sitting on motorcycle parked 30 feet away from National Highway – Tanker also hitting another truck parked in court-yard – Injured and other witnesses clearly stating about rash driving of accused – Accused taking plea that accident took place because of brake failure – Accused relying upon report of auto mechanic that brake pressure found nil – No evidence that brake pressure nil before accident – It could have occurred after accident also – Held, evidence on record clearly proves rash driving on part of accused – Appeal allowed – Acquittal set aside – Accused convicted of offences under Sections 279, 337, 338 I.P.C. and 187 of Motor Vehicles Act. (Paras-8 to 15).

For the appellant: Mr. R.P. Singh and Mr. Kunal Thakur, Dy. A.Gs.
For the respondent: Mr. B.R. Kashyap, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The State, aggrieved by the judgment dated 7.12.2007 passed by learned Judicial Magistrate 1st Class, Court No.4, Mandi, District Mandi, H.P in Police Challan No. 8/II/04/01, whereby Gurcharan Singh, respondent herein (hereinafter referred to as the 'accused') has been acquitted of the charge under Sections 279, 337, 338 IPC and Section 187 of the Motor Vehicles Act, has questioned the legality and validity thereof on the grounds *inter-alia* that learned trial Court has failed to appreciate the evidence available on record in its right perspective and rather in a slip-shod and perfunctory manner and the findings to the contrary have been recorded on the basis of conjectures and surmises. The reasonings given to discredit the prosecution evidence are manifestly wrong and cogent and reliable evidence as has come on record by way of testimony of PW-1 Ludarmani, PW-2 Bhagat Singh and PW-6 Parvinder Kumar, the eye witnesses to the accident has not been appreciated properly. All of them have stated that the accident had occurred due to rash and negligent driving attributed to the accused. The statement of PW-5 Jagdish Rana, the proprietor of Rana Service Station is also stated to be erroneously mis-construed and misinterpreted. On the other hand, undue weightage was given to the testimony of PW-10 in his cross-examination that brake pressure was nil and further admission that in a case of pressure brake reduced to nil, brake system does not work. The mechanical report rather show that there was no mechanical defect in the offending vehicle (tanker) and as such, the cause of death was rash and negligent driving, however, such evidence is sated to be not taken into consideration at all.

2. Now if coming to the factual matrix, admittedly, on 23.06.2001 around 5.15 p.m. accused Gurcharan Singh was driving the offending tanker bearing registration No. HR-37-7947 from Mandi side to Dadour under Police Station, Balh, District Mandi (H.P.). The tanker was being driven by him in a rash and negligent manner and as a result thereof, the same firstly hit motorcycle No. HP-58-0551, parked on road side and PW-2 Bhagat Singh sitting thereon and thereafter truck No. HP-33-3686, also lying parked on road side in a court-yard. The accident was witnessed by PW-1 Ludarmani, running a 'Dhaba' nearby, PW-3 Parvinder Kumar and also PW-5 Jagdish, the proprietor of Rana Service Station. In this accident, PW-2 Bhagat Singh had received simple as well as grievous injuries on his person. The accused after the accident had fled away from the spot. The injured PW-2 was

taken to Community Health Centre, Ratti for his treatment. He was attended to by PW-7 Dr. R.N. Jaryal, Medical Officer on duty in the hospital vide MLC Ext. PW-7/A. The injuries on the person of PW-2 were found to be grievous as well as simple in nature. As per x-ray report proved by PW-8 Dr. Rakesh Kumar, PW-2 Bhagat Singh had suffered fracture of right scapula upper and right fibula and fracture in the 6th and 7th ribs in right side. The police got the spot photographed from PW-9 Khem Chand vide photographs Ext. PW-9/A-1 to Ext. PW-9/A-8. The spot map Ext. PW-12/C was also prepared by the I.O. during the course of investigation. PW-10 Asgar Ali had conducted mechanical examination of all the three vehicles involved in the accident and submitted the report Ext. PW-10/A to Ext. PW-10/C. He did not find any mechanical defect either in the motor cycle or truck and for that matter even in the offending tanker also. However, as per his report, the break pressure was nil.

3. The investigating agency on the basis of evidence collected and on finding the involvement of the accused in the commission of the offence punishable under Section 279, 337, 338 IPC and 187 of the Motor Vehicles Act has field report under Section 173 of the Code of Criminal Procedure against him in the trial Court. Learned trial Judge on appreciation of the report and also the documents annexed thereto had put notice of accusation to the accused accordingly to which he pleaded not guilty and claimed trial. The prosecution, in turn, has examined 13 witnesses in all to substantiate its case against the accused.

4. The accused was also examined under Section 313 Cr.P.C in which he has denied all the incriminating circumstances appearing against him in the prosecution evidence either being wrong or for want of knowledge. He has not led any evidence in his defence.

5. Learned trial Judge on appreciation of the evidence has arrived at a conclusion that the prosecution failed to prove its case against the accused beyond all reasonable doubt. The accused, as such, has been acquitted vide judgment under challenge in this appeal.

6. Mr. R.P. Singh, learned Deputy Advocate General assisted by Mr. Kunal Thakur, learned Deputy Advocate General has pointed out from the testimony of material prosecution witnesses that the cause of accident was rash and negligent driver on the part of the accused and none-else. According to Mr. Singh, learned trial Court has miserably failed to appreciate the evidence as has come on record by way of eye witness count of the occurrence given by the complainant PW-1 Ludarmani, injured PW-2 Bhagat Singh, PW-3 Parvinder Kumar and PW-5 Jagdish. The oral evidence having come on record also finds support from the spot map Ext. PW-12/C and the photographs Ext. PW-9/A-1 to Ext. PW-9/A-8 and also report of the mechanical examination of all the three vehicles conducted by PW-10 Asgar Ali. The link evidence, according to learned Deputy Advocate General, is also complete in this case. He, therefore, has urged to quash the impugned judgment and sought conviction of the accused for the offence he committed.

7. On the other hand, Mr. B.R. Kashyap, learned counsel representing the accused has strenuously contended that in view of brake pressure reduced to nil, the brake system does not function and as a result thereof, the accident occurred. Also that, as per prosecution evidence itself, oil and water was on the road at the place of accident and as such, the cause of accident was not rash and negligent driving on the part of the accused. It is also argued that after the accident, the accused did not run away and rather remained on the spot itself. While referring to the statement of PW-7 Dr. R.N. Jaryal, it is submitted that PW-2 Bhagat Singh has not received injuries on his person in the accident, but may be by way of fall. It has, therefore, been submitted that the impugned judgment calls for no interference.

8. On analyzing the rival submissions and also going through the evidence available on record, it is pertinent to note that the offending tanker was being driven by the accused in a rash and negligent manner. It is stated so by PW-1 Ludarmani, PW-2 Bhagat Singh and also PW-5 Jagdish Rana. As a matter of fact, PW-5 Ludarmani was running a tea stall at the place of accident, whereas, PW-5 Jagdish Rana is proprietor of Rana Service Station situated at Dadour on road side. Although, PW-1 had expressed his ignorance as to who was responsible for the accident, however, when declared hostile and permitted to be cross-examined by learned Public Prosecutor, it is admitted that the offending tanker came on wrong side of the road and struck against the truck lying parked there. He has admitted his statement Ext.PW-1/A signed by him, therefore, irrespective of turned hostile, once he has admitted his signature on statement Ext.PW-1/A, he has proved the prosecution case qua offending tanker being driven by the accused in a rash and negligent manner. When cross-examined, no doubt, he tells us that oil and water was lying on the road, however nothing has come in his statement that it is due to that the truck skidded and the accident occurred. The suggestion that accident occurred due to brake failure has, however, been denied being wrong. He was not able to tell the speed of the offending tanker and rightly so as it may not have been possible for him to tell about the exact speed of the tanker.

9. Now if coming to the testimony of PW-2 Bhagat Singh, he was outside Rana Service Station at Dadour sitting on his motorcycle as his son accompanying him went inside the shop situated there. It is at that stage, the offending tanker came from Ner Chowk side and hit the motorcycle. As a result thereof, the same was damaged and he also received injuries on his person. Although, nothing has come on record about the speed of the tanker, yet, when cross-examined, he has disclosed the speed of the tanker between 70-80 kms. The motorcycle on which he was sitting lying parked at a distance of 30 feet away from the national highway. However, it is denied that oil and water was lying on the road side as a result thereof, the accident had occurred. It is also denied that the cause of accident was the brake failure. Another material witness is PW-5 Jagdish Rana, proprietor of Rana Service Station situated at Dadour. According to him, the accident had occurred in front of his shop. According to him, the offending tanker being driver in a rash and negligent manner had firstly struck against the motorcycle and thereafter with the truck. The accused after the accident ran away from the spot. He has also supported the prosecution case qua investigation including clicking of photographs and preparing of spot map having taken place on the spot. If coming to his cross-examination like PW-2 Bhagat Singh, he has also denied the suggestion that oil and water was lying on the road and as a result thereof the accident occurred. He has also denied that the cause of accident was failure of brake.

10. The close scrutiny of statement made by all the three witnesses as aforesaid lead to the only conclusion that the cause of accident was rash and negligent driving attributed to the accused. No doubt, PW-1 has said that oil and water was lying on the road at the place of accident, however, the remaining two witnesses had denied the suggestion to be wrong. Otherwise also, had there been any oil and water lying on that portion of the road, why other vehicles had not met with accident at that place because being national highway it is a busy road.

11. Interestingly enough, the accused in his defence has raised two pleas i.e. (i) the oil and water was on the road and; (ii) failure of brake. However, the pleas so raised are not correct nor he could substantiate the same by way of producing cogent and reliable evidence. On the other hand, as discussed hereinabove, the plea qua oil and water was lying on the road is false and as regards the failure of brake, no iota of evidence except that when PW-10 Asgar Ali, mechanically examined the offending tanker, the brake pressure was found nil is available on record. The pressure was nil well before the accident; nothing in

this regard is made out from the given facts and circumstances of this case. The possibility of the same having reduced to nil after the accident, cannot be ruled-out. On the other hand, it was never suggested to PW-10 that the cause of accident was failure of brake on account of pressure was nil. Of course, a suggestion given to him that on account of brake pressure reduced to nil, the brake does not work has been admitted by him as correct, however, it cannot be taken to believe that well before the accident, the brake pressure was reduced to nil and accident occurred as a result thereof. In view of such plea raised by the accused in his defence as emerges from the trend of cross-examination of the prosecution witnesses conducted on his behalf which ultimately turned false, the only inescapable conclusion would be that the accident occurred due to rash and negligent driving attributed to him alone.

12. It is not the case of mere rashness and negligence rather criminal rashness and criminal negligence, as is proved on record by way of photographs Ext. PW-9/A-1 to Ext. PW-9/A-8 and also spot map Ext.PW-12/C. One can see from the photographs that the offending tanker completely went outside the road. It has not only hit the motorcycle and crushed the same, which as per version of PW-2 Bhagat Singh was lying parked at a distance of 30 feet from the road but also truck No. HP-33-3686, which again was lying parked outside the road in a court-yard. The position reflected in the spot map goes to show that the offending tanker came across the road in wrong side and hit the motorcycle at point 'B' whereas, truck No. HP-33-3686 at point 'E'. True it is that nothing has come on record about the exact speed of the tanker and rightly so as it is not possible to say with all exactness qua the speed of the vehicles by someone having witnessed the accident. The speed of the offending tanker, in the case in hand, however, can be determined from the evidence as has come on record by way of spot map and also the photographs and of course statement of PW-2 Bhagat Singh, who had given the speed between 70-80 kms per hour. The report Ext. PW-10/C amply demonstrates that no mechanical defect could be detected during the mechanical examination of the offending tanker. As regards the brake pressure, there is nothing suggesting that it had already reduced to nil well before the accident having taken place. Therefore, the only apparent reason and the cause of accident was rash and negligent driving attributed to the accused and none-else.

13. The link evidence as has come on record by way of testimony of PW-3 Parvinder Kumar shows that truck No. HP-33-3686 was of his brother Gajinder and it was lying parked near Rana Service Station. He has also supported the prosecution case so as to Bhagat Singh PW-2 sitting on the motorcycle was also hit by the offending tanker. The damaged motorcycle and truck No. HP-33-3686 along with offending tanker HR-37-7947, all were taken in possession vide seizure memo Ext. PW-4/A in the presence of PW-4 Yashwant Singh. PW-6 Gurdev Singh was the owner of offending tanker, who had produced the documents which were taken in possession by the police. PW-9 Khem Chand has proved the photographs as it is he who had taken the same. PW-10 Asgar Ali, Motor Mechanic, has proved the reports Ext. PW-10/A to Ext.PW-10/C of all the three vehicles involved in the accident. The evidence as has come on record by way of his testimony is already discussed hereinabove.

14. Now if coming to the statement of PW-11 K.D. Sharma, he was posted as Station House Officer in Police Station, Balh at the relevant time and after preparation of the report filed the same in the Court. The Investigating Officers are PW-12 Head Constable Amar Nath and PW-13 Sham Lal. They both have stated about the manner in which they have conducted the investigation. Nothing tangible was suggested to them to prove that the accident had not taken place in the manner as claimed in the police report and documents annexed thereto.

15. In view of the re-appraisal of the entire evidence, the present is a case where the prosecution has proved its case against the accused beyond all reasonable doubt. As a matter of fact, it is learned trial Judge who has failed to appreciate, interpret and construe the same in its right perspective and as a result thereof wrong findings came to be recorded and the accused acquitted. The findings recorded by leaned Court below, as such, are not legally and factually sustainable. The impugned judgment, as such, is quashed and set aside. Consequently, the accused is convicted for the commission of offence punishable under Sections 279, 337 and 338 IPC and also under Section 187 of the Motor Vehicles Act. He is on bail. His personal bonds are cancelled and surety discharged. Let the Incharge, High Court Security to take him in custody and thereafter the Superintendent of Police, Shimla District Shimla to provide proper escort so that he can be lodged in Sub-Jail, Kaithu.

16. List for hearing on quantum of sentence tomorrow on 4.10.2018. The Superintendent Sub-jail, Kaithu to arrange for production of the accused-convict in this Court on 4.10.2018 at 10.00 a.m under proper police escort.

The Registry to prepare jail warrants accordingly.

Judgment to continue.

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

Sukh Dev alias Devi Ram ...Petitioner.
Versus
Lata Kumari & others ...Respondents.

Cr. MMO No. 318 of 2018
Reserved on: 25.09.2018
Decided on: 05.10.2018.

Code of Criminal Procedure, 1973- Sections 244 and 245 – Discharge – Circumstances – Held, where pre-charge evidence is intrinsically untrustworthy, same can not be made basis for proceeding against accused- In such circumstances, discharge of accused justified. (Para-12).

Indian Evidence Act, 1872- Section 114- Marriage – Presumption – Held, Long cohabitation and birth of children will raise presumption of valid marriage. (Para-9) .

Cases referred:

Soma Chakravarty vs. State through CBI, (2007) 5 SCC 403
State of Bihar vs. Ramesh Singh, AIR 1977 Supreme Court 2018

For the petitioner: Mr. Tenzen Tashi Negi, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition is maintained by the petitioner/State under Section 482 Cr.P.C. against orders dated 15.09.2016, passed by the learned Judicial Magistrate 1st Class, Bilaspur, in Criminal Case No. 80/1 of 2003 and 02.04.2018, passed by learned Sessions Judge, Bilaspur, in Criminal Revision No. 17/10 of 2016.

2. The key facts necessary for disposal of the present petition can succinctly be summarized thus:

> The petitioner/complainant (hereinafter referred to as "the complainant") presented an application in the learned Trial Court under Section 156(3) Cr.P.C., wherein, in nitty-gritty, a prayer had been made to proceed against the respondents/accused persons (hereinafter referred to as "the respondents") under Sections 420, 468, 471 and 120B IPC. As per the petitioner, he is son of Shri Tikhu Ram, who was married to Smt. Nanaki alias Durgi Devi. Said Durgi Devi expired after the birth of the complainant. The complainant has further averred that Shri Tikhu Ram had no other child, except him. Shri Lal Singh, brother of Shri Tikhu Ram, was married with Smt. Santosh and Smt. Dropti and subsequently he died. Smt. Santokhu alias Santosh Devi, who has been made as accused No. 5 in the learned Trial Court, gave birth to accused No. 1 to 4 (respondents herein). As per the complainant, the name of the father of respondents is unknown, as the Smt. Santosh Devi was a lady of easy virtue. As per the panchayat record, Smt. Santosh Devi, is recorded as wife of Shri Lal Singh, but subsequently her name alongwith the names of all the respondents, in connivance with the Secretary, Gram Panchayat, Dhaun Kothi and Dhar Tatoh, were entered in the register and Smt. Santosh Devi was shown as widow of Tikhu. It is further averred that names of the respondents were shown in the register, as sons and daughters of Tikhu, and the name of the complainant was erased. As per the complainant, the accused persons, in connivance with Panchayat Officials, committed offences punishable under Sections 420, 468, 471 and 120B IPC. The complaint, so moved by the complainant, was forwarded to SHO, Police Station Barmana, whereupon FIR No. 111/2003, dated 18.06.2003, under Sections 420, 468, 471 and 120B IPC was registered and after completion of investigation, police filed cancellation report before the learned Trial Court. However, the complainant filed objections against the cancellation report and the learned Trial Court, vide its order dated 02.01.2008, treated the complaint as private complaint. The complainant led his preliminary evidence and after the closer of the same, on 10.09.2013 the learned Trial Court took cognizance against the accused persons for the commission of the offences punishable under Sections 420 and 466 of IPC and the respondents were summoned. The complainant, in pre-charge evidence, examined four PWs and tendered certain documents. After closer of the evidence, the learned Trial Court, vide its order dated 15.09.2016, discharged the respondents for the offences, as alleged by the complainant against them. The complainant preferred a revision petition against the said order before the learned Revision Court, but the same was dismissed and the order of the learned Trial Court was upheld, hence the present petition preferred by the complainant, wherein it is prayed that the petition be allowed and impugned orders dated 15.09.2016, passed by the learned Judicial Magistrate 1st Class, Bilaspur, and 02.04.2018, passed by learned Sessions Judge, Bilaspur, be quashed and set aside and the learned Judicial Magistrate 1st Class, Bilaspur, be directed to frame charges under Section 420, 468, 471 and 120B IPC and proceed accordingly.

3. Heard. The learned counsel for the petitioner has argued that the learned Trial Court has committed illegality in not framing the charge under Sections 420, 468, 471 and 120B IPC against the respondents, though clear cut case has been made out against

them. He has further argued that the learned Revisional Court by upholding the judgment of the learned Trial Court has also committed gross illegality. On the other hand, the learned counsel for the respondents has argued that no case is made out against the respondents and the present litigation is just an abuse of the process of the Court. He has further argued that the present petition deserves dismissal with exemplary costs.

4. In rebuttal, the learned counsel for the petitioner has argued that from the bare reading of the complaint *prima facie* case is made out against the respondents, so the impugned orders be quashed and set aside and the learned Trial Court be directed to frame charge against the respondents under Sections 420, 468, 471 and 120B IPC.

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

6. The petitioner, under Section 202 Cr.P.C., examined four witnesses, including himself. The complainant (petitioner) reiterated the contents of the complaint. CW-2, Shri Tulsi Ram, stated that the complaint is son of Tikhu Ram and Durgi Devi and when Tikhu Ram died, mutation No. 414, dated 29.05.1982, was rightly attested. He has further deposed that neither Santosh Devi married Tikhu Ram, nor they resided together. As per this witness, the father name of Lata Kumari, Saroj Kumari and Pushpa Devi is not known to any one. This witness, in his cross-examination, has deposed that in a civil case, titled Sukh Dev vs. Lata, Sukh Dev gave statement on 10.06.2004, which is correct. He admitted that a case has been initiated against him and Sukh Dev for attestation of mutation and they got arrested.

7. CW-3, Shri Anil Sharma, Record Keeper, brought record pertaining to Civil Suit No. 72/1 of 2005/02, titled Lata Kumari vs. Sukh Dev @ Devi Ram @ Dev Raj, decided on 03.03.2014. As per this witness, in that case, record of rights for the year 1996-97, Ex. PA, had been brought on record and he proved copy whereof as Ex. PW-3/A. This witness has also proved the certified copy of register, Ex. PC and certified copy of judgment and decree, Ex. PW-3/M. CW-4, Godawari Devi, Panchayat Secretary, produced family register and stated that the name of husband of Smt. Santosh was written as Lal Singh and after cutting it was written as Tikhu Ram.

8. After meticulously scrutinizing the evidence, it is emanating clearly from the panchayat record that the name of the husband of Smt. Godawari Devi is Shri Tikhu Ram. This Court has examined the judgment dated 03.03.2014, rendered in Civil Suit No. 71/1 of 2005/02, decided by learned Civil Judge (Judicial Division), Bilaspur. From the record it is clear that Shri Lal Singh and Shri Tikhu Ram were real brothers. The first wife of Shri Lal Singh, Smt. Dropti Devi, while appearing as PW-2 in the civil suit (supra) stated that Smt. Santosh Devi got married to Tikhu after the death of Lal Singh on 05.11.1958. However, she was not aware as what customs and ceremonies were performed to conduct the marriage and where the marriage took place. In the civil suit (supra) PW-6, Shri Munshi Ram, who got his two sons married to the daughters of Santoshi Devi, was not aware that whether Santoshi Devi was married to Tikhu Ram.

9. The above statements clearly show that there was something with respect to marriage of Tikhu Ram and Santoshi Devi. The birth of the daughters of Santoshi Devi and her continuously living with Tikhu Ram and the statement of earlier wife of Tikhu Ram lucidly shows that there is a presumption with regard to the marriage because of long cohabitation and birth of daughters. Though, Tikhu Ram was also father of the complainant, but it is clear that deceased Tikhu Ram and Santoshi Devi resided together for long time till the death of Tikhu Ram and four daughters were born to them. So, the presumption under Section 114 of the Indian Evidence Act arises in favour of the

respondents, as Tikhu Ram and Santoshi Devi resided together as husband and wife for long time and the presumption that they married and that is why daughters were born is always there. The daughters of Tikhu Ram (respondents herein) will always remain daughters of Tikhu Ram and Santoshi Devi. There is nothing to controvert the fact that Tikhu Ram was not having any access to Santoshi Devi. So, the presumption, as drawn by the learned Trial Court, while framing the charge against the respondents, is well reasoned, as per the law and the same needs no interference.

10. The learned counsel for the petitioner has placed reliance on the following judicial pronouncements:

1. ***Soma Chakravarty vs. State through CBI, (2007) 5 SCC 403; &***
2. ***State of Bihar vs. Ramesh Singh, AIR 1977 Supreme Court 2018.***

11. The Hon'ble Supreme Court in ***Soma Chakravarty vs. Sate through CBI, (2007) 5 SCC 403,*** has held as under vide para 10:

> ***"10. It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial."***

However, the judgment (supra) is not applicable to the facts of the present case, as the there is nothing on record to proceed against the respondents under Sections 420, 468, 471 and 120B IPC. The petitioner (complainant) has failed to connect the respondents, by leading preliminary evidence before the learned Trial Court, that there exists a *prima facie* case against the respondents. So, the judgment (supra) is of no help to the petitioner.

12. The petitioner has also placed reliance on ***State of Bihar vs. Ramesh Singh, AIR 1977 Supreme Court 2018,*** wherein the Hon'ble Supreme Court vide paras 5, 6 and 7 has held as under:

> ***"5. In Nirmaljit Singh Hoon v. The State of West Bengal, (1973) 2 SCR 66 : (AIR 1972 SC 2639) Shelat J., delivering the judgment on behalf of the majority of the Court referred at page 79 of the report to the earlier decisions of this Court in Chandra Deo Singh v. Prokash Chandra Bose, (1964) 1 SCR 639 : (AIR 1963 SC 1430) where this Court was held to have liad down with reference to the similar provisions contained in Ss. 202 and 203 of the Code of Criminal Procedure, 1898 "that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed that where there was prima facie evidence, even though the person charged of an offence in the complaint might***

have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused". Illustratively, Shelat J., further added "Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case."

6. The fact that Tara Devi died an unnatural death and there were burn injuries on her person does not seem to be in doubt or dispute. The question to be decided at the trial would be whether the respondent, as is the prosecution case, had murdered her and set fire to her body or whether she committed suicide by herself setting fire to it. This undoubtedly is a serious matter for decision at the trial. But at the stage of framing the charge copious reference to Modi's Medical Jurisprudence and judgment the post-mortem report of the Doctor who performed the autopsy over the dead body of the lady meticulously was not quite justified as has been done by the trial Judge. According to the prosecution case the respondent was in love with one of his girl students, named, Nupur Ghosh and this led to the serious differences between the respondent and his wife, the unfortunate Tara Devi, inducing the former to clear the path of his misadventure in the manner alleged by the prosecution. On the other hand, the defence seems to suggest that the alleged love-affair of the respondent led Tara Devi to commit suicide. Whether the respondent will be able to prove his defence at the final stage of the trial may not be of much consequence. Surely the prosecution will have to prove its case beyond any reasonable doubt. Although at the time of the alleged occurrence were present in the house of the respondent his brother, his brother's wife, and children the prosecution does not seem to be in possession of any ocular testimony of an eye-witness of the occurrence. The case will largely, rather, wholly, depend upon the circumstantial evidence. A stricter proof will have to be applied for judging the guilt of the accused with reference to the various circumstantial evidence against him. But at this stage the Additional Sessions Judge was not right when he said - "it appears that there is neither direct evidence nor any circumstantial evidence to connect the accused with the alleged murder of Tara Devi". He also ought not to have referred to the varying opinions of the Circle Inspector and the Superintendent of Police, Motihari as to the submission of charge-sheet against the respondent.

7. Apart from some other circumstances, as it appears, the prosecution proposes to prove in this case, and whether it will succeed in proving them or not is a different matter, the High Court has enumerated three circumstances in its impugned order. We may just add, and that is only for the purpose of a cursory observation for deciding the matter at this stage, that

the story of assault on Tara Devi by the respondent a day prior to the occurrence is perhaps sought to be proved by the evidence of Chandreshwar Singh, the informant, and it seems, he would also try to say, rightly or wrongly that at the time of the said assault the respondent had given her a threat to kill her. The High Court felt persuaded to take the view that the three circumstantial facts, even if proved, would not be incompatible with the innocence of the accused and then added. "There may be strong suspicion against the opposite party, but the three circumstances which I have just mentioned above, cannot be said to be incompatible with the defence of the accused". The said observation of the High Court is not quite apposite in the background of the law which we have enunciated above with reference to the provisions of Section 227 and 228 of the Code."

Again, the judgment (supra) is of no help to the petitioner, as the material available before the learned Trial Court was intrinsically untrustworthy, which was not rightly be made basis for proceeding against the respondents. So, the judgment (supra) is not applicable to the facts of the present case.

13. In view of what has been discussed hereinabove, the impugned order passed by the learned Trial Court and upheld by the Revisional Court is not required to be interfered with, as the same has been passed after appreciating the material, which has come on record, and also applying the law correctly to the facts of the case. Therefore, the petition sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, also stand(s) disposed of.

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

Deepak Kumar … Petitioner

Versus

State of Himachal Pradesh … Respondent

CrMP(M) No. 1252 of 2018
Decided on October 8, 2018.

Code of Criminal Procedure, 1973- Section 439- Bail – Grant of – Circumstances – Accused alongwith his parents allegedly harassing and treating his wife 'S' with cruelty – 'S' committing suicide by consuming insecticide – Bail of accused resisted by State on ground of seriousness of offences – State contending that accused and his parents did not bring 'S' to hospital when she was suffocating rather brought her dead – On finding that (i) suicide took place on 5.6.2018 whereas FIR was registered only on 19.9.2018, (ii) No allegation in statement of mother of 'S' that accused or any member of his family raised demand of dowry or otherwise harassed 'S', (iii) Investigation was complete, (iv) Custody of accused not required by police and (iv) Accused public servant and there being no likelihood of his escape, bail granted subject to conditions. (Paras-6, 7 & 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. Suresh Saini and Mr. Vinod Chauhan, Advocates.
For the respondent	:	Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General. SI/SHO Chattar Singh, Police Station Kaza, Lahul & Spiti, Himachal Pradesh.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner namely Deepak Kumar, who is behind the bars since 20.9.2018, has approached this court in the instant proceedings, praying therein for grant of regular bail in case FIR No. 26/18 dated 19.9.18, under Sections 498-A, 306 and 201 IPC, registered at Police Station Kaza, Lahul & Spiti, Himachal Pradesh.

2. Sequel to order dated 24.9.2018, SI/SHO Chattar Singh, Police Station Kaza, Lahul & Spiti, Himachal Pradesh 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. Careful perusal of record/status report suggests that on 5.6.2018, police received an information from medical officer, CHC Kaza that one lade namely Shalini wife of the present bail petitioner, has been brought dead to the hospital. After having received aforesaid information, police started investigation. On 7.6.2018, police sent the preserved viscera of the deceased to RFSL Mandi, for chemical analysis. On 19.9.2018, police received report of the RFSL Mandi, who opined that Organophosphorus insecticide has been detected in the viscera of the deceased Shalini. Pursuant to aforesaid report, police obtained report from the medical officer, CHC Kaza, who in her report, opined that, "*I am of the opinion that the deceased Smt. Shalini age 26 yrs. Female died (sic. dieds) due to cardio respiratory arrest because of use of Organophosphorus poison"* On 20.9.2018, police arrested the present bail petitioner, who happened to be husband of the deceased, Shalini. As per investigation conducted by the police, deceased Shalini consumed poison after being harassed by her husband as well as his family members. In the aforesaid background, FIR detailed herein above came to be lodged against the bail petitioner as well as other family members of the bail petitioner. Bail petitioner is behind the bars since 20.9.2018, whereas, other co-accused have been already enlarged on interim bail by learned Additional Sessions Judge, Rampur.

4. Mr. Suresh Saini and Mr. Vinod Chauhan, learned counsel appearing for the bail petitioner, while inviting attention of this court to the status report, vehemently argued that no case is made out against the bail petitioner under Ss. 498-A, 306 and 201 IPC, as such, he deserves to be enlarged on bail. Mr. Chauhan, argued that factum with regard to death of deceased Shalini had come to the notice of the police on 5.6.2018, but there is no plausible explanation on record with regard to delay in lodging FIR, which admittedly came to be lodged on 19.9.2018. He further argued that there is no material, if any, adduced on record by the investigating agency suggestive of the fact that deceased Shalini was being harassed by the bail petitioner or other family members, for want of dowry, as such, bail petitioner, who is a government employee, deserves to be enlarged on

bail. Lastly, Mr. Chauhan, contended that the investigation in the case is almost complete and nothing is required to be recovered from the bail petitioner as such, prayer for his release on bail may be considered.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while fairly acknowledging the factum with regard to completion of investigation, stated that keeping in view the gravity of the offence alleged to have been committed by the bail petitioner, he does not deserve to be enlarged on bail. He further argued that on 5.6.2018, investigating agency, after having received information from medical officer had made an entry in the *Rojnamcha* but FIR could only be registered against the bail petitioner after receipt of report from the RFSL Mandi. Mr. Thakur, while inviting attention of this court to the report submitted by RFSL as well as medical officer Kaza, contended that it has come specifically on record that deceased Shalini had consumed poison. While referring to the statement of bail petitioner, Mr. Thakur made a serious attempt to persuade this court that bail petitioner despite having noticed that deceased Shalini after having consumed poison is suffocating, took no steps to take her to the hospital, rather, he alongwith other family members, waited till her death, whereafter she was taken to the hospital.

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

7. Having carefully perused the material available on record, this court is persuaded to agree with the contention of Mr. Vinod Chauhan, learned counsel representing the bail petitioner that there is no material on record adduced by the investigating agency at this stage, suggestive of the fact that complaint, if any, was ever made by deceased to her parents against the bail petitioner or his family members alleging therein that she was being harassed on account of dowry. Otherwise also, if statement having been made by mother of deceased (Shalini) is perused, it also nowhere indicates that at any point in time, deceased had conveyed to her with regard to cruelty being meted out to her by her husband (bail petitioner) or other family members. Though aforesaid aspect of the matter is to be considered and decided by the court below, on the basis of evidence being adduced on record by the investigating agency, but this court having perused record/status report, sees no reason to let the bail petitioner incarcerate in jail for indefinite period. Otherwise also, investigation is almost complete and nothing is required to be recovered from the bail petitioner. No material has been brought on record by investigating agency, from where it can be inferred that in the event of bail petitioner being enlarged on bail, he may flee from justice. It is not in dispute that bail petitioner is a government employee and as such, there is no likelihood of his fleeing from justice. It is well settled law that till such time, guilt of a person is not proved, he is deemed to be innocent. In the case at hand, guilt of bail petitioner is yet to be proved in accordance with law.

8. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has 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."

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, 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;

(ix) reasonable apprehension of the witnesses being influenced; and

(x) 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 CJM Reckong Peo/Rampur, 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 violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of instant petition alone.

The petition stand accordingly disposed of.

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

Jeewan Lakshmi ...Petitioner
Versus
Dr. Shrikant Baldi ...Respondent

CrMMO No. 93 of 2014
with CrMMO No. 94 of 2014
Decided on: October 8, 2018.

Code of Criminal Procedure, 1973- Section 468(2) and 469- **Indian Penal Code, 1860-** Sections 500 and 201– Defamation – Limitation for cognizance - Computation- Held, in offences punishable with imprisonment for terms exceeding one year but not exceeding three years, no Court shall take cognizance after three years – And limitation would commence in relation to offence from date of said offence – Alleged defamation caused by way of frivolous complaints occurred in 2002 – Complaints for defamation filed in 2011, held to be barred by limitation. (Paras-18 to 20).

Equal Remuneration Act, 1976- Section 10(2)- **Code of Criminal Procedure, 1973-** Section 482- **Indian Penal Code, 1860-** Sections 500 and 201- Quashing of proceedings – Principles – Accused (employee) earlier filed two complaints against department with allegations that she was intentionally not paid salary and other maternity benefits– Complaints of employee dismissed on merit by CJM and judgments attained finality – Thereafter, present complainant, a Senior Bureaucrat filing complaints against employee for defamation by alleging that he was defamed in earlier proceedings on account of baseless allegations leveled by employee – CJM taking cognizance on complaints and summoning employee for offences under Sections 500 and 201 of I.P.C. – Petition against summoning order – Held, in complaints filed earlier by employee, complainant was not arrayed as accused – There was no specific allegation against complainant in complaints of employee – Complainant was never summoned as an accused in those complaints – He was not Managing Director of Corporation at relevant point of time – No allegation in complaints of employee either against the then M.D. of Corporation- Present complainant remained M.D. of Corporation during 2006-07 whereas complaints were filed by employee in 2002 – Not clear as to how present complainant personally aggrieved of allegations, if any, contained in complaints filed by employees in 2002–Complaints filed by complainant bureaucrat quashed - Summoning orders Set aside – Petitions allowed. (Paras- 15, 16, 23 & 24)

Cases referred:
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330
Asmathunnisa v. State of A.P. (2011) 11 SCC 259
Sirajul v. State of U.P. (2015) 9 SCC 201

For the petitioner: Mr. Satyen Vaidya, Senior Advocate with Mr.Mohd. Aamir, Advocate, in both the petitions.
For the respondent: Mr. Raman Jamalta, Advocate, in both the petitions.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Since in both the above captioned petitions, parties are same and question of law involved is also similar, as such, same are being taken up together for disposal vide this common judgment.

2. Present petitions are directed against orders dated 27.9.2012 passed by the Chief Judicial Magistrate, Shimla in case No. 105-2 of 211 (CrMMO No. 93 of 2014) and case No. 104-2 of 11 (CrMMO No. 94 of 2014) both titled as Dr. Shrikant Baldi vs. Ms. Jeevan Laxmi Kukreja, whereby learned Court below taking cognizance of the complaints under Ss. 500 and 211 IPC having been filed by the respondent issued process against the petitioner directing her to remain present in the court on 5.5.2014.

3. For having a bird's eye view, necessary facts as emerge from the record are that the petitioner filed two complaints under Section 10(2) of the Equal Remuneration Act, 1976 and Section 21 of the Maternity Benefits Act alleging therein that she was not paid due and admissible wages/maternity benefits, while she worked with the Himachal Road Transport Corporation (hereinafter, 'HRTC') with effect from 1.6.1991 to 8.10.2001. Allegedly, complainant was posted as a Computer Operator with the HRTC with effect from 1.6.1991, vide appointment letter dated 30.5.1991 and she rendered her services in this capacity till 8.10.1991 but since she was not paid her admissible dues/maternity benefits, she filed two complaints as referred herein above arraying therein following persons as respondents-accused:

Complaint under Section 10(2) of the Equal Remuneration Act, 1976 (Criminal Case No. 114/3 of 2010/02

1. Himachal Road Transport Corporation through its Managing Director, Head Office, Shimla, H.P.
2. Mr. T.G. Negi, the then, Managing Director, Himachal Road Transport Corporation, Head Office, Shimla, H.P.
3. Mr.P.K.Mahajan, Deputy General Manager, Himachal Road Transport Corporation, Head Office, Shimla, H.P.
4. Mr.Raghubir Chowdhary, Deputy Divisional Manager (Computer), Himachal Road Transport Corporation, Head Office, Shimla, H.P.

Complaint under Section 21 of the Maternity Benefit Act, 1961 (Criminal Case No. 115/3 of 2010/02

1. Himachal Road Transport Corporation through its Managing Director, Head Office, Shimla, H.P.
2. Mr. T.G. Negi, the then, Managing Director, Himachal Road Transport Corporation, Head Office, Shimla, H.P.
3. Mr. Daljeet Singh Dogra, Managing Director (Presetn) Himachal Road Transport Corporation, Head Office, Shimla, H.P.
4. Mr.P.K.Mahajan,(Admn) Deputy General Manager, Himachal Road Transport Corporation, Head Office, Shimla, H.P.
5. Mr.Raghubir Chowdhary, Deputy Divisional Manager (Computer), Himachal Road Transport Corporation, Head Office, Shimla, H.P.

4. If the contents of the complaints having been filed by the petitioner are perused, there are no specific allegations, if any, by name, against any of the respondents-accused arrayed in the same, rather, complainant in the complaints has alleged that despite her having made several representations to the respondents-accused, she was not paid salary qua the work rendered by her in the capacity of a Computer Operator. It is a matter of record that the aforesaid complaints having been filed by the petitioner were dismissed vide judgments dated 8.3.2011 and 1.4.2011 (Annexure P-5, in both the petitions) and aforesaid judgments have attained finality.

5. After passing of aforesaid judgments in the complaint, as have been taken note hereinabove, present respondent filed two complaints under Ss. 500 and 211 IPC i.e. Case No. 105-2 of 2011 and Case No. 104-2 of 2011 (Annexure P-2, in both the petitions), against the petitioner, praying therein to summon, try and convict the petitioner for having committed offences punishable under Ss. 500 and 211 IPC. Respondent alleged that due to false and baseless allegations made by the petitioner in her complaints, he not only felt humiliated but such humiliation was brought to the public domain and besides this, he also underwent immense mental agony and harassment. Respondent also averred in the complaints that due to the frivolous allegations having been levelled by the petitioner his official work was also affected in as much as he had to appear in person on various dates of hearing in the complaint having been filed by the petitioner.

6. Learned Chief Judicial Magistrate, Shimla, taking cognizance of the averments contained in the aforesaid complaints filed by the respondent, issued process against the petitioner vide impugned order dated 27.9.2012 (in both the complaints). In the aforesaid background, petitioner has approached this court in the instant proceedings, laying therein challenge to summoning orders dated 27.9.2012, with further prayer to quash and set aside the same.

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

8. Before adverting to the factual matrix of the case, this Court deems it necessary to elaborate upon the 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. Relevant 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."

9. Subsequently, Hon'ble Apex Court in **Bhajan Lal** (supra), 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

10. 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)
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> > 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."

11. Hon'ble Apex Court in **Asmathunnisa** v. **State of A.P.** (2011) 11 SCC 259, has held as under:

"12. This Court, in a number of cases, has laid down the scope and ambit of the High Court's power under section 482 of the Code of Criminal Procedure. Inherent power 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.

13. The law has been crystallized more than half a century ago in the case of R.P. Kapur v. State of Punjab AIR 1960 SC 866 wherein this Court has summarized some categories of cases where inherent power can and should be exercised to quash the proceedings. This Court summarized the following three broad categories where the High Court would be justified in exercise of its powers under section 482:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

14. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, according to the court, the process against the accused can be quashed or set aside :

> "(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
>
> (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".
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> 15. This court in State of Karnataka v. L. Muniswamy & Others (1977) 2 SCC 699, observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice requires that the proceedings ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the Legislature. This case has been followed in a large number of subsequent cases of this court and other courts."

12. Hon'ble Apex Court in **Asmathunnisa** (supra) has categorically held that where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like, High Court would be justified in exercise of its powers under S. 482 CrPC.

13. From the bare perusal of 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.

14. Now in the light of the aforesaid exposition of law, this Court shall make an endeavor to examine the material available on record vis- à-vis impugned order to arrive at conclusion that whether facts of the case warrant exercise of power by this court under Section 482 Cr.PC for quashing of summoning process or not.

15. Having heard the learned counsel representing the parties and perused the material available on record, this court is persuaded to agree with the contention of Mr. Satyen Vaidya, learned Senior Advocate that there is nothing on record suggestive of the fact that allegations, specific in nature, were ever made by the petitioner against the respondent. Careful perusal of the complaints having been filed by the petitioner under S. 10(2) of the Equal Remunerations Act/S. 21 of the Maternity Benefits Act, clearly suggests that same

were filed in the year 2002 and respondent was never arrayed as respondent/accused in his personal capacity. If memorandum of parties of both the complaints filed by petitioner are perused, they clearly suggest that Mr. T.G. Negi, who was the Managing Director, HRTC, at the relevant point in time, was arrayed as respondent/accused. Apart from above, having carefully examined the contents of the complaint having been filed by the petitioner, this court fins that there is no allegations specific in nature, against the Managing Director, HRTC, rather, petitioner has simply stated that she despite having made several representation has not been paid her admissible dues on account of services rendered by her in the HRTC.

16. Leaving it aside, it clearly emerges from the record i.e. complaints having been filed by the respondent under Ss. 500 and 211 IPC, wherein summoning orders came to be issued against the petitioner, respondent remained posted as Managing Director of the Corporation with effect from May, 2006 to June, 2007, whereas complaints in question came to be filed by the petitioner in the year 2002 and as such, it is not understood that how respondent is aggrieved of the allegations, if any, contained in the complaints having been filed by the petitioner. At the cost of repetition, it may be observed that otherwise also, Managing Director of HRTC never came to be arrayed in his personal capacity rather, HRTC came to be sued through Managing Director. If the averments contained in the complaint filed by respondent under Ss. 500 and 211 IPC are perused/examined, they nowhere disclose, offence, if any, committed by the petitioner under Ss. 500/211 IPC. Respondent in para-11 of both the complaints has made very vague allegations that, *"....due to false and baseless allegations made by the accused in her complaint and also in her deposition made in court, the complainant felt humiliated and was brought to public odium, and besides this he underwent immense mental agony and harassment..."* There appears to be no material placed on record to substantiate aforesaid assertions.

17. Having carefully gone through the averments of the complaints having been filed by the petitioner under the Equal Remunerations Act and the Maternity Benefits Act, this court sees no force in the arguments of Mr. Raman Jamalta, learned counsel representing the respondent that due to false and frivolous allegations made in the complaints by the petitioner, undue harassment was caused to the respondent, who admittedly remained Managing Director, HRTC with effect from May 2006 to June, 2007, whereas, complaints in question came to be filed in the year 2002. Similarly, there is no material placed on record that the summons, by name, if any, ever came to be issued against the respondent in the complaints having been filed by the petitioner.

After carefully going through the averments contained in the complaints having been filed by the respondent as well as material placed alongwith the same, this court has no hesitation to conclude that the magistrate, while issuing process, has not bothered at all to peruse the contents of the complaints as well as material placed alongwith the same, to see whether prima facie, case, if any, is made out against the petitioner. Contents of the complaints having been filed by respondent are wholly irrelevant as far as commission of offences punishable under Ss. 500/211 IPC is concerned and as such, this court, while exercising power vested in it under S. 482 CrPC, deems it fit to quash the summoning orders issued against the petitioner.

18. There is yet another aspect of the matter which also requires discussion i.e. limitation. Admittedly, the complaints under Ss. 500/211 IPC came to be filed by the respondent in the year 2011 i.e. after dismissal of the complaints having been filed by the petitioner at this stage, it would be appropriate to take note of S. 468 CrPC, which is reproduced hereunder:

"468. Bar to taking cognizance after lapse of the period of limitation.

(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub- section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only

1. Provisions of this Chapter shall not apply to certain economic offences, see the Economic Offences (Inapplicability of Limitation) Act, 1974 (12 of 1974), s. 2 end Sch.

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]"

19. Sub-clause (c) of Clause (2) of S. 468 clearly provides that for the offences punishable with imprisonment for term exceeding one year but not exceeding three years, no court shall take cognizance of the offence after three years. In the case at hand, offence alleged to have been committed by the petitioner pertains to the year 2002 i.e. on which date, she filed complaints arraying therein Managing Director, HRTC as a respondent/accused but complaints under Ss. 500/211 IPC came to be filed in the year 2011 i.e. after a period of almost nine years. Argument having been made by Mr. Raman Jamalta learned counsel representing the respondent that the limitation would commence from the date when complaints having been filed by petitioner were dismissed, is wholly misconceived and can not be accepted. Similarly, another contention of Mr. Jamalta that limitation in case of respondent would start from the year 2007, till which period, respondent remained posted as Managing Director, also deserves outright rejection, for the reasons that even if for the sake of argument, if it is presumed that limitation would start from the year 2007, even in that eventuality, proceedings initiated by respondent under Ss. 500/211 IPC are barred by limitation in terms of S. 468(2)(c) CrPC, which clearly provides that no proceedings for offences entailing imprisonment upto one year and not exceeding three years can be filed beyond three years.

20. Apart from above, S. 469 CrPC provides for commencement of period of limitation. S. 469(1)(a) clearly provides that limitation would commence in relation to an offence on the date of said offence. Undisputedly, in the cases at hand, complaints under the Equal Remunerations Act and the Maternity Benefits Act, purportedly containing baseless allegations against the respondent, were filed in the year 2002, meaning thereby, limitation would commence from the date of filing of said petitions. Otherwise also, in the case at hand, it is an admitted case of the respondent that he had assumed charge of Managing Director, HRTC in the year 2006, meaning thereby he had come to know with regard to pendency of the complaints having been filed by petitioner on his assuming the office and proceedings, if any, under Ss. 500/211 IPC could only be filed by him within a period of three years from the assuming of the office in May, 2006.

21. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **Sirajul** v. **State of U.P.** (2015) 9 SCC 201, whereby it has been reiterated that no person can be kept under continuous apprehension that he can be prosecuted at "any time" for "any

crime" irrespective of the nature or seriousness of the offence. "People will have no peace of mind if there is no period of limitation even for petty offences. It has been held in the aforesaid judgment as under:

> "10. In response to this stand of the complainant, learned counsel for the accused submitted that even if it is assumed that the appellants had caused the injury in question, the nature of injury, in the circumstances can at best fall under Section 324 IPC in which case bar under Section 468 Cr.P.C. is applicable. In any case, even cases not covered by statutory bar of limitation could be held to be liable to be quashed on the ground of violation of right of speedy trial under Article21 of the Constitution.
>
> 11. We have given due consideration to the rival submissions. The question whether the proceedings in criminal cases not covered by Section 468 Cr.P.C. could be quashed on the ground of delay has been gone into in several decisions. While it is true that cases covered by statutory bar of limitation may be liable to be quashed without any further enquiry, cases not covered by the statutory bar can be quashed on the ground of delay in filing of a criminal complaint in appropriate cases. In such cases, the question for consideration is whether there is violation of right of speedy trial which has been held to be part of Article 21 of the Constitution having regard to the nature of offence, extent of delay, person responsible for delay and other attending circumstances. In this regard, observations in judgments of this Court may be referred to.
>
> 12. In Japani Sahoo (supra), it was observed :
>
> > "16. At the same time, however, ground reality also cannot be ignored. Mere delay may not bar the right of the "Crown" in prosecuting "criminals". But it also cannot be overlooked that no person can be kept under continuous apprehension that he can be prosecuted at "any time" for "any crime" irrespective of the nature or seriousness of the offence. "People will have no peace of mind if there is no period of limitation even for petty offences.""

22. Applying the ratio of law laid down by the Hon'ble Apex Court in the aforesaid judgment to the facts of the present case, petitioner could not have been allowed to prosecuted after nine years of filing the complaint that too for an offence under Ss. 500/211 IPC, as such, proceedings initiated by the respondent under aforesaid provisions, are barred by limitation as prescribed under S. 468 CrPC.

23. Consequently, in view of the detailed discussion made hereinabove, impugned orders dated 27.9.2012 in case No. 105-2 of 211 titled as Dr. Shrikant Baldi vs. Ms. Jeevan Laxmi Kukreja and case No. 104-2 of 11 titled as Dr. Shrikant Baldi vs. Ms. Jeevan Laxmi Kukreja, passed by the learned Chief Judicial Magistrate, Shimla are quashed and set aside alongwith entire proceedings under Ss. 500/211 IPC.

24. In view of above, both the petitions are allowed. pending applications are disposed of. Interim directions, if any, are vacated. Record of the learned Court below be sent back forthwith.

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

Oriental Insurance Company Ltd. ..Appellant

Versus

Neelam and others ..Respondents

FAO(MVA) No. 503 of 2017
Decided on: October 10, 2018.

Motor Vehicles Act, 1988- Section 166- Motor Accident – Claim application by wife, children and mother of deceased - Compensation – Determination – Tribunal granting 50% increase on established income of deceased engaged in self employment towards future prospects – Also allowing Rs. 1 lac towards loss of love and affection each to wife, children and mother besides granting Rs. 1 lac to wife towards loss of consortium – Appeal by insurer – Appeal partly allowed – 40% increase towards future prospects allowed – Compensation under conventional heads also scaled down in terms of National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157. Award modified (Paras-9 to 14).

Case referred:
National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157

For the Appellant	:	Mr. Lalit Kumar Sharma, Advocate.
For the Respondents	:	Mr. Tara Singh Chauhan, Advocate for respondents No.1 to 4. Mr. Kunal Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of appeal at hand, appellant-Insurance Company has challenged Award dated 5.7.2016 passed by learned Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. camp at Nalagarh in M.A.C. Petition No. 27-NL/2 of 2012, whereby compensation to the tune of Rs. 24,90,500/- has been awarded in favour of respondents No.1 to 4-claimants (hereinafter, 'claimants') holding appellant-Insurance Company (hereinafter, 'Insurance Company') and respondent No.5, jointly and severally liable to pay the compensation with interest at the rate of 9% per annum from the date of filing of petition till deposit of the entire amount.

2. Facts in brief, as are necessary for the adjudication of the appeal are that the a petition under Section 166 of the Motor Vehicles Act, 1988 came to be filed for grant of compensation on account of death of one Manjit Kumar, on behalf of the claimants who are wife, son, daughter and mother, respectively, of the deceased. Facts disclosed in the petition are that on 6.7.2012, at around 11.15 am, when Manjit Kumar while driving Santro Car bearing registration No. CH-01-AG-0873, reached near bus stand Kohara, Bhura, Tehsil Nalagarh, his car was hit by Maxi Cab bearing registration No. HR-58(T)-3920 coming from opposite side being driven by respondent No.5 in high speed, resulting into death of Manjit Kumar. Matter was reported to police and FIR was lodged. Post-mortem of the deceased was conducted at Civil Hospital Naraingarh. It is claimed in the petition that deceased was running business in the name and style of M/s Sai Engineering Works at Baddi and also running dairy farm and was earning Rs.29,000/- per month i.e. Rs.15,000/- from his business and Rs.14,000/- from dairy farm. As per claimants, Manjit Kumar was the sole bread earner of the family.

3. Respondent No. 5, while filing the reply, denied the involvement of offending vehicle in the accident and alleged that accident had occurred due to negligence of the

deceased. In the alternative, it was pleaded that in any case, offending vehicle being insured with the appellant-Insurance Company, it was liable to indemnify the claimants. On the other hand, appellant-Insurance Company contested the petition by taking preliminary objections of maintainability, cause of action, collusion and offending being plied in violation of the terms and conditions insurance policy. On merits, factum of accident was denied for want of knowledge.

4. Learned Tribunal below, on the basis of pleadings of the parties, framed following issues on 7.1.2014:

"1. Whether accident in question resulting into the death of Manjit Kumar, predecessor-in-interest of the petitioners, was the result of respondent No.1 in driving his Maxi Cab baring No. HR-68(T)-3920 in high speed, as alleged? OPP

2. If issue No. 1 is proved in affirmative, whether the petitioners being dependents are entitled to claim compensation amount in the sum of Rs.60.0/- lacs along with interest @ 12% per annum from the respondents, as alleged? OPP

3. Whether the vehicle belonging to and driven by respondent Nno.1 was insured, if so, its effects? OPR-1

4. If issue No.3 is proved in affirmative, whether the vehicle had not been driven and plied by respondent No.1 in accordance with terms and conditions of the insurance policy? OPR-2

5. Relief"

5. Learned Tribunal below, on the basis of evidence led on record by the respective parties, allowed the petition and awarded following amounts under different heads:

(a)	Total compensation amount	Rs.20,65,500
(b)	Loss of consortium and loss of estate	Rs.1,00,000
(c)	Loss of love and affection to wife of the deceased i.e. petitioner	Rs.1,00,000
(d)	Loss of love and affection to children i.e. petitioner No. 2 & 3	Rs.1,00,000
(e)	Loss of love and affection to mother of the deceased petitioner No. 4	Rs.1,00,000
(f)	Funeral expenses	Rs.25,000
	Total	Rs.24,90,500

6. Being aggrieved and dissatisfied with the compensation awarded by the learned Tribunal below, appellant-Insurance Company has approached this court in the instant proceedings for quashing of the award.

7. Claimants claimed in the petition that monthly income of deceased was Rs.29,000/- from dairy and workshop. Besides this, claimants examined PW-3 Jeet Ram and PW-4 Teja Singh, to prove the income of the deceased from dairy and workshop. As per affidavit, exhibit PW-3/A, PW-3, Jeet Singh, has stated that the deceased was selling milk and earning Rs.2500-3000 per day. Similarly, PW-4 Teja Singh in his affidavit Exhibit PW-4/A has stated that deceased was earning Rs.40,000-50,000/- per month by making gates, grills etc. Appellant-Insurance Company has not led any evidence to rebut the evidence regarding income of the deceased. The learned Tribunal below, on the basis of evidence of claimants, took monthly income of deceased as Rs.9,000/- by taking daily income of

deceased at Rs.300/-. Learned Tribunal below has granted an addition of 50% to the established income of deceased and thus calculated monthly income at Rs.13,500/- and after deducting 1/4th towards personal expenses, net income has been arrived at Rs.10,125/- and thus total loss of income has been calculated at Rs.20,65,500/-.

8. Learned counsel representing the appellant-Insurance Company has argued that the learned Tribunal below has awarded an addition of 50% to the established income of the claimant, which ought to have been 40% since the claimant was not in permanent employment and was self employed.

9. Hon'ble Apex Court in National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157, has laid down parameters regarding grant of addition to established income. 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."

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."

10. In view of the law laid down above, addition of 40% on account of loss of future income to the established income of deceased could only be granted, and as such, compensation awarded by learned Tribunal below needs to be reassessed in the following terms:

Monthly income =9,000

40% addition = 3,600

Net monthly income =12,600

1/4th deduction 12,600-3150 =9450

Annual income 9450x 12 = 1,13,400

After applying multiplier of 17 1,13,400x 17=19,27,800

11. Learned counsel for the appellant-Insurance Company further argued that the learned Tribunal below has wrongly awarded amounts under the head of loss of love and

affection that too, separately to the claimants, whereas, no such amount could have been awarded in favour of the claimants. Besides this, learned counsel representing the appellant-Insurance Company stated that the learned Tribunal below has awarded amounts on account of loss of consortium and loss of estate to claimant No.1 and funeral expenses, which are on higher side.

12. In view of the law laid down in Pranay Sethi (supra) claimants are entitled to following amounts under conventional heads:

1. Loss of consortium (petitioner No.1) Rs.40,000
2. Loss of estate Rs.15,000
3. Funeral expenses Rs.15,000

13. Applying the ratio of law laid down in the judgment supra and parameters laid down, no amounts could have been awarded by the learned Tribunal below under the head of loss of love of affection and as such, impugned award deserves to be set aside to that extent. However, there is no illegality with the multiplier applied by learned Tribunal below i.e. 17 and further the rate of interest awarded by it.

14. Consequently, in view of aforesaid modification made herein above, claimants are are held entitled to following amounts under various heads:

1.	Compensation on account of loss of income of deceased	19,27,800
2.	Loss of consortium to petitioner No.1 being wife	40,000
3.	Loss of estate	15,000
4.	Funeral expense	15,000
	Total	**19,97,800**

15. Apportionment of amount of compensation shall be as under:

Claimant No. 1 Rs.8,00,000
Claimant No.2 Rs.4,00,000
Claimant No.3 Rs.4,00,000
Claimant No.4 Rs.3,97,800

16. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award dated 5.7.2016 passed by learned Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. camp at Nalagarh in M.A.C. Petition No. 27-NL/2 of 2012, is modified to the above extent only. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

State of HP and Ors. .....Appellants
Versus
Sh. Hakam Ram .....Respondent.

LPA No. 106 of 2013
Date of Decision: 10.10.2018.

Demobilized Armed Forces Personnel (Reservation of Vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972 (Rules)- **CCS (Pension) Rules, 1972 (Pension Rules)**- Rule 19(2)- Re-employment of Retired Armed Personnel - Pay fixation – Benefit of service rendered in Army – Hon'ble Single Bench directing State to work out pay due to petitioner engaged and subsequently regularized as Surveyor on and w.e.f. 7.1.2003 from day of his regularization by giving him benefit of Pension Rule 19 – LPA – State arguing that petitioner not appointed against post reserved for armed personnel being so, Rules had no applicability in his case - Held, under Pension Rule 19 (2) Authority issuing order of substantive appointment to civil service or post shall along with such order require in writing, re-employed armed personnel to exercise option either to continue to draw military pension or get previous military service counted as qualifying service towards Pension –Rule 19 does not talk about method of appointment and it is not necessary that ex-serviceman has been appointed against post/category reserved for ex-servicemen – LPA dismissed. (Paras-4 to 8)

Case referred:
V.K. Behal and others v. State of H.P. and Ors., latest HLJ 2009 (HP) 402

For the Appellants: Mr. Ajay Vaidya, Senior Additional Advocate General with Mr. Ashawni Sharma, Ms. Ritta Goswami & Mr. Vikas Rathore, Additional Advocate Generals, and Mr. J.S. Guleria, Deputy Advocate General.

For the Respondent: Mr. Rajesh Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(oral)*

By way of instant Letters Patent Appeal having been filed by the appellants-State, challenge has been laid to judgment dated 22.3.2012, passed by the learned Single Judge of this Court in CWP(T) No. 11483 of 2008 titled *Hakam Ram v. State of HP and Ors*, whereby learned Single Judge, while allowing the writ petition having been preferred by the petitioner (respondent herein), directed as under:-

> *"1. That the respondents-State, latest by 30th June, 2012, shall work out the pay due to the petitioner w.e.f. 7th January 2003, the of his regularization, by giving him the benefit of Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972.*
>
> *2. That the arrears shall be paid to the petitioner latest by 31st August, 2012, failing which the State shall be liable to pay interest @ 9 % per annum from the date when the amount fell due till the payment of the amount.*
>
> *3. That if the petitioner, within two months from today, exercise his option to get his Army service counted for the purpose of pension and refunds the benefit already received by him, then the arrears due and payable on this account shall also be paid by the same date and in case not paid, it shall carry*

interest @9% per annum from the date when the amount fell due till the payment of the amount."

2. Briefly stated facts as emerge from the record are that the petitioner after having served in the Indian Army w.e.f. 16.5.1967 to 1.3.1989, came to be engaged as Surveyor on daily wage basis in August 1989 with the respondent-department and worked in the aforesaid capacity till 31.12.2002. Right from the year, 1990 till 2002, petitioner worked continuously for 240 days each year and w.e.f. 7.1.2003, he was regularized in service as Surveyor and ultimately, superannuated from service on 30.10.2004.

3. In nutshell, claim of the petitioner as emerge from the original application having been filed by him before the HP State Administrative Tribunal, which subsequently, came to be transferred to this Court, is that in terms of Rule 19 of the CCS (Pension) Rules, appellants-respondents-State ought to have given him the option after his regularization as to whether he wanted to get pension under Civil Rules or would prefer to get the benefit for the Army service rendered. By way of aforesaid original application, petitioner (respondent herein) also claimed that service rendered by him in the Army should be taken into consideration while fixing pay from the stage of his regularization in the service.

4. Learned Single Judge while deciding the aforesaid issue placed reliance upon the judgment rendered by the learned Single Judge of this Court in CWP(T) No. 10333 of 2008, titled *Ranjit Chand Katoch v. State of HP and another*, wherein learned Single Judge after having considered the Rule 19 of the CCS (Pension) Rules, observed as under:-

"*6. What emerges from the plain reading of Rule 19 and the decision taken on 26.2.1988, is that the re-employed Government servant can opt to continue to draw military pension or he can get the previous military service counted as qualifying service. However, he will cease to get pension already drawn and the value received for the commutation or a part of military pension and the amount of retirement gratuity including service gratuity.*

7. According to sub-rule (2) (a) of Rule 19, the authority while issuing order of substantive appointment to a civil service or post shall alongwith such order require in writing him to exercise the option within three months of the issuance of such order."

5. In the case at hand, it is not in dispute that no such option was ever asked from the petitioner, rather respondent-State claimed before the Court that petitioner was neither employed from the Ex-servicemen Cell nor he was employed against the seat/quota reserved for the Ex-servicemen and as such, there was no question, if any, for calling option from him as provided under Rule 19 of CCS (Pension) Rules, however, this Court having carefully perused Rule 19 of CCS (Pension) Rules is in total agreement with the finding returned by the learned Single Judge that since Rule 19 does not talk about the method of appointment and it is not necessary that the ex-servicemen should have been appointed against the reserved post/category.

6. Similarly, Division Bench of this Court in judgment, titled *V.K. Behal and others v. State of H.P. and Ors., latest HLJ 2009 (HP) 402*, which has been otherwise taken note by the learned Single Judge while rendering the impugned judgment, has categorically held that even though Ex-servicemen, who were not employed against the post reserved for Ex-servicemen, but had been appointed against the post meant for general category, were entitled to the benefit of Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972, for the purpose of fixation of pay. Since relevant para of the aforesaid judgment has been already taken note of by the

learned Single Judge in para-7 of the impugned judgment, this Court finds it not necessary to reproduce the same.

7. Ms. Ritta Goswami, Learned Additional Advocate General, while arguing before us, was unable to point out that judgments, as have been taken note herein above, have not attained finality. As far as another contention raised by, learned Additional Advocate General that learned Single Judge while considering the issue at hand, failed to appreciate that reservation is/was not available for the daily wage services and as such, claim of the petitioner (respondent herein) for considering his case, ought to have been rejected, deserves outright rejection, solely for the reason that material available on record clearly suggests that Department of Personnel vide letter dated 16.7.1993, advised the Department that even the work charge and daily wage posts are to be filled in keeping in view the reservation rules applicable to the ex-servicemen. Ms. Goswami, was unable to indicate material, if any, available on record suggestive of the fact that aforesaid instructions issued by the Department of Personnel were not applicable in the case of the petitioner or same came to be withdrawn. Otherwise also, we find from the record that learned Single Judge while accepting petition having been filed by the petitioner has held that, in case of the petitioner, benefit is being given on both accounts from the date of regularization and not on account of daily wage service. In the case at hand, it is not in dispute that the petitioner came to be regularized as Surveyor w.e.f. 7.1.2003, and thereafter, he retired on 30.10.2004, after rendering service of almost 20 months. Learned Single Judge while extending relief to the petitioner has categorically directed the State to work out the pay due to the petitioner w.e.f. 7.1.2003, by giving him the benefit of Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972, and as such, appellants-State cannot have any grouse with regard to grant of the aforesaid relief.

8. Having carefully perused the reasoning recorded by the learned Single Judge while accepting the petition having been filed by the petitioner, this Court is of the view that there is no illegality and infirmity in the same, rather same is based upon proper appreciation of facts as well as rule in vogue and hence, the petition fails and dismissed accordingly.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Latif Mohd. ...Appellant.

Versus

State of Himachal Pradesh. ...Respondent.

Cr. Appeal No. 157 of 2017
Date of Decision: October 11, 2018.

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Sections 20 and 35- Presumption, When can be raised? – Held, Presumption stipulated under Section 45 of Act would arise and arise only if prosecution has been able to establish genesis of prosecution story of recovery of contraband from conscious possession of accused. (Para-3)

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)- Sections 20 and 45- Recovery of charas – Statements of police witnesses revealing interception of accused – Also showing that one lady accompanying accused was also allegedly searched by female

constable – No reference to that lady either in charge sheet or about recovery effected from her –She also not made accused or witness – Lady constable who searched her also not examined – Evidence of recovery of charas from accused doubtful – No occasion to raise presumption under 45 of Act - Appeal allowed – Conviction recorded by Special Judge singly by raising presumption set aside. (Paras- 20 to 28 and 34)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793

Lal Mandi v. State of W.B., (1995) 3 SCC 603

Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722

Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760

Girja Prasad v. State of M.P., (2007) 7 SCC 625

Aher Raja Khima v. State of Saurashtra, AIR 1956

For the Appellant:	Mr. Naresh K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate, for the appellant.
For the Respondent:	Ms.Rita Goswami, Mr.Vikas Rathore, Addl.AGs and Mr.J.S.Guleria, Dy.AG., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (Oral).

In this appeal filed under Section 374 Cr.P.C., convict Latif Mohd. has assailed the judgment dated 06.04.2017, passed by Special Judge-II, Chamba, District Chamba, H.P., in Case Filing No./NDPS Act/418/2015. (Regd.No./NDPS Act/30/2015), titled as *State of Himachal Pradesh vs. Latif Mohd.,* whereby he stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of `1,00,000/- (rupees one lac) and in default thereof, to further undergo simple imprisonment for a period of 2 ½ years.

2. Allegedly 1 kg 456 grams of charas stands recovered from the conscious possession of the accused. While convicting the accused, learned trial Court has found: (a) genesis of the prosecution story to be believable; (b) witnesses to be reliable and worthy of credence; and (c) the defence taken by the accused not to have been established on record.

3. In our considered view, the approach adopted by the trial Court, to say the least, has been extremely erroneous if not perverse. The learned trial Court proceeded as though onus to establish innocence solely rests upon the accused. It is true that under the provisions of the NDPS Act, there is a statutory presumption, but then such presumption, would arise only and only if it is proven, at the first instance that prosecution has been able to establish the genesis of the prosecution story of recovery of the contraband substance from the conscious possession of the accused to be true.

4. Now let us examine as to what really is the prosecution case.

5. It has come in the testimonies of HHC Mohd. Aslam (PW.1), Constable Sunil Kumar (PW.2), HHC Ravinder Singh (PW.3) and HC Virender Singh (PW.7) that in the night of 01.06.2015, police party, left Police Station Sadar, Chamba on a routine checking duty.

At about, 2.15 am, they set up a *Nakka* at a place known as Balu Chowk, when they saw two persons, a male and a female come from the opposite side. Seeing the police party, these persons tried to flee away and as such, on apprehension, were chased and apprehended. The male, who is the present accused Latif Mohd., was nabbed by Head Constable Ravinder Singh (PW.3) and the female was nabbed by another lady constable Uma Devi (not examined). Both these persons (female and the male) were searched and from the bag carried by the male i.e. the accused, charas in the shape of sticks and rounds was recovered. Since the police party was having the investigation kit and the weighing scales, contraband substance, which was checked, was found to be charas and as such was weighed. It was of 1 kg 456 grams. Prior thereto, NCB forms (Ex.PW.7/A) were filled up. HC Virender Singh (PW.7) prepared Rukka (PW.7/B) and sent it through HHC Mohd. Aslam (PW.1) to the Police Station for registration of FIR, which was so registered as Ex.PW.6/A by HC Rajput Pradeep (PW.6). Whereafter, Mohd. Aslam returned to the spot. With the completion of the proceedings on the spot, police party alongwith the accused returned to the Police Station, where the contraband substance was entrusted to the SHO Harnam Singh (PW.12), who after resealing the same, handed it over to MHC Rajput Pradeep (PW.6). Special report was sent to the superior authorities through HHC Rajesh Kumar (PW.8), which was received by Constable Sanjay Kumar (PW.9). Report (Ex.PX) of the Scientific Analyst was obtained by HHC Bhim Singh (PW.4).

6. With the completion of investigation, challan was presented in the Court for trial and the accused was charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which he did not plead guilty and claimed trial.

7. In order to establish its case, in all, prosecution examined as many as twelve witnesses. Statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took defence of innocence and false implication. No evidence in defence was led by the accused.

8. Finding the testimonies of the prosecution witnesses to be inspiring in confidence, Trial Court convicted the accused of having committed an offence punishable under the provisions of Section 20 of the NDPS Act and sentenced him as aforesaid. Hence the present appeal by the convict.

9. Having heard Mr. Naresh K. Thakur, learned Senior Counsel, duly assisted by Mr.Divya Raj Singh, learned counsel, on behalf of the appellant as also Ms.Rita Goswami, learned Additional Advocate General, on behalf of the State, as also minutely examined the testimonies of the witnesses and other documentary evidence, so placed on record by the prosecution, we are of the considered view that trial Court committed grave illegality in convicting the accused, for the reasons discussed hereinafter. Contradictions and improbabilities which are glaring, rendering the prosecution case to be extremely doubtful, if not false. Conviction has resulted into travesty and miscarriage of justice.

10. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "...Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ...
> (Emphasis supplied)

11. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

12. It is a settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

13. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

14. It is also not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

15. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

16. With these principles we discuss the evidence.

17. Noticeably prosecution has not examined any independent witness. The case solely rests upon the testimonies of HHC Mohd. Aslam (PW.1), Constable Sunil Kumar (PW.2), HHC Ravinder Singh (PW.3) and HC Virender Singh (PW.7) being the spot witnesses and HC Rajput Pradeep (PW.6) and SI/Addl. SHO Harnam Singh (PW.12) being other police officials, who conducted the remaining proceedings at the Police Station corroborating the case of recovery.

18. As per the version of HC Virender Singh (PW.7), he along with HHC Mohd. Aslam (PW.1), Constable Sunil Kumar (PW.2), HHC Ravinder Singh (PW.3) and lady constable reached the spot and set up a Nakka. Noticeably, it has come in the testimonies

of all these witnesses that the police party travelled in private vehicles from the Police Station to the place where Nakka was set up. Now there is no sanction, on record, authorizing such persons to travel in a private vehicle. Why would a police party at the first instance travel in a private vehicle remains unexplained, after all it was not a case of prior intimation. Routine checkup duty has to be in an authorized vehicle.

19. That apart, genesis of the prosecution story of having set up Nakka and apprehended the accused in the middle of the night itself appears to be doubtful and this we say so for the reason that according to HHC Mohd. Aslam (PW.1), Constable Sunil Kumar (PW.2), HHC Ravinder Singh (PW.3) and HC Virender Singh (PW.7), accused was accompanied by a lady, who also was nabbed and searched by another lady constable. It has come in the testimony of HHC Mohd. Aslam (PW.1) and HC Virender Singh (PW.7) that both the accused and that lady were carrying bags and as such were searched by the respective police officials. Now who is this lady? what happed to her? what was found from her possession? why was she let off? and who was that another lady constable who also searched her, remains an undisclosed mystery. Why lady constable Uma Devi was not examined in Court, has not been explained by the prosecution. In fact, from the testimony of Constable Sunil Kumar (PW.2), it is evident that there were two lady constables, namely, Uma Devi and Shakuntala Devi (PW.11), both of whom have not been examined on the point in issue.

20. There is yet another reason for us to disbelieve the testimony of the police officials with regard to setting up of Nakka and the accused apprehended at the said place. HHC Mohd. Aslam and Constable Sunil Kumar admit that in and around the place, where the accused was apprehended, there are commercial establishments and local habitation. It has also come in the testimony of these witnesses that even though commercial establishments were closed, but chowkidars are available and vegetable shops open up early in the morning. According to these witnesses, an endeavour was made to search for an independent witness, for HC Virender Singh had sent HC Ravinder Singh for such purpose. But HC Ravinder Singh while stepping into the witness box as PW.3 does not whisper anything about such fact. Not only that, there is contradiction even on this aspect, for according to HC Virender Singh, it was not HC Ravinder Singh, but some other person, who was sent for searching independent witnesses. Also he denies existence of any commercial establishment at the place of occurrence of the incident, which fact stands materially contradicted both by HHC Mohd. Aslam and Constable Sunil Kumar.

21. As already observed, there is no explanation forthcoming as to who was that lady, who was found to have accompanied the accused, carrying bag on her person. Also what happened to her. Undisputedly, she was not arrayed as an accomplice. Now if police did not suspect her to be involved in the crime, then why she was not associated as an independent witness for conducting the proceedings on the spot remains unexplained.

22. Further, there is material contradiction with regard to the manner in which search was conducted. HC Virender Singh states that search was conducted in the street light as also with the help of the demo light. Whereas, on the other hand, HHC Mohd. Aslam and Constable Sunil Kumar, categorically state that there was no light and proceedings were conducted only in the light of the vehicle and the demo light.

23. There is yet another reason for us to disbelieve the witnesses and the genesis of the prosecution story so deposed by them that being the factum of Rukka taken to the Police Station and the time which HHC Mohd. Aslam took to return to the spot after registration of the FIR. It appears documents were prepared later on in the Police Station. Noticeably it stands admitted by HHC Mohd. Aslam and Constable Sunil Kumar that the distance from the alleged place of occurrence to the Police Station is only 1 km, yet it took

more than 2 ½ hours for the police official to reach the Police Station. Noticeably, Rukka was sent at about 3.45 am and the witness reached the Police Station at 6.05 am. Faintly it is sought to be explained that prior to reaching the Police Station, the said Constable had gone to report the matter to the superior authority. But then, this explanation is highly un-plausible and untenable, apart from the fact that it stands contradicted by HC Virender Singh himself, who states that the higher authority was informed much after registration of the FIR. It is the version of the police officials on record that the vehicle in which they travelled belonged to them. If that were so, then why HHC Mohd. Aslam did not travel to the Police Station carrying the Rukka in that vehicle, more so, when he himself owned it.

24. There are yet other reasons for us to disbelieve the prosecution case. According to HC Rajput Pradeep (PW.6), it was he who recorded the FIR (Ex.PW.6/A). Whereas, according to SI/Addl. SHO Harnam Singh (PW.12), it was he who lodged the same.

25. Also no endeavour was made to associate any of the passengers or the drivers of the vehicles, which had passed by at the time of the incident.

26. We notice that HHC Mohd. Aslam, who is a police official, in fact, appears to be a stock witness of HC Virender Singh. For it has come in his testimony that in more than 22 cases in which investigation was conducted by HC Virender Singh, this witness had invariably appeared as a witness.

27. Further we may add that it has come in the testimony of Constable Sunil Kumar (PW.2) that he could not specify the exact time of preparation of *jamatalashi* of the accused and "The IO did not try to associate any witness during the preparation of the arrest memo and *jamatalashi*". Now all this shatters the testimonies of police officials, namely HHC Mohd. Aslam (PW.1) and HC Virender Singh (PW.7) that an endeavour was made to associate independent witnesses at the time of occurrence of the incident.

28. Thus for all the aforesaid reasons, we find the genesis of the prosecution story of having recovered the contraband substance from the conscious possession of the accused to be extremely doubtful, if not false. Having arrived to such a conclusion, we are of the considered view that the statutory presumption of existence of mental state of the accused of having committed the crime cannot be invoked and presumed. The initial burden thus cannot be said to have been discharged.

29. We are of the considered view that the witnesses are only unreliable and their testimonies are unbelievable and not worthy of credence. The contradictions are many and material. Certain facts remain totally unexplained and it is for these reasons we find the order of conviction to be perverse.

30. Further HC Rajput Pradeep admits that in the malkhana register, he did not mention the description of receiving the NCB forms and the sample seals. Not only that, it stands admitted by him that he did not mention the rapat number of having received the case property as also the result of the chemical analyst in the malkhana register. Now even from the said statement, it cannot be established that by way of corroborative evidence, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt.

31. Noticeably in para-23 of the impugned judgment, learned trial Court wrongly observed that "it is not the case of the accused that he was not present at the spot". This finding of fact is not borne out from the record. The trial Judge presumed and assumed the guilt of the accused and as such proceeded to appreciate the evidence and decide the case. Simply because police party did not harbour any animosity against the accused, that fact itself would not lend credence to the credibility of the witnesses or make their testimonies believable. It is in this backdrop, we find the observation made by the trial Court that police party had no animosity against the accused and as such their testimonies could be believed

to be legally unsustainable. The learned trial Court also erred in coming to the conclusion that simply because no complaint was lodged by the accused of false implication, that fact would render the plea of false implication to be incorrect. Mere absence of filing complaint, *ipso facto* would not tantamount to admission of guilt by the accused, for it would only be a circumstance against the accused only and only if at the first instance prosecution is able to establish its case, beyond reasonable doubt.

32. The trial Court also erred in coming to the conclusion that the contradictions recorded in para-24 of the impugned judgment are trivial in nature not having any bearing on the genesis of the prosecution case. As we have already observed the genesis of the prosecution story stands shattered, for we find the testimonies of the police officials not to be worthy of credence.

33. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stand wrongly convicted for the charged offence.

34. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 06.04.2017, passed by Special Judge-II, Chamba, District Chamba, H.P., in Case Filing No./NDPS Act/418/2015. (Regd.No./NDPS Act/30/2015), titled as *State of Himachal Pradesh vs. Latif Mohd.*,, is set aside and convict Latif Mohd. is acquitted of the charged offence. He be released from jail, if not required in any other process of law. Amount of fine, if deposited by the convict, be refunded to him. Release warrants be prepared accordingly.

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

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

M/s Una-Himancha (Food Division) Ltd. and another ...Petitioners
Versus
State of Himachal Pradesh ...Respondent

Arb. Case No. 14 of 2016
Decided on: October 12, 2018.

Arbitration & Conciliation Act, 1996- Section 34- Objections to award – Public policy of India- What is? – Held, term 'Public policy' connotes some matter which concerns public good and public interest- Award or judgment likely to adversely affect administration of justice can also termed to be against 'public policy'. (Para-7).

Arbitration & Conciliation Act, 1996- Section 34- Objections to award – Held, Award passed by arbitrator can be interfered with in case of fraud or bias or violation of principles of natural justice -Interference, if any, on ground of 'patent illegality' is only permissible, if same goes to root of case-Violation should be so unfair and unreasonable so as to shock conscience of Court. (Para-11).

Arbitration & Conciliation Act, 1996- Section 34- Objections to award – Public policy of India – State allotting industrial plots to company 'U' – Requiring it to set up industry and start production within specified period – Company failing to start production even during extended period on ground of non-sanctioning of finances – State cancelling allotment and allocating same plots to company 'B' – Company 'U' taking recourse of arbitration proceedings and claiming money value of structures and machinery standing over said plots – State pleading before arbitrator of having given option to company 'U' to remove its structures from plots – State not opting to acquire said structures – Arbitrator denying claim of company 'U' in toto – Objections thereto – Held, under Clause 6(x) of agreement State was to give money equivalent of structures and machinery only if it opted to acquire them and not otherwise – State had given notice and required company 'U' to remove its structures – State never exercised option to acquire said structures – Structures aforesaid as per claim of company 'U' were demolished by company 'B' and not by State – Award not against public policy – Objections dismissed – Award upheld. (Paras-17 to 20) .

Cases referred:

Oil & Natural Gas Corporation Limited vs Western Geco International Limited (2014) 9 Supreme Court Cases 263

Oil & Natural Gas Corporation Limited vs Saw Pipes Limited (2003) 5 Supreme Court Cases 705

Hindustan Tea Company v. M/s K. Sashikant & Company and another, AIR 1987 Supreme Court 81

M/s Sudarsan Trading Company v. The Government of Kerala and another, AIR 1989 Supreme Court 890

McDermott International Inc. v. Burn Standard Company Limited and others (2006) 11 Supreme Court Cases 181

For the petitioners	:	Mr. Dushyant Dadwal, Advocate.
For the Respondent	:	Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge.

Instant petition under S. 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as, 'Act') is directed against Award dated 2.10.2015 passed by learned arbitral tribunal, whereby claim petition having been filed by petitioners-claimant (hereinafter, 'claimant') has been dismissed in toto.

2. Factual matrix of the case, as emerges from the record, is that the claimant came to be allotted two plots bearing Nos. 24 and 25 at Industrial Area, Tahliwal, Una, District Una, Himachal Pradesh by respondent Department for setting up factory/plant for manufacturing the food products. Possession of Plots No. 25 and 24 was handed over to the claimant on 8.8.1995 and 14.11.1995, respectively. As per terms and conditions contained in the lease deed, claimant was required to establish factory on the said plots within a period of one year after obtaining sanction for construction of building from the concerned authority. The period was extendable by six months. Record reveals that despite repeated show cause notices having been issued by the respondent, claimant failed to set up factory /plant and commence production. Record further reveals that respondent vide communication dated 20.11.1999 cancelled the allotment of plots and terminated the lease,

however, subsequently, having taken note of the representation dated 17.12.1999 filed by the claimant, further period of one month was granted to the claimant to do the needful, but even after expiry of time granted to the claimant pursuant to its representation dated 17.12.1999, claimant failed to commence production. Respondent granted extension of time on four occasions to enable the claimant to set up factory/plaint and commence production, however, the fact remains that the claimant failed to set up factory/plant even during extended period and accordingly, vide communication dated 25.4.2003, plots No. 24 and 25, Industrial Area, Tahliwal, Una, came to be allotted to M/s Betamax Remedies Pvt. Ltd., who allegedly, without having any authority of law, entered into premises and took over possession of the plots from the claimant. Being aggrieved with aforesaid action of the private company i.e. Betamax Remedies Pvt. Ltd., claimant approached this court by way of writ petition i.e. CWP No. 571 of 2005, but same was also dismissed on 15.6.2007. Record further reveals that claimant had also approached Hon'ble Apex Court laying therein challenge to the interim order passed by this court in CWP No. 571 of 2005 but the same was also dismissed. It may be noticed that this court while dismissing CWP No. 571 of 2005, had categorically recorded that in case, petitioner has suffered damages and has not been paid price of the structure erected by it on the plots then it may take appropriate action for recovery of amount in accordance with law. After dismissal of SLP filed by claimant against interim order passed by this court, whereby interim protection granted was ordered to be vacated, claimant filed a review petition before this court, however, same was also dismissed. Subsequently claimant, while invoking arbitration clause provided in lease deed dated 21.5.1996, requested respondent to appoint an arbitrator for adjudication of the dispute. Claimant claimed that in terms of Clause 6(x) of the lease deed it is entitled to amount /damages qua buildings/ machinery and cost of construction. Claimant claimed that it is entitled for a sum of Rs.62,10,000/- on account of buildings, machineries and cost of construction raised by it on the plots No. 24 and 25. Since respondent failed to accede to the aforesaid request of claimant, it approached this court by filing application under S. 11 of the Act praying therein for appointment of an arbitrator. This court vide order dated 9.10.2009, appointed Mr. Ajay Kumar Sood, learned Senior Advocate as main Arbitrator and Ms. Divya Sood and Ms. Renu Parwari, as Co-arbitrators to adjudicate upon the dispute *inter se* parties. Above named arbitrators, vide award dated 2.10.2015, rejected the claim of the claimant in toto. In this background, claimant has approached this court in the instant proceedings, praying therein for setting aside the Award and grant it adequate compensation as prayed for in the claim petition having been filed by it before the learned arbitral tribunal.

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

4. Having carefully perused the grounds of challenge vis-à-vis impugned Award passed by the learned arbitral tribunal, this court finds that challenge to the Award is on the ground of public policy. As per Mr. Dushyant Dadwal, learned counsel representing the claimant, award is against the public policy of India and contrary to the material evidence adduced on record by respective parties. To substantiate aforesaid argument Mr. Dadwal, while inviting attention of this court to Clause 6(x) of the lease deed, as referred to hereinabove, contended that project sought to be set up by claimant could not materialize, because of non-sanctioning of the capital by the financial institutions and as such, respondent ought to have paid amount as claimed in the claim petition qua the buildings, machinery and cost of construction raised by the claimant on the plots allotted in its favour. He further argued that being lessor, the respondent had the first option to acquire the building and machinery, if any, on the spot and that too on agreed price, failing which amount qua the same is/was required to be determined by the arbitrator as provided under Clause 6(x). Mr. Dadwal, further argued that as per own case set up by respondent, plots

originally allotted in favour of the claimant came to be re-allotted in favour of Betamax Remedies Pvt. Ltd. vide communication dated 25.4.2003, who subsequently, without having any authority of law forcibly entered into the premises and took possession thereof. Lastly, Mr. Dadwal, contended that as per Clause 6(x), claimant is entitled to the amount as referred to herein above but learned arbitral tribunal, despite there being specific evidence available on record to the effect at the time of handing over possession of the plots to M/s Betamax Remedies Pvt. Ltd., building and machinery were standing on the plots in question, failed to award amount in favour of claimant, as prayed for in the claim petition. He further contended that it has specifically come in the evidence that respondent before handing over the possession of the land in favour of Betamax Remedies Pvt. Ltd. had got cost of structure assessed at Rs.60,67,564/-, but despite availability of such evidence on record, learned arbitral tribunal failed to award any amount in favour of the claimant.

5. To the contrary, Mr. Dinesh Thakur, learned Additional Advocate General, while supporting the impugned award passed by learned arbitral tribunal contended that there is no illegality or infirmity in the same, as such, same needs to be upheld. While making this court to travel through the impugned award, Mr. Thakur, made a serious attempt to persuade this court to agree with his contention that in view of meticulous findings returned by the learned arbitral tribunal, no scope is left for this court to interfere. He further contended that this court, while exercising powers under S. 34 of the Arbitration & Conciliation Act, has a very limited scope of re-appreciating the evidence, as such, present petition deserves to be dismissed. Mr. Thakur, further argued that it is amply clear from the record that the respondent vide communication dated 3.6.2005, had asked the claimant to remove the structure and as such, Clause 6(x) is not applicable in the present case. He further argued that since respondent did not exercise option available to it to acquire structure, if any, constructed on the spot, claim, if any, set up by the claimant for compensation on account of building and machinery and cost of construction allegedly raised by claimant on the plots allotted in its favour, rightly came to be rejected by the learned arbitral tribunal.

6. Before ascertaining correctness of aforesaid submissions having been made by the learned counsel for the parties vis-à-vis impugned award passed by the learned arbitrator, it would be apt to take note of judgment passed by Hon'ble Apex Court in **Oil & Natural Gas Corporation Limited** versus **Western Geco International Limited** (2014) 9 Supreme Court Cases 263; wherein Hon'ble Apex Court taking note of the judgment passed by the Hon'ble Apex Court in Oil & Natural Gas Corporation Limited versus Saw Pipes Limited (2003) 5 Supreme Court Cases 705, has held as under:-

> "34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognized under Section 34(2)(b)(ii) (supra). The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words: (SCC pp.727-28)
>
> > "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or

> harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 1994 Supp(1) SCC 644, it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or
>
> (d) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

> 35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact that so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge."

7. It clearly emerge from the aforesaid judgment that the concept of "public policy" connotes some matter which concerns public good and the public interest. Similarly, award/judgment/decision likely to adversely affect the administration of justice has been also termed to be against "public policy"

8. Reliance is also placed upon a judgment passed by Hon'ble Apex Court in **Hindustan Tea Company** v. M**/s K. Sashikant & Company and another**, AIR 1987 Supreme Court 81; wherein it has been held as under:-

> " Under the law, the arbitrator is made the final arbiter of the dispute between the parties. The award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts.
>
> Where the award which was a reasoned one was challenged on the ground that the arbitrator acted contrary to the provisions of Section 70 of the Contract Act, it was held that the same could not be set aside."

9. Similarly, Hon'ble Apex Court in M**/s Sudarsan Trading Company** v. **The Government of Kerala and another**, AIR 1989 Supreme Court 890, has held as under:-

> "It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator as to what impelled him to arrive at his conclusion. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In the absence of any reasons for making the award, it is not open to the Court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the Court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator."

10. Reference is also made to the judgment passed by the Hon'ble Apex Court in **McDermott International Inc**. v. **Burn Standard Company Limited and others** (2006) 11 Supreme Court Cases 181. The relevant paras of the judgment are reproduced as under:-

> "In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-a-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder. Section 30 of the Arbitration Act, 1940 did not contain the expression " error of law…". The same was added by judicial interpretation.
>
> While interpreting Section 30 of the 1940 Act, a question has been raised before the courts as to whether the principle of law applied by the arbitrator was (a) erroneous or otherwise or (b) wrong principle was applied. If, however, no dispute existed as on the date of invocation, the question could not have been gone into by the Arbitrator.
>
> The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be

> justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.
>
> The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law;(b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of the Act.
>
> What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular government.

11. It is quite apparent from the aforesaid exposition of law that scope of interference by Court is very limited while considering objections having been filed by the aggrieved party under Section 34 of the Act. Award passed by the learned arbitrator can be interfered with in case of a fraud or bias or violation of principles of natural justice. Interference, if any, on the ground of 'patent illegality' is only permissible, if the same goes to the root of the case. Violation should be so unfair and unreasonable so as to shock the conscience of the Court. In the judgment referred herein above, it has been held by the Hon'ble Apex Court that what is to be constituted as 'public policy' is a matter dependent upon the transaction and nature of the statute, but the same should be so unfair and unreasonable as to shock the conscience of the Court, as has been observed herein above.

12. Similarly, there cannot be any dispute, as has been repeatedly held by the Hon'ble Apex Court as well as this Court that Courts while deciding objections, if any, filed by the aggrieved party under Section 34 of the Act, against the award passed by learned arbitrator, does not sit in appeal over the findings returned by the learned arbitrator and there can not be any reappraisal of evidence on the basis of which learned arbitrator has passed the award. Otherwise also, in terms of Section 34 of the Act, objections, if any, filed by the aggrieved party can be considered by the Court, if the award is in any manner against public policy, which certainly has to be liberally interpreted in view of the facts of the case.

13. With a view to test the genuineness and correctness of the submission of the learned counsel representing the petitioner that the Award passed by the learned Arbitrator is against the public policy, this court carefully perused record vis-à-vis impugned Award passed by the learned arbitral tribunal, perusal whereof clearly suggests that since claimant failed to set up factory/plant and commence production on the plots allotted in its favour despite repeated opportunities afforded to it, allotment made in its favour came to be cancelled vide order dated 20.11.1999. Record further reveals that even after passing of cancellation order dated 20.11.1999, further opportunities were granted to the claimant to commence production on the allotted plots but ultimately when claimant failed to start production, plots in question came to be allotted in favour of M/s Betamax Remedies Pvt. Ltd., vide letter dated 25.4.2003, as has been taken note herein above. Claimant being aggrieved with the forcible dispossession by M/s Betamax Remedies Pvt. Ltd., had approached this court by filing CWP No. 571 of 2005, wherein no relief was granted, and

claimant went to Hon'ble Supreme Court of India but no relief was granted to the claimant there too.

14. Question which needs to be determined in the instant proceedings is that whether claimant is entitled to amount if any, in terms of clause 6(x) of the lease deed, which reads as under:

> "x) That in the event of the project not materializing (sic materialining) or the industry failing, the lease will be terminated and the lessor shall have the first option to acquire on such termination the buildings, machinery etc. at an agreed price or (sic of) failing that at price determined by a sole arbitrator agreed upon by both the lessor and the lessee or in the absence of such a sole agreed arbitrator (sic arbitrators), one to be appointed by the lessor and one by the lessee. The provisions of the Arbitration Act, 1940 and any statutory modifications thereof shall apply to any such arbitration. If the lessor does not exercises vacant possession of the said land after removing any construction made or machinery fixed etc. within a period of two years completed from the date of termination of the lease."

15. Careful perusal of clause contained in lease deed clearly suggests that in the event of project not materializing, right was reserved to the respondent to terminate the lease deed and it also had a right/option to acquire the buildings, machinery etc. on agreed price, failing which mater was to be decided by sole arbitrator agreed upon by both, lessee and the lessor. In the case at hand, it is not in dispute that dispute arose *inter se* parties on account of claim of the claimant qua cost of building, machinery and cost of construction allegedly set up /raised by it on the allotted plots and ultimately arbitrator came to be appointed pursuant to orders passed by this court in arbitration proceedings.

16. Careful perusal of impugned award passed by the arbitrator clearly suggests that issue raised before this court by way of instant petition filed under S. 34 of the Arbitration & Conciliation Act, has been carefully and elaborately dealt with by the learned arbitral tribunal. Though, having perused the findings returned by the learned arbitral tribunal qua the issue, this court sees no reason, more so in the instant proceedings to elaborate further upon the issue. However, on the persistence of learned counsel representing the claimant, this court examined issue afresh and is of the view that the finding returned by learned arbitral tribunal is absolutely based upon correct appreciation of the Clause 6(x) of the lease deed.

17. Mr. Dushyant Dadwal, learned counsel representing the claimant, was unable to dispute that vide notice dated 3.6.2005, claimant was asked to remove the structure. Perusal of aforesaid communication clearly reveals that respondent asked the claimant to remove the structure, if any, raised by it on the allotted plots and as such, there appears to be force in the arguments of Mr. Dinesh Thakur, learned Additional Advocate General, that since respondent did not exercise its first option in terms of clause 6(x), there was no occasion for the respondent to pay amount, if any, qua the building, machinery and cost of construction, if any, raised on the plots by claimant. Otherwise also, it clearly emerges from the record that factum with regard to removal of structure by third party i.e. Betamax Remedies Pvt. Ltd. was very much in the knowledge of the claimant, who being aggrieved with its forcible dispossession by Betamax Remedies had approached this court by way of CWP No. 571 of 2005, which was also dismissed.

18. It clearly emerges from the record that claimant while approaching this court in CWP No. 571 of 2005 had alleged that machinery, building and wall constructed by it has been demolished by third party i.e. Betamax Remedies meaning thereby it is admitted case

of claimant that the structure, machinery, if any, on the plots was never taken into possession by the respondent.

19. Having carefully perused the material available on record, this court is not persuaded to agree with the contention of Mr. Dushyant Dadwal, learned counsel representing the claimant that since learned arbitral tribunal had evidence before it to the effect that respondent before handing over possession to Betamax Remedies had got the valuation of structure done and assessed the same at Rs.60,67,546, learned arbitral tribunal ought to have awarded said amount to the claimant, because if aforesaid argument advanced by Mr. Dadwal is presumed to be correct, even in that eventuality, there is no evidence available on record adduced by the claimant that aforesaid amount of Rs.7,68,564/- was actually released by respondent and subsequently eaten up by it. Only evidence available on record is that respondent at the time of handing over possession to Betamax Remedies had got the cost of the structure standing on the plot assessed at Rs.7,68,546/-. Otherwise also, as has been noticed herein above, there is ample evidence that structure, if any, standing on the plot was demolished and damaged by Betamax Remedies as was alleged by claimant in CWP No. 571 of 2005.

20. Having considered the facts of the case in light of the aforesaid exposition of law, this Court has no hesitation to conclude that the impugned award, as has been assailed before this Court by way of objections under Section 34 of the act, is neither against public policy nor has been passed in violation of principles of natural justice. Perusal of the objections filed by the objector suggests that neither there are any specific allegations that Award is against the public policy nor it has been clarified as to which finding or findings made by the learned arbitrator are against public policy, save and except general allegations that award is against express terms of the contract, unjust, unfair and unsustainable and patently illegal. Apart from above, interference on the ground of "patent illegality" is permissible only if the same is going to the root of the matter. The public policy, violation should be so unfair and unreasonable as to shock the conscience of the Court.

21. Hence, this court sees no reason to differ with the findings returned by the learned arbitral tribunal, while rejecting the claim as set up by the claimant.

22. Consequently in view of the detailed discussion made herein above, present petition fails and is accordingly dismissed.

****

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

Pawan Chauhan and others ...Petitioners

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 2149 of 2017 along with other connected matters:
Date of decision: 12.10.2018

National Council for Teacher Education Act, 1993- Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted)

Recruitment and Promotion Rules, 2012-Delegated legislation – Challenge thereto – Scope-Held, Scope for challenging legislation be it delegated or primary is restricted and limited in nature unlike an administrative order. (Para-13)

National Council for Teacher Education Act, 1993- Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2012- Teacher Eligibility Test (TET) **–** Minimum qualification – Requirement –Justifiability- Held, Rationale for including TET as minimum qualification for person to be eligible for appointment as teacher is to bring national standards of teacher quality in recruitment process. (Para- 24)

National Council for Teacher Education Act, 1993- Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2012-Rule 2 providing for drawing of merit list on basis of marks obtained by candidates in T.E.T. – Administrative Tribunal setting aside Rule as arbitrary by holding that marks obtained by candidate in T.E.T. alone could not be eligibility criteria – Petition against – Held, TET is an examination conducted by reputed centralized agency of State - It is open for all - All can participate, regardless of scores obtained by them in their various qualifying examinations - Criterion is uniformly applied across State for filling up all posts of teachers and there is nothing discriminatory about same - Making marks obtained in TET to be sole eligibility criterion is an endeavour to enhance excellence in field of education, for after all the best and only the best must be engaged in imparting education for fulfilling constitutional goals and obligations - Future of country lies in hands of children who must be educated and groomed by the best. (Paras- 7, 16, 23, 24, 30 and 32).

Cases referred:

State of U.P. & others v. Shiv Kumar Pathak & others (reported in AIR 2017 SC 3612

Subramaniam Swamy v. Director, Central Bureau of Investigation and another, (2014) 8 SCC 682

Shayra Bano v. Union of India, (2017) 9 SCC 1

Special Courts Bill, 1978, In Re: President of India v. The Special Courts Bill, 1978, (1979) 1 SCC 380

Mrs. Maneka Gandhi v. Union of India & another, (1978) 1 SCC 248

Indian Express Newspapers v. Union of India, (1985) 1 SCC 641

For the Petitioners	:	Mr. B.C. Negi, Senior Advocate with Mr. P.P. Singh, Advocate in CWP No.2149/2017. Mr. Amit Singh Chandel, Advocate for the petitioners in CWP No.2199/2017 and for respondents No.4 to 21 in CWP No.337/2018 and for caveator in CWP No.233/2018. Mr. Inder Sharma, Advocate for the petitioners in CWP No.337/2018 and for respondents No.4 and 5 in CWP No.2199/2017. Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Additional Advocate General for the petitioners/ State in CWP Nos.233/2018 and 403/2018.
For the Respondents	:	Mr. Ashok Sharma, Advocate General with Mr. Vikas Rathore, Additional Advocate General for the respondents/State in all the petitions, except CWP Nos.233/2018 and 403/2018.

Mr. B. Nandan, Advocate for National Council for Teacher Education (NCTE).
Mr. C.N. Singh, Advocate for respondent No.1, in CWP No.403/2018.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

In all these petitions, challenge is laid to the three orders passed by the Himachal Pradesh State Administrative Tribunal (hereinafter referred to as the Tribunal) in OA No.3896 of 2016, titled as *Joginder Pal v. State of H.P. & others;* OA No.3442 of 2017, titled as *Rakesh Kumar & another v. State of H.P. & others;* and Rev. Pet. No.11 of 2017, titled as *Amit Kumar & others v. State of Himachal Pradesh & others*.

2. In the year 1993, by virtue of Entry No.25 of List-3 of the Seventh Schedule of the Constitution of India, a Central Legislation by the name of National Council for Teacher Education Act, 1993 (hereinafter referred to as NCTE Act) was enacted and notified on 29.12.1993. The said Act prescribes the functions of the Council, inter alia, providing for determination and maintenance of standards of teacher education, and providing guidelines in respect of minimum qualification of a person to be employed as a teacher in the schools or in any one of the recognized institutions.

3. With the 86th Amendment in the Constitution of India, again, in exercise of its power under the Constitution, another Central legislation by the name of Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as RTE Act), was enacted and notified w.e.f. 1.4.2010. Qualification for appointment of teachers could be fixed and prescribed in terms thereof.

4. In exercise of its constitutional power and not in derogation to the power of the Centre, by virtue of delegated legislation, the State of Himachal Pradesh, on 23.8.2012 notified the Himachal Pradesh Elementary Education Department Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2012 (hereinafter referred to as the 2012 Rules), inter alia, prescribing the criteria for selection to the post of Junior Basic Trained Teachers (JBT).

5. In terms of these Rules, 21696 posts of Class-III were to be notified and filled up by way of direct recruitment (100%, either on regular basis or contractual basis). Marks obtained in TET were the sole eligibility criterion.

6. Relevant portion of the eligibility criteria reads as under:

"15.	Selection for appointment to the post by direct recruitment.	Selection of candidate for appointment to JBT post in the case of direct recruitment (regular or contract basis), will be made by the Deputy Director of the concerned district out of TET (class 1 to V) pass candidate in following manner:- 1. Category-wise number of posts to be filled up in the District will be notified by the Deputy Director concerned to the Employment Exchange with in the district and local newspaper.

		2. A category-wise merit would be drawn by the Deputy Director concerned on the basis of marks obtained by the candidate in the TET. 3. The candidates who apply in response to the advertisement and those who are sponsored by the Employment Exchange with in the district will be called for counseling by the Deputy Director at District office; where in original certificates/documents would be checked. 4. The Deputy Director will draw a category-wise merit of the candidates based on TET score. In case the candidates have same TET score then their interse merit would be decided on the basis of combined score of TET and JBT final year score. Still there being a tie the candidate senior in age would be placed above the junior, in the merit. 5. The Ist posting to the candidates shall be offered in remote and difficult areas of the district, where they shall have to serve for minimum 5 years. Further, if considered necessary or expedient selection may also be made by a screening test followed by interview with the prior approval of the Govt."

(Emphasis supplied)

7. The Tribunal, seeking reliance upon the decision rendered by the Apex Court in Civil Appeals No.4347-4375 of 2014, titled as *State of U.P. & others v. Shiv Kumar Pathak & others* (reported in AIR 2017 SC 3612), vide order dated 16.11.2017, passed in OA No.3896 of 2016, titled as *Joginder Pal (supra),* struck down the eligibility criteria No.2 & 4 prescribed in the 2012 Rules (reproduced supra).

8. The Tribunal further reiterated its view vide order dated 30.8.2017, passed in OA No.3442 of 2017, titled as *Rakesh Kumar (supra).*

9. Review of such order passed in *Rakesh Kumar (supra)* was sought by some of the aggrieved candidates, which application was disposed of by the Tribunal, vide order dated 11.1.2018, passed in Rev. Pet. No.11 of 2017, titled as *Amit Kumar (supra).*

10. Thus, all these orders referred to in Paras 7, 8 & 9 ibid are subject matter of the present petition.

11. Since prior to the passing of the orders, State had already initiated its process of recruitment, for filling up some of the posts, so notified, it appears that for saving the same and prescribing fresh criteria, perhaps, with the avowed object of bringing in

transparency, the 2012 Rules were repealed and new Rules, termed as the Himachal Pradesh Elementary Education Department Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2017 (hereinafter referred to as the 2017 Rules), were notified on 22.9.2017. The notification reads as under:

"Government of Himachal Pradesh

Elementary Education Department

(Education-C)

No.EDN-C-A(3)-1/2016 Dated: Shimla-171002 22-09-2017

NOTIFICATION

In exercise of the powers conferred by proviso to Article 309 of the Constitution of India, the Governor, Himachal Pradesh, in consultation with the Himachal Pradesh Public Service Commission, is pleased to make the Recruitment and Promotion Rules, for the Post of Junior Basic Trained Teacher Class-III, (Non-Gazetted) in the Department of Elementary Education, Himachal Pradesh as per Annexure-"A" attached to this notification; namely:-

1.	Short title and commencement:	1.	(1) These rules may be called the Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2017. (2) These rules shall come into force from the date of publication in the Rajpatra, Himachal Pradesh.
2.	Repeal and savings:	2.	(1) The Himachal Pradesh, Elementary Education Department, Junior Basic Trained Teacher, Class-III (Non-Gazetted) Recruitment and Promotion Rules, 2012, notified vide notification No. EDN-C-A(3)-1/2002, dated 23-08-2012, as published in the Rajpatra Himachal Pradesh vide notification of even number dated 25th August, 2012 are hereby repealed. (2) Notwithstanding such repeal, any appointment made or anything done or any action taken under the rules, so repealed under sub-rule (1) supra shall be deemed to have been validly made, done or taken under these rules.

By orders

Pr. Secretary (Education) to the

Government of Himachal Pradesh.**"**

Evidently, the old process for recruitment or action taken in terms of the 2012 Rules stands protected.

12. Vide third order dated 11.1.2018, the Tribunal clarified that the ongoing process for recruitment of JBT Teacher stands protected in view of the repealing and saving clause.

13. With this factual backdrop, we proceed to decide the present petitions, which on first blush appeared to be only an academic examination, but as insisted by the writ petitioners, we think it prudent to decide the issues one way or the other.

14. Noticeably, save and except for referring to and relying upon the opinion rendered by the Apex Court in *Shiv Kumar Pathak (supra),* making it alone the basis, the Tribunal has not assigned any other reason for quashing the Rules providing the eligibility criteria. Though in a passing reference in Para-7 of the order passed in *Joginder Pal (supra),* following observations are also made:

> "7. The NCTE had suggested to the States to give weightage to teacher eligibility test (TET) score in the recruitment process. It is expressed in clear terms that the TET score was not the sole criteria for selection. By making TET merit the sole criteria, the respondents have not given weightage to the academic qualification and co-curricular activities etc. The TET is also not a screening test. The TET merit on the basis of performance of one or two years is not sufficient to assess the suitability. Action of the respondents is arbitrary, discriminatory, unfair and violative of Articles 14 and 16 of the Constitution of India."

15. We may observe that the Tribunal was dealing with a legislation and not an administrative order. It is a settled principle of law that scope for challenging a legislation, be it delegated or primary, is restricted and limited in nature, unlike an administrative order.

16. Be that as it may, we proceed to examine as to whether the Tribunal was right in basing its decision solely on the decision rendered in *Shiv Kumar Pathak (supra)* or not.

17. Having carefully gone through and objectively considered the same, we are of the considered view that had the Tribunal gone through the judgment in its entirety and examined the issues raised and the ratio of law laid down therein, perhaps it would have refrained itself from relying upon certain solitary observations made contextually, specific to the attending facts and circumstances therein, and not interfered by quashing the most relevant and operative portion of the instant legislation.

18. To our reading, *Shiv Kumar Pathak (supra)* categorically does not deal with the Rules, with which we are concerned. Primarily, the issue before the Apex Court was that of conflict and repugnancy of different legislations, i.e. Central Legislations, like NCTE Act & RTE Act, and State Legislation that of the State of Uttar Pradesh, as is evident form Para-1 of the said Report.

19. There, for appointment of teachers, initially the State of Uttar Pradesh had formulated rules, prescribing the eligibility criteria of 'quality point marks'. However, with the notification of the central legislations (NCTE Act and RTE Act), these rules for appointment as a teacher were amended, making passing of Teacher Eligibility Test (TET) as a compulsory qualification. While the process for recruitment to posts under such process was underway, it came to the notice of the State that there had been mass scale bungling, also influenced by monetary considerations. Resultantly, rules were amended, prescribing the earlier eligibility criteria of quality point marks and not the clearance of TET, which action was quashed by the High Court on the ground of repugnancy.

20. It is in this backdrop, the Apex Court, noticing the intent, object and purpose of the central legislation and the power of the Central Government to legislate, upheld the order of the High Court, interfering with the action of the State in amending the rules, incorporating the condition of 'quality point marks', directly in conflict with the Central Legislation, holding it to be ultra vires the Constitution.

21. The issue as to whether marks obtained by the candidate in TET alone could be the eligibility criteria or not, was never an issue for consideration before the Apex Court. Notwithstanding Question No.(b), framed for its consideration, observation made in Para-16 of the said Report, which we reproduce herein after, are to be read in the backdrop that NCTE itself had taken a stand that giving weightage to the marks obtained in TET, was not mandatory:

> "16. There is no manner of doubt that the NCTE, acting as an 'academic authority' under Section 23 of the RTE Act, under the Notification dated 31st March, 2010 issued by the Central Government as well as under Sections 12 and 12A of the NCTE Act, was competent to issue Notifications dated 23rd August, 2010 and 11th February, 2011. The State Government was under obligation to act as per the said notifications and not to give effect to any contrary rule. However, since NCTE itself has taken the stand that notification dated 11th February, 2011 with regard to the weightage to be given to the marks obtained in TET is not mandatory which is also a possible interpretation, the view of the High Court in quashing the 15th Amendment to the 1981 Rules has to be interfered with. Accordingly, while we uphold the view that qualifications prescribed by the NCTE are binding, requirement of weightage to TET marks is not a mandatory requirement."

22. It is not the mandate of the central legislation that result of TET alone cannot be the eligibility criteria. Nothing to the contrary has been brought to our notice.

23. All that the central legislature/authorities thereunder provide for is that qualification of passing TET is compulsory and the reason is not far to seek, for after all, these legislations came into existence only to enhance the standard of education in all the schools to fulfill the constitutional goals of imparting quality education and ensuring overall health, growth and development of the children, undertaking education in various schools, as enshrined in Para-III of the Constitution of India and more specifically Article 21A thereof, which mandates that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

24. The rationale for including TET as a minimum qualification for a person to be eligible for appointment as a teacher is to bring national standards and benchmark of teacher quality in the recruitment process; induce teacher education institutions and students from these institutions to further improve their performance standards; and send a

positive signal to all stakeholders that the Government lays special emphasis on teacher quality. It is only to enhance excellence in the field of education.

25. Question (b) framed by the Apex Court in *Shiv Kumar Pathak (supra)* reads as under:

> "b) Whether the marks obtained in the TET Examination is the sole criterion for filling up the vacancies?"

However, the question was never answered as such, in view of the stand taken by the NCTE, as observed in Para-16 (reproduced supra).

26. A Coordinate Bench of this Court in CWP No.612 of 2017, titled as *Abhimanyu Rathore* and other connected matters, decided on 22.12.2017, in extenso, has examined and dealt with the circumstances, under which a legislation can be held to be ultra vires the Constitution, in the following terms:

> "81. We have ourselves researched, minutely examined and found several decisions of the Apex Court, explaining as to what really is the meaning of "equality before law", what are the grounds on which a legislation, primary or delegated, can be assailed; what are the constraints of the Court in holding the same to be ultra vires and what is the approach which the Court must adopt in examining its constitutional validity.
>
> 82. To our mind, principle stands best culled out by the Apex Court in *Subramaniam Swamy v. Director, Central Bureau of Investigation and another,* (2014) 8 SCC 682 (five- Judge Bench) and *Shayra Bano (supra)*.
>
> 83. Lest we mis-read the same, we deem it appropriate to reproduce the relevant portion of what the Apex Court observed in *Subramaniam (supra)*:
>
> > "41. In *Ram Krishna Dalmia v Justice SR Tendolkar & Ors*, 1959 SCR 279, the Constitution Bench of five Judges further culled out the following principles enunciated in the above cases:
> >
> > > "11. ... (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
> > >
> > > (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
> > >
> > > (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
> > >
> > > (d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
> > >
> > > (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report,

the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

Further:

"43. .....

"12. ..... In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law.

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination."

44. *In Nagpur Improvement Trust and Anr v Vithal Rao and Ors*, (1973) 1 SCC 500, the five-Judge Constitution Bench had an occasion to consider the test of reasonableness under Article 14 of the Constitution. It noted that the State can make a reasonable classification for the purpose of legislation and that the classification in order to be reasonable must satisfy two tests: (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. The Court emphasized that in this regard object itself should be lawful and it cannot be discriminatory. If the object is to discriminate against one section of the minority, the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.

45. The constitutionality of Special Courts Bill, 1978 came up for consideration in *Special Courts Bill, 1978, In Re: President of India v. The Special Courts Bill, 1978*, (1979) 1 SCC 380 as the President of

India made a reference to this Court under Article 143(1) of the Constitution for consideration of the question whether the "Special Courts Bill" or any of its provisions, if enacted would be constitutionally invalid. The seven Judge Constitution Bench dealt with the scope of Article 14 of the Constitution. Noticing the earlier decisions of this Court *in Budhan Choudhry v. State of Bihar,* AIR 1955 SC 191, *Ram Krishna Dalmia v. S.R. Tendolkar,* AIR 1958 SC 538, *CI Emden v State of U.P.*, 1960 2 SCR 592, *Kangsari Haldar & Anr v State of West Bengal*, 1960 2 SCR 646, *Jyoti Pershad v. UT of Delhi,* AIR 1961 SC 457 and *State of Gujarat & Anr v Shri Ambica Mills Ltd*, *Ahmedabad & Anr*, (1974) 3 SCR 760, in the majority judgment the then Chief Justice Y.V. Chandrachud, inter alia, exposited the following propositions relating to Article 14:

> "(1) * * *
>
> (2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.
>
> (3) * * *
>
> (4) * * *
>
> (5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well- defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.
>
> (6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.
>
> (7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from

> others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act."

84. What is "arbitrary" also stands explained by the Apex Court in *Mrs. Maneka Gandhi v. Union of India & another,* (1978) 1 SCC 248, where it held that:

> "7. Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach._ No attempt should be made to truncate its all embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E. P. Royappa v. State of Tamil Nadu & Another,1974 2 SCR 348 namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". ……."

(Emphasis supplied)

85. A Constitution Bench of the Apex Court in *State of* Gujarat *v. Mirzapur Moti Kureshi Kassab Jamat & others,* (2005) 8 SCC 534 (seven-Judge Bench), held:

> "40. In *State of Kerala v. N. M. Thomas,* (1976) 2 SCC 310, also a seven-Judge bench of this Court culled out and summarized the ratio of this Court in *Kesavananda bharati*. Fazal Ali, J. extracted and set out the relevant extract from the opinion of several Judges in *Kesavananda Bharati* and then opined:
>
> > "164. In view of the principles adumbrated by this court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact

is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."

41. ... A restriction placed on any Fundamental right, aimed at securing Directive Principles will be held as reasonable and hence intra vires subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and secondly that it has been enacted within the legislative competence of the enacting legislature under Part xi Chapter I of the Constitution." (Emphasis supplied)

86. In the present case, respondents made an argument that in exercise of power under judicial review striking down a legislation only on the basis of "arbitrariness" is not permissible in view of *State of Andhra Pradesh v. McDowell & Co.,* (1996) 3 SCC 709 and *Binoy Viswam (supra)*. The submission needs to be rejected in view of authoritative pronouncement of the Constitution Bench (3:2) in *Shayra Bano (supra)*, which states, in no uncertain terms, in Paragraph-99, that both these judgments were in fact *per incurium*, and that laws/legislations can be struck down on the ground of arbitrariness, if found to be violative of Article 14. It held:

"87. The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in *State of A.P. v. McDowell and Co.,* (1996) 3 SCC 709, when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."

"99. However, in *State of Bihar v. Bihar Distillery Ltd.*, (1997) 2 SCC 453 at paragraph 22, in *State of M.P. v. Rakesh Kohli*, (2012) 6 SCC 312 at paragraphs 17 to 19, in *Rajbala v. State of Haryana & Ors.*, (2016) 2 SCC 445 at paragraphs 53 to 65 and *Binoy Viswam v. Union of India*, (2017) 7 SCC 59 at paragraphs 80 to 82, McDowell (supra) was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, *Mcdowell (supra)* itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following *McDowell (supra)* are, therefore, no longer good law."

100. .....

> 44. Also, in *Sharma Transport v. State of A.P.* [(2002) 2 SCC 188], this Court held: (SCC pp. 203-04, para 25) "25. ... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."
>
> (at pages 736-737)
>
> 101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers v. Union of India*, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such 391 legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."
>
> (Emphasis supplied)

87. The Apex Court in *K.R. Lakshmanan (Dr.) v. State of Tamil Nadu,* (1996) 2 SCC 226 (three-Judge Bench) struck down a 1986 Tamil Nadu Act on the ground that it was arbitrary and, therefore, violative of Article 14. Two separate arguments were addressed under Article 14. One that the Act in question was discriminatory and, therefore, violative of Article 14. The other that in any case the Act was arbitrary and for that reason would also violate the separate facet of Article 14. The issues were decided as under:

> "48. … We fail to understand how the State Government can acquire and take over the functioning of the race club when it has already enacted the 1974 Act with the avowed object of declaring horse racing as gambling? Having enacted a law to abolish betting on horse racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse racing again in the name of public good and public purpose. It is ex-facie irrational to invoke "public good and public purpose" for declaring horse racing as gambling and as such prohibited under law, and at the same time speak of "public purpose and public good" for acquiring the race club

> and conducting the horse racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1985 Act."
>
> 88. Article 14 is not meant to perpetuate illegality or fraud. It has a positive concept. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or Court in a negative manner. (*Fuljit Kaur v. State of Punjab and others,* (2010) 11 SCC 455)."

27. In the instant case, the State Government, to attain the constitutional goal prescribed higher standards of eligibility criteria, and that being not only qualification of TET, so undertaken by the State Government, through a centralized process, but also to ensure that the best and only the best, being the most meritorious, should be selected, based on their performance in the examination. Well, what is wrong with such criteria. We see no conflict between the State legislation and the Central legislation.

28. Repetitively though, we may observe that *Shiv Kumar Pathak (supra)* was dealing with a case where the State Government had framed Rules, which were directly in conflict with the Central Legislation (subordinate in nature) and the repugnancy between the State and the Central law was subject matter of consideration before the High Court and the Supreme Court. The Court also observed that the NCTE had made passing of TET as an essential criterion. The NCTE vide Notification dated 11.2.2011 had prescribed the minimum qualifying marks, with a suggestion that due weightage should be given to the score obtained in TET.

29. Noticeably, the State Government had not framed any rules, making marks obtained in TET to be the sole criteria, which is the case in hand. It is in this backdrop, the Apex Court held that the TET was not a mandatory requirement, but a mere suggestion.

30. Now, let us examine as to whether the instant rules are arbitrary in any manner or not. To begin with, we do not find there to be any conflict between the legislative powers. The only other issue, which needs to be considered, is as to whether prescription of such criterion is demonstratively arbitrary or not. Well, in our considered view, there is nothing arbitrary about the same, for after all, TET is an examination conducted by a reputed centralized agency of the State. It is open for all. All can participate, regardless of the scores obtained by them in their various qualifying examinations. The criterion is uniformly applied across the State, for filling up all the posts of teachers and there is nothing discriminatory about the same. Making the marks obtained in TET to be the sole eligibility criterion is an endeavour to enhance excellence in the field of education, for after all the best and only the best must be engaged in imparting education for fulfilling the constitutional goals and obligations. Future of the country lies in the hands of the children who must be educated and groomed by the best.

31. Noticeably, marks obtained in the Common Entrance Tests, is the criterion uniformly applied for all admissions, be it admission to Medical Colleges, Engineering Colleges or other professional disciplines and services. Administrative services is one such example.

32. We are not in agreement with the observations made by the learned Tribunal in Para-7 of the order passed in *Joginder Pal (supra).* Weightage, if any, to the past education should or should not be given is to be decided by the employer and not by the Courts.

Applying the principles laid down by the Apex Court in *Subramaniam Swamy v. Director, Central Bureau of Investigation and another,* (2014) 8 SCC 682; *Shayra Bano v. Union of India,* (2017) 9 SCC 1; Special Courts Bill, 1978, In Re: *President of India v. The Special*

Courts Bill, 1978, (1979) 1 SCC 380*; Mrs. Maneka Gandhi v. Union of India & another*, (1978) 1 SCC 248; and *Indian Express Newspapers v. Union of India*, (1985) 1 SCC 641, we do not find that the criterion fixed in the Rules framed by the State to be in any manner unreasonable. Rules cannot be said to have been framed capriciously, at pleasure without adequate determining principles or not founded in the nature of things, which are irrational or not based on sound reasoning and judgment. It is also not excessively disproportionate to the object sought to be achieved. The Rules are framed to achieve the constitutional goal of socialistic pattern of society and to give best education to the children by recruiting the meritorious teachers on the basis of centralized test.

33. Thus, under these circumstances, we are of the considered view that the Tribunal seriously erred in allowing the Original Applications, by quashing the legislation.

34. In view of the aforesaid discussion, we quash and set aside the impugned orders, referred to in Para-1 supra. We clarify that the recruitment process so undertaken under the 2012 Rules shall be completed, in terms thereof.

All the petitions stand disposed of, so also pending application (s), if any.

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

The Himachal Pradesh Power Corporation Limited and another ...Appellants

Versus

Narayan Singh and others ...Respondents

RFA No. 368 of 2014 a/w RFAs No. 402 to 406 of 2014 a/w connected matters
Reserved on: 07/13.09.2018
Decided on: 12.10.2018.

Land Acquisition Act, 1894 -Financial Commissioner's Standing Orders – Standing Orders No.12- Acquisition of Land for public purpose- Market value- Assessment- Held, Standing Orders provide that Kanungos should not be called upon to give their opinion on market value of land and Tehsildar/Circle Revenue Officer concerned should personally visit spot, closely scrutinize data and ensure that all relevant information is supplied in proforma prescribed for purpose before making his recommendation. (Para-66)

Land Acquisition Act, 1894- Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Compensation – Market value – Determination- Held, In absence of sale transaction of village where land is acquired, sales made in neighbouring villages can be considered provided lands involved have similar potentiality or fertility or other advantageous factors. (Para-43).

Land Acquisition Act, 1894- Section 4- Date of Notification, What is? Held, last date of publication and giving of Public Notice is date of publication of notification. (Para-47).

Further held, Annual average value is to be determined with reference to date(s) of execution of sale deed(s) and not with reference to date of attestation of mutation. (Para-64).

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Market value – Determination- Held, for determining market value of land for acquisition, purpose for which land is acquired is relevant and not its nature and classification - Where nature and classification of land has no relevance for purpose of acquisition, market value of

land is to be determined as single unit irrespective of its nature and classification - In such case, uniform rate to all kinds of land under acquisition as single unit is to be awarded. (Para-49).

Land Acquisition Act, 1894- Sections 18 & 23- Acquisition of land for public purpose – Reference- Market value – Determination – Held, Section 23 of Act provides for determination of compensation on basis of market value of land and not on basis of average value or circle rate of land- Average rates/circle rates may not depict fair and just market value of land under acquisition –In absence of any other relevant evidence on record, circle rates can be taken into consideration but after making suitable deductions (Para-72).

Land Acquisition Act, 1894- Sections 4, 18 & 23- Acquisition of Land for public purpose- Reference- Market Value-Assessment- Exemplar sale deed(s)- Evidentiary value- Held market value of acquired land when calculated as per exemplar sale deeds is less than highest value assessed by Collector, then such sale deeds are not relevant, even though they pertain to period within one year from date of notification issued under Section 4 of Act. (Para-69

Land Acquisition Act, 1894- Sections 4, 18 & 23- Financial Commissioner's Standing Orders – Standing Order No.28- Acquisition of land – Market value – Procedure- Held, As per Standing Orders rates of land will be worked out by District Collector after taking into account average rate determined from sale transactions in revenue estate concerned for period of one year preceding date of notification under Section 4 of Act. (Para-46).

Cases referred:

Narendra and others versus State of Uttar Pradesh and others, (2017) 9 Supreme Court Cases 426

Periyar and Parkeekanni Rubbers Ltd. versus State of Kerala, (1991) 4 SCC 195

Jai Prakash and others versus Union of India, (1997) 9 SCC 510

Kanwar Singh and others versus Union of India, (1998) 8 SCC 136

Manoj Kumar etc. versus State of Haryana, 2017 SCC Online SC 1262

Special Land Acquisition Officer, Kheda and another versus Vasudev Chandrashankar and another, (1997) 11 Supreme Court Cases 218

Chandra Bhan (dead) through Legal Representatives and others versus Ghaziabad Development Authority and others, (2015) 15 Supreme Court Cases 343

Usha Stud and Agricultural Farms (P) Ltd. versus State of Haryana, (2013) 4 Supreme Court Cases 210

Surinder Singh Brar versus Union of India, (2013) 1 Supreme Court Cases 403

Dadu Ram vs. Land Acquisition Collector and others, (2016) 2 ILR 636 (HP)

H.P. Housing Board vs. Ram Lal and others, 2003 (3) Shim L.C. 64

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

Executive Engineer and another vs. Dila Ram, Latest HLJ 2008 (HP) 1007

LAC and another vs. Bhoop Ram and others, 1997 (2) SLC 229

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

G.M. Northern Railway vs. Gulzar Singh and others, Latest HLJ 2014 (HP) 775

Subh Ram and others versus State of Haryana and another, (2010) 1 SCC 444

Government (NCT of Delhi) and others versus Ajay Kumar and others, (2014) 13 Supreme Court Cases 734

Union of India versus Savitri Devi and another, (2018) 12 Supreme Court Cases 545

Lal Chand versus Union of India and another, (2009) 15 Supreme Court Cases 769

Thakur Kuldeep Singh (dead) through LRs and others versus Union of India and others, (2010) 3 Supreme Court Cases 794

Haryana State Agricultural Market Board and another versus Krishan Kumar and others, (2011) 15 Supreme Court Cases 297

Jagdish Prasad Verma (dead) by LRs versus State of Madhya Pradesh and others, (2016) 11 Supreme Court Cases 430

U.P. State Industrial Development Corpn. Ltd. versus Shakti Bhatta Udyog and others, (2004) 8 Supreme Court Cases 70

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M. Vijayalakshmamma Rao Bahadur versus Collector of Madras, (1969) 1 MLJ 45 (SC)

State of Punjab versus Hans Raj, (1994) 5 SCC 734

Anjani Molu Dessai versus State of Goa, (2010) 13 SCC 710

Mehrawal Khewaji Trust (Registered) Faridkot and others versus State of Punjab and others, (2012) 5 Supreme Court Cases 432

State of Madhya Pradesh and others versus Kashiram (dead) by LR and others, (2010) 14 Supreme Court Cases 506

Haridwar Development Authority versus Raghubir Singh and others, (2010) 11 Supreme Court Cases 581

Kolkata Metropolitan Development Authority versus Gobinda Chandra Makal and another, (2011) 9 Supreme Court Cases 207

Executive Engineer (Electrical), Karnataka Power Transmission Corporation Limited (earlier Karnataka Electricity Board) versus Assistant Commissioner and Land Acquisition Officer, Gadag and others, (2010) 15 Supreme Court Cases 60

Indian Council of Medical Research versus T.N. Sanikop and another, (2014) 16 Supreme Court Cases 274

Land Acquisition Officer & Sub-Collector, Gadwal versus Sreelatha Bhoopal (Smt) and another, (1997) 9 Supreme Court Cases 628

Haryana State Agricultural Market Board's case (supra) and Bijender and others versus State of Haryana and another, (2018) 11 Supreme Court Cases 180

Hasanali Khanbhai & Sons versus State of Gujarat, (1995) 5 Supreme Court Cases 422

Land Acquisition Officer versus Nookala Rajamallu, (2003) 12 Supreme Court Cases 334

Viluben Jhalejar Contractor (dead) by LRs versus State of Gujarat, (2005) 4 Supreme Court Cases 789

Nelson Fernandes versus Land Acquisition Officer, (2005) 4 Supreme Court Cases 789

C.R. Nagaraja Shetty (2) versus Land Acquisition Officer, (2009) 11 Supreme Court Cases 75

Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 Supreme Court Cases 392

Land Acquisition Collector and others versus Jeet Ram, Latest HLJ 2014 (HP) Suppl. 225

Peerappa Hanmantha Harijan (dead) by Legal Representatives and others versus State of Karnataka and another, (2015) 10 Supreme Court Cases 469

Bhikulal Kedarmal Goenka (D) By LRs versus State of Maharashtra & anr., 2017 (2) Him. L.R. (SC) 635

LAC Parvati Hydro Electric Project versus Jeet Ram and others, 2018 (1) Shim.L.C. 402

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For the respondents: Mr. Bhupender Gupta, Senior Advocate, with M/s. Sunil Mohan Goel, B.M. Chauhan, Hominder Ghezta, Raman Jamalta, D.N. Sharma, G.S. Rathore, Neeraj Gupta, Devinder

Chauhan Jaita, Advocates, for the private respondents in the respective appeals.
Ms. Rameeta Kumari, Additional Advocate General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondents-State in the respective appeals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

All these appeals and cross-objections arising out of ten different awards passed under Section 18 of the Land Acquisition Act (hereinafter referred to as 'the Act') by Additional District Judge-I and Additional District Judge-II, Shimla (hereinafter referred to as 'the Reference Court') are being decided together vide this judgment as common question of facts and law involved in these appeals is to be determined based on the identical/similar evidence led in different bunches of Land Reference Petitions.

2. In these appeals, determination of value of land in Villages Hatkoti, Chamsu, Bharot, Mungranadal and Ghunsa acquired for common purpose, i.e. construction of Sawra Kuddu Hydro Electric Project, is to be adjudicated. These appeals can be divided into three main categories i.e. Lot 'A', Lot 'B' and Lot 'C'. These categories, keeping in view the Village and on the basis of notification under Section 4 of the Act and also separate award passed by the Collector can be further classified into sub-categories 'A-1', 'A-2', 'A-3' and 'A-4' in Lot 'A'; 'B-1', 'B-2' and 'B-3' in Lot 'B' and 'C-1', 'C-2' and 'C-3' in Lot 'C'. Classification in tabulated form is referred as under:

Category	Sub-category with lead Appeal in Lot in this Court	Date of Award of Reference Court	(1) Date of Section 4 notification (2) Date of last publication (3) Award of Collector	Village
Lot 'A'	A-1 RFA -368/2014	09.05.2014	(1) 06.08.2005 (2) 26.12.2005 (3) Award No. 585, dated 18.07.2007	Hatkoti
	A-2 RFA-166/16	09.10.2015		
	A-3 RFA 196/2017	06.01.2016		
	A-4 RFA-261/2017	26.07.2016		
	B-1 RFA-461/2015	01.07.2015	(1) July, 2005 (2) 25.10.2005 (3) Award No. 588,	Chamsu

			dated 24.09.2007	
Lot 'B'	B-2 RFA-184/2016	01.09.2015	(1) 30.07.2005 (2) 21.10.2005 (3) Award No. 589, dated 25.09.2007	Bharot
	B-3 RFA-186/2017	28.06.2016	(1) 26.07.2005 (2) 19.10.2005 (3) Award No. 592, dated 31.03.2008	Mungra nadal
Lot 'C'	C-1 RFA-156/2017	28.06.2016	(1) 01.08.2008 (2) 26.09.2008 (3) Award No. 614, dated 12.07.2010	Mungrana dal
	C-2 RFA-466/2015	15.05.2015	(1) 01.08.2008 (2) 26.09.2008 (3) Award No. 632, dated 14.06.2011	Ghunsa
	C-3 C-3A RFA-14/17	01.04.2016	(1) 01.08.2008 (2) 26.09.2008 (3) Award No. 632, dated 14.06.2011	Ghunsa
	C-3/B RFA-15/17		(1) 24.03.2008 (2) 07.10.2008 (3) Award No. 631, dated 20.05.2011	Chamsu

3. In Lot 'B', RFAs No. 368, 402 to 406 of 2014 and 63 to 65, 166 and 167 of 2016, 175, 196 of 2017, 261 and 262 of 2017 and Cross Objections No. 7 of 2015 in RFA No. 368 of 2014, Cross Objections No. 20 of 2015 in RFA No. 402 of 2014, Cross Objections No. 85 of 2017 in RFA No. 405 of 2014, Cross Objections No. 86 of 2017 in RFA No. 406 of 2014 and Cross Objections No. 62 of 2018 in RFA No. 65 of 2015, are arising out of common award No. 585, dated 18th July, 2007, passed by the Land Acquisition Collector (hereinafter referred to as the 'Collector') in pursuance to one and the same notification, dated 6th August, 2005, issued under Section 4 of the Act and last published on 26th December, 2005, with regard to acquisition of land in Village Hatkoti for common purpose. Reference Petitions under Section 18 of the Act, arising out of Award No. 585, have been decided by

the Reference Court vide different awards passed on 9th May, 2014; 9th October, 2015; 6th January, 2016 and 26th July, 2016.

4. In Lot 'A-1', by way of **RFAs No. 368, 402 to 406 of 2014 and 63 to 65 of 2016, Cross Objections No. 7 of 2015 in RFA No. 368 of 2014, Cross Objections No. 20 of 2015 in RFA No. 402 of 2014, Cross Objections No. 85 of 2017 in RFA No. 405 of 2014, Cross Objections No. 86 of 2017 in RFA No. 406 of 2014 and Cross Objections No. 62 of 2018 in RFA No. 65 of 2015,** award, dated 9th May, 2014, passed by the Reference Court in Land Reference Petitions No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others; 54-S/4 of 2013/08, titled Sh. Krishan Chand versus Himachal Pradesh State Electricity Board and others; 55-S/4 of 2013/08, titled Sh. Sohan Lal and others versus Himachal Pradesh State Electricity Board and others; 57-S/4 of 2013/08, titled Sh. Moti Lal and others versus Himachal Pradesh State Electricity Board and others; 60-S/4 of 2013/08, titled Sh. Devinder Singh and others versus Himachal Pradesh State Electricity Board and others; 61-S/4 of 2013/08, titled Sh. Devinder Singh and others versus Himachal Pradesh State Electricity Board and others; 56-S/4 of 2013/08, titled Smt. Sodha Devi and another versus Himachal Pradesh State Electricity Board and others; 58-S/4 of 2013/08, titled Smt. Kanta versus Himachal Pradesh State Electricity Board and others; 59-S/4 of 2013/08, titled Sh. Devinder Singh and others versus Himachal Pradesh State Electricity Board and others; has been assailed.

5. In Lot 'A-2', in **RFAs No. 166 and 167 of 2016,** award, dated 9th October, 2015, passed by the Reference Court in Land Reference Petitions No. RBT-83-R/4 of 2014/08, titled Shamsher Singh versus State of H.P. and others; and RBT 30-R/4 of 2014/08, titled Prabhu Dyal and another versus State of H.P. and others, respectively, has been assailed.

6. In Lot 'A-3', in **RFAs No. 175 and 196 of 2017,** award, dated 6th January, 2016, passed by the Reference Court in Land Reference Petitions No. RBT-28-R/4 of 2015/14, titled Gian Singh and others versus H.P. State Electricity Board and others; and RBT-27-R/4 of 2015/10, titled Shiv Dyal and others versus H.P. State Electricity Board and others, respectively, has been assailed.

7. In Lot 'A-4', in **RFAs No. 261 and 262 of 2017,** award, dated 26th July, 2016, passed by learned Additional District Judge-II, Shimla, H.P. (hereinafter referred to as 'Reference Court') in Land Reference Petitions No. RBT-37-R/4 of 2014/08, titled Mohan Lal and others versus State of H.P. and others; and RBT-38-R/4 of 2014/08, titled Salig Ram Sharma versus State of H.P. and others. Respectively, has been assailed.

8. Appeals in Lot 'B' are arising out of Awards No. 588, 589 and 592, passed by the Collector with respect to Villages Chamsu, Bharot and Mungranadal wherein value of land in these villages has been determined on the basis of Award No. 585 of Village Hatkoti and Reference Court vide awards, dated 1st July, 2015, 1st September, 2015 and 28th June, 2016, has determined the value of acquired land on the basis of Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others (subject matter of RFA No. 368 of 2014). These appeals have been further classified into sub-categories 'B-1', 'B-2' and 'B-3'.

9. In Lot 'B-1', RFAs No. 461 to 463 of 2015 are arising out of common award No. 588, dated 24th September, 2007, passed by the Collector in pursuance to notification, dated July, 2005 issued under Section 4 of the Act, published lastly on 25th October, 2005, with regard to acquisition of land in Village Chamsu for common purpose, wherein

Reference Petitions under Section 18 of the Act have been decided by the Reference Court vide award, dated 1st July, 2015.

10. In Lot 'B-1', in **RFAs No. 461 to 463 of 2015,** award, dated 1st July, 2015, passed by the Reference Court in Land Reference Petitions No. RBT-10-S/4 of 2015/08, titled Inder Pal and others versus Himachal Pradesh State Electricity Board and others; Land Reference Petitions No. RBT-11-S/4 of 2015/08, titled Kanwar Singh and others versus Himachal Pradesh State Electricity Board and others; and Land Reference Petitions No. RBT-12-S/4 of 2015/08, titled Pratap Singh versus Himachal Pradesh State Electricity Board and others, respectively, has been assailed.

11. In Lot 'B-2', RFAs No. 184 to 200 and 351 of 2016 are arising out of common award No. 589, dated 25th September, 2007, passed by the Collector in pursuance to notification, dated 30th July, 2005, issued under Section 4 of the Act published lastly on 21st October, 2005, with regard to acquisition of land in Village Bharot for common purpose wherein Reference Petitions under Section 18 of the Act have been decided by the Reference Court vide award, dated 1st September, 2015.

12. In Lot 'B-2', in **RFAs No. 184 to 200 and 351 of 2016,** award, dated 1st September, 2015, passed by the Reference Court in Land Reference No. 19-S/4 of 2015/08, titled Jai Lal versus Himachal Pradesh State Electricity Board and others; Land Reference No. 22-S/4 of 2015/08, titled Bala Nand and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 25-S/4 of 2015/08, titled Vijay Pal and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 26-S/4 of 2015/08, titled Jai Lal and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 27-S/4 of 2015/08, titled Suresha Nand and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 30-S/4 of 2015/08, titled Brahma Nand and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 31-S/4 of 2015/08, titled Devinder Singh and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 32-S/4 of 2015/08, titled Mohan Lal and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 33-S/4 of 2015/08, titled Bala Nand and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 34-S/4 of 2015/08, titled Suresh Kumar and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 35-S/4 of 2015/08, titled Rajinder Singh versus Himachal Pradesh State Electricity Board and others; Land Reference No. 20-S/4 of 2015/08, titled Sukh Dass and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 21-S/4 of 2015/08, titled Jai Lal and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 23-S/4 of 2015/08, titled Jai Lal and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 28-S/4 of 2015/08, titled Narinder Singh and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 36-S/4 of 2015/08, titled Anil Dulta and others versus Himachal Pradesh State Electricity Board and others; Land Reference No. 29-S/4 of 2015/08, titled Bali Ram (now deceased) through LRs versus Himachal Pradesh State Electricity Board and others; Land Reference No. 24-S/4 of 2015/08, titled Jail Lal and others versus Himachal Pradesh State Electricity Board and others; respectively, has been assailed.

13. In Lot 'B-3', **RFA No. 186 of 2017** is arising out of award No. 592, dated 31st March, 2008, passed by the Collector pursuant to notification, dated 26th July, 2005, issued under Section 4 of the Act, published lastly on 19th October, 2005, with regard to acquisition of land in Village Mungranadal for common purpose, award wherein was passed on 28th

June, 2016 in Land Reference No. RBT-45-S/4 of 2015/11, titled Moti Singh (since deceased) through his LRs and others versus State of H.P. and others.

14. In Lot 'C', appeals arising out of Awards No. 614, 631 and 632 passed by the Collector with respect to Villages Mungranadal, Chamsu and Ghunsa are involved wherein, after adding 10%-12% in the value of land determined in Award No. 585 of Village Hatkoti, value of acquired land has been determined by the Collector as in case of Awards No. 614 and 632, notification, dated 1st August, 2008 under Section 4 of the Act was lastly published on 26th September, 2008 in comparison to the date of last publication of notification under Section 4 of the Act, i.e. 26th December, 2005 in Award No. 585 whereas in case of Award No. 631, notification under Section 4 of the Act was issued on 24th March, 2008 and published lastly on 7th October, 2008. In Reference Petitions arising out of Awards No. 614 (Village Mungranadal) and 632 (Village Ghunsa), decided on 28th June, 2016 and 15th May, 2015, Reference Court has determined the compensation by adding 10% in the value of land determined in Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others (subject matter of RFA No. 368 of 2014) whereas in Reference Petitions arising out of Awards No. 631 and 632, deiced on 1st April, 2016, no such enhancement has been granted despite equivalency and proximity in dates of notification under Section 4 of the Act with other cases decided on 28th June, 2016 and 15th May, 2015, arising out of Awards No. 614 and 632. These appeals have been further classified into sub-categories 'C-1', 'C-2' and 'C-3' and in view of different dates of notifications with respect to land of different villages, class C-3 can be further divided into 'C-3A' and 'C-3B'.

15. In Lot 'C-1', RFAs No. 156 & 157 of 2017 are arising out of common award No. 614, dated 12th July, 2010, passed by the Collector in pursuance to notification, dated 1st August, 2008, issued under Section 4 of the Act, published lastly on 26th September, 2008 with regard to acquisition of land in Village Mungranadal for common purpose. Reference Petition under Section 18 of the Act in these cases have been decided vide award, dated 28th June, 2016.

16. In Lot 'C-1', in **RFAs No. 156 and 157 of 2017,** award, dated 28th June, 2016, passed by the Reference Court in Land Reference No. RBT-44-S/4 of 2015/12, titled Moti Singh (since deceased) through his LRs and others versus Principal Secretary (Power) and others; and Land Reference No. RBT-43-S/4 of 2015/12, titled Utra Devi and others versus Principal Secretary (Power) and others, respectively, has been assailed.

17. In Lot 'C-2', **RFAs No. 466 and 467 of 2015** are arising out of common award No. 632, dated 14th June, 2011, passed by the Collector in pursuance to notification, dated 1st August, 2008, issued under Section 4 of the Act, published lastly on 26th September, 2008, with regard to acquisition of land in Village Ghunsa for common purpose. Reference Petitions under Section 18 of the Act in these cases were decided vide award, dated 15th May, 2015.

18. In Lot 'C-2', in **RFAs No. 466 and 467 of 2015,** award, dated 15th May, 2015, passed by the Reference Court in Land Reference RBT No. 25-S/4 of 2014/12, titled Vijay Pal Singh versus The Principal Secretary (Power) and others; Land Reference RBT No. 24-S/4 of 2014/12, titled Kanwar Singh versus The Principal Secretary (Power) and others; respectively, has been assailed.

19. In Lot 'C-3', **RFAs No. 14, 16 and 17 of 2017** are arising out of common award No. 632, dated 14th June, 2011, passed by the Collector in pursuance to notification, dated 1st August, 2008, issued under Section 4 of the Act, published lastly on 26th September, 2008, with regard to acquisition of land in Village Ghunsa for common purpose,

whereas **RFA No. 15 of 2017** is arising out of award No. 631, dated 20th May, 2011, passed by the Collector in pursuance to notification, dated 24th March, 2008, issued under Section 4 of the Act, lastly published on 7th October, 2008, with regard to acquisition of land in Village Chamsu for common purpose. Reference Petitions under Section 18 of the Act in these cases were decided vide award, dated 1st April, 2016.

20. Appeals, i.e. RFAs No. 14, 16 and 17 of 2017 have been classified as **Lot 'C-3A'**, wherein award passed by the Reference Court in Land Reference No. RBT-52-S/4 of 2015/12, titled Ram Lal and others versus The Principal Secretary (Power) and others; Land Reference No. RBT-41-S/4 of 2015/12, titled Partap Singh and others versus The Principal Secretary (Power) and others; Land Reference No. RBT-50-S/4 of 2015/12, titled Pratap Singh versus The Principal Secretary (Power) and others, respectively, has been assailed. RFA No. 15 of 2017 has been classified as **Lot 'C-3B'**, wherein award passed by the Reference Court in Land Reference No. RBT-42-R/4 of 2015/12, titled Prem Singh and others versus The Principal Secretary (Power) and others, has been assailed.

21. Before proceeding further, it is necessary to clarify again that all appeals/cross objections in Lot 'A' have been preferred by the project proponent/land owners assailing enhancement/claiming further enhancement in above referred Land Reference Petitions decided by the Reference Court arising out of common award No. 585, dated 18th July, 2007, pertaining to acquisition of land in Village Hatkoti, Tehsil Jubbal, District Shimla, for construction of Sawra Kuddu Hydro Electric Project. However, the Reference Court, in its awards, dated 9th October, 2015; 6th January, 2016; and 26th July, 2016, passed in RFA No. 166 of 2016 & connected matter (Lot 'A-2'), RFA No. 196 of 2017 & connected matter (Lot 'A-3') and RFA No. 261 of 2017 & connected matter (Lot 'A-4'), in para 31, has wrongly stated that in these cases, notification was published through Tehsildar on 9th March, 2006 and has also wrongly referred that the Land Reference Petitions, in these cases, were arising out of Award No. 590, dated 30th January, 2008, passed by the Collector.

22. Similarly, in RFA No. 14 of 2017, it has been wrongly mentioned that these appeals are arising out of Award No. 632, dated 20th May, 2011, passed by the Collector whereas RFAs No. 14, 16 and 17 of 2017 are arising out of Award No. 632, but, passed on 14th June, 2011 and RFA No. 15 of 2017 is arising out of Award No. 631 announced on 20th May, 2011. These findings/ observations of the Reference Court are erroneous as well as contrary to the facts and record.

23. As evident from details referred hereinabove, basic award passed by the Collector is Award No. 585, dated 18th July, 2007, which has been considered by the Collector as a parameter for determining value of land of all villages in which land has been acquired for the same purpose, but, issuing different notification under Section 4 of the Act. The said Award No. 585 was adjudicated by the Reference Court in Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others and the appeal arising therefrom is pending consideration in these appeals in RFA No. 368 of 2014.

24. Government of Himachal Pradesh, vide notification, dated 6th August, 2005, issued under Section 4 of the Act, has acquired the land situated in Village Hatkoti, Tehsil Jubbal, District Shimla for public purpose stated supra. The said notification was published in Rajpatra on 6th August, 2005 and in two daily news papers on 26th August, 2005, and lastly, it was publicized by the Tehsildar, Jubbal in the area concerned on 26th December, 2005. After completing process under the Act, the Collector had announced award No. 585, dated 18th July, 2007 determining the rates of acquired land according to nature and classification. Firstly, Collector, on the basis of transactions with respect to Mauja Hatkoti, assessed average value of land as under:

Sr. No.	Classification of Land	Rate per sqmt. (Centiare)
1	Kayar Abbal	Rs. 1,026=79
2	Kayar Dom	Rs. 899=50
3	Kulahu Abbal	Rs. 763=73
4	Kulahu Dom	Rs. 704=33
5	Bakhal Abbal	Rs. 636=40
6	Bakhal Dom	Rs. 517=64
7	Gair Mujruha, Banjar Kadeem	Rs. 161=23

25. Thereafter, the Collector classified the land under acquisition into three major categories, i.e. (i) irrigated land, (ii) un-irrigated/cultivated land and (iii) uncultivated land. Thereafter, he took the average of two categories, i.e. irrigated and un-irrigated/cultivated land and after making 20% reduction in the said average value, determined value of these two categories of land. So far as uncultivated land is concerned, he did not make any reduction of 20% by stating that land of this category was being acquired for the same purpose, therefore, such reduction was not proper. Accordingly, the Collector determined the value of land of three categories as under:

(i) Irrigated land : ₹ 821.00 (per centiare)

(ii) Un-irrigated/cultivated land : ₹ 509.00 per centiare

(iii) Uncultivated land : ₹ 161.00

26. Land owners-claimants had preferred Reference Petitions under Section 18 of the Act for enhancement, in which Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others, was decided by the Reference Court vide impugned award, dated 9th May, 2014, whereby value of land has been assessed at the enhanced uniform rate to the tune of ₹ 3038 per centiare alongwith statutory benefits. On the basis of this award, the same suit was followed in impugned awards, dated 9th October, 2015; 6th January, 2016 and 26th July, 2016, pertaining to the same Village Hatkoti. In awards passed by the Collector pertaining to appeals of Lot 'B', identical value of land was assessed for the land acquired in Villages Chamsu and Bharot. For the land of these villages, the Reference Court has also determined the value of land equivalent to that of Village Hatkoti vide awards, dated 1st July, 2015, 1st September, 2015 and 28th June, 2016. However, for the land acquired in Villages Mungranadal and Ghunsa, subject matter of appeals in Lot 'C', the Collector has assessed the value of land giving enhancement of 10% - 12% for the reason that notification under Section 4 of the Act was issued almost after three years. In the cases of Lots 'C-1' and 'C-2', Reference Court has also awarded compensation on the absis of rate determined for the land of Village Hatkoti in the year 2005, but, with enhancement of 10% vide awards, dated 28th June, 2016 and 15th May, 2016. However, in cases of Lots 'C-3A' and 'C-3B', no enhancement of 10% has been awarded by the Reference Court and value of land has been assessed on the basis of award passed in Reference Petition No. 53-S/4 of 2013/08, titled Narayan Singh and others versus Himachal Pradesh State Electricity Board and others (subject matter of RFA No.368 of 2014).

27. Evidence before the Reference Court was led in one lead case in each set of Reference Petitions. In Lot 'A-1', evidence was led in RFA No. 368 of 2014 (i.e. Reference Petition No. 53-S/4 of 2013/08, titled Narayan Singh and others versus Himachal Pradesh State Electricity Board and others), wherein thirteen witnesses were examined on behalf of the land owners and two witnesses were examined on behalf of the project proponent. In Lot 'A-2', evidence was led in RFA No. 166 of 2016 (i.e. Reference Petition No. RBT-83-R/4 of 2014/08, titled Shamsher Singh versus State of H.P. and others). In Lot 'A-3', evidence was led in RFA No. 196 of 2017 (i.e. Reference Petition No. RBT-27-R/4 of 2015/10, titled Shiv Dyal and others versus H.P. State Electricity Board and others). Similarly, in Lot 'A-4', evidence was led in RFA No. 261 of 2017 (i.e. Land Reference Petition No. RBT-37-R/4 of 2014/08, titled Mohan Lal and others versus State of H.P. and others).

28. Common Award No. 585 passed by the Collector has been placed on record in Lot 'A-1' as Ex. PW-1/D in RFA No. 368 of 2014 and connected matters and also Ex. PW-2/E, Ex. PW-2/L, Ex. PW-9/D, Ex PW-10/E, Ex. PW-11/E, Ex. PW-12/C and Ex. RW-1/A. It has also been placed on record in Lots 'A-2', 'A-3' and Lot 'A-4' as Ex. PW-1/F in RFA No. 166 of 2016, Ex. PW-1/F in Ex. PW-1/F in RFA No. 196 of 2017 and Ex. PW-1/B in RFA No. 261 of 2017, respectively (for convenience, hereinafter referred to as 'Award No. 585').

29. Land owners have relied upon the award in Case No. 1 of 2006, dated 24th March, 2006, passed by the Collector in a case wherein land in Village Hatkoti was acquired for beautification of Sri Hatkoti Mata Temple at Hatkoti (hereinafter referred to as 'Award No. 1 of 2006') placed on record of Lot 'A-1' as Ex. PW-1/E (also exhibited as Ex. PW-2/D, Ex. PW-2/M, PW-9/E, PW-10/D, PW-11/D and PW-12/D). Besides placing reliance on sale deeds, one year average from September, 2004 to August, 2005, placed on record as Ex. PW-7/A in RFA No. 368 of 2014 (Lot 'A-1') and Ex. PW-1/C in RFA No. 196/2017 (Lot 'A-2') and one year average with effect from 1st May, 2006 to 31st May, 2006, placed on record as Ex. PW-7/B in RFA No. 368 of 2014 (hereinafter referred to as 'Ex. PW-7/A' and 'Ex. PW-7/B') has also been relied upon.

30. In Lot 'A', project proponent has also placed on record the award No. 585 as Ex. RW-1/A and placed reliance on one year average with effect from 26th December, 2004 to 25th December, 2005 Ex. RW-1/B in RFA No. 368 of 2014 and Ex. RW-1/A in RFAs No. 166 of 2016, 196 of 2017 and 261 of 2017. In RFA No. 261 of 2017, land owners have also placed it on record as Ex. PW-1/C (for convenience, this average hereinafter is to be referred as 'Ex. RW-1/B').

31. In Lot 'B-1', evidence has been led in one lead case, i.e. Land Reference Petition No. RBT-10-S/4 of 2015/08, titled Inder Pal and others versus Himachal Pradesh State Electricity Board and others, which is subject matter of RFA No. 461 of 2015. In these cases, sale deeds No. 229/2006 Ex. PW-1/A and 309/2004 Ex. PW-2/B, award No. 1 of 2006 Ex. PW-3/A, averages Ex. PW-4/A and Ex. PW-4/B are the documents, which have also been relied upon in RFA No. 368 of 2014 in Lot 'A' as Ex. PW-6/A, Ex. PW-6/B, Ex. PW-1/E, Ex. PW-7/A, Ex. PW-7/B, respectively. Ex. PW-5/D is Award No. 585, dated 18th July, 2007, which is subject matter of RFA No. 368 of 2014 in Lot 'A'. Ex. PY is an award passed in Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others and Ex. PZ is award passed by the Reference Court in cases arising out of Award No. 590, which is based on the award passed in Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others, which is under consideration in RFA No. 368 of 2014.

32. The project proponent, in Lot 'B-1', has examined two witnesses. RW-1 Mohan Dass had produced the record of impugned award No. 585 passed by the Collector.

RW-2 Balbir Chand is the Senior Manager of the project proponent. In examination-in-chief, he has stated that acquired land was of inferior quality and instead of deduction of 20%, deduction of 30% should have been there. However, he has further stated that value of the land has been determined on the basis of award of Village Hatkoti.

33. In Lot 'B-2' also, evidence has been led in one lead case, i.e. Land Reference No. 19-S/4 of 2015/08, titled Jai Lal versus Himachal Pradesh State Electricity Board and others, which is under consideration in RFA No. 184 of 2016. In these appeals also, sale deeds No. 229/2006 Ex. PW-1/A, No. 309/2004 Ex. PW-1/B, award No. 1 of 2006 Ex. PW-2/A, average with effect from September, 2004 to August, 2005 Ex. PW-5/A, Average with effect from May, 2006 to April, 2007 Ex. PW-5/B, are the same as has been relied upon in RFA No. 368 of 2014 in Lot 'A' as Ex. PW-6/A, Ex. PW-6/B, Ex. PW-1/E, Ex. PW-7/A and Ex. PW-7/B, respectively. Ex. PW-19/D is an award, dated 9th May, 2014 passed in Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others and Ex. PW-19/F is an award passed by the Reference Court on the basis of award Ex. PW-19/D, which is under consideration in RFA No. 368 of 2014. Ex. PW-19/E is Award No. 585 passed by the Collector, which is impugned in RFA No. 368 of 2014.

34. In Lot 'B-2', one witness, namely Vidya Singh, Office Kanungo, has been examined by the project proponent as RW-1, who, in his examination-in-chief, has stated that at the time of notification under Section 4 of the Act, no sale transaction related to Village Bharot was available and, therefore, compensation was awarded on the basis of Award No. 585, dated 18th July, 2007 related to Village Hatkoti.

35. In Lot 'B-3', there is only one case, i.e. Land Reference No. RBT-45-S/4 of 2015/11, titled Moti Singh (since deceased) through his LRs and others versus State of H.P. and others, which is under consideration in RFA No. 186 of 2017. In this case, Ex. PW-1/B is an average value prepared by Patwari concerned, but, the same is undated, therefore, is not relevant. Ex. PW-2/A, Ex. PW-2/B, Ex. PW-3/B, Ex. PW-3/F are sale deeds No. 12/2005, 13/2005, Award No. 1 of 2006 and average value of land of Village Hatkoti, which are Ex. PW-1/C in RFA No. 166 of 2016, Ex. PW-1/D in RFA No. 166 of 2016, Ex. PW-1/E in RFA No. 368 of 2014 and Ex. PW-7/A in RFA No. 368 of 2014, respectively. Award Ex. PW-3/G is based on the award passed in Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others (subject matter of RFA No. 368 of 2014) Project proponent has examined Vidya Singh as RW-1, who has produced in evidence average value Ex. RW-1/A, which is Ex. RW-1/B in Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others (subject matter of RFA No. 368 of 2014).

36. In Lot 'C-1', evidence, in the Reference Court, was led in lead case, i.e. Reference Petition No. RBT-44-S/4 of 2015/12, titled Moti Singh (since deceased) through his LRs and others versus Principal Secretary (Power) and others, and the appeal arising out of the said Reference Petition in this Court is RFA No. 156 of 2017, titled M.D. HPPCL and another versus Moti Singh (since deceased) through his LRs and others. Land owners in these appeals have relied upon average value Ex. PW-1/B, but, the same does not bear any detail with respect to the period during which this average has been calculated, thus, cannot be taken into consideration. PW-2/A and Ex. PW-2/B are sale deeds No. 12/2005 and 13/2005 of Village Hatkoti, which have also been relied upon in appeals in Lot 'A' as Ex. PW-1/C and Ex. PW-1/D in RFA No. 166 of 2016. Similarly, Award No. 1 of 2006 Ex. PW-3/B and average Ex. PW-3/F are Ex. PW-1/E and Ex. PW-7/A in RFA No. 368 of 2014 in Lot 'A'. Award No. 592, dated 31st March, 2008 (Ex. PW-3/H) is an award passed by the

Collector with respect to Village Mungranadal, which has been passed on the basis of value of land determined in Award No. 585, subject matter of RFA No. 368 of 2014 in Lot 'A'. PW-3/G is an award passed in Reference Petition No. 13-R/4 of 2014/09, titled Liaq Ram and others versus Himachal Pradesh State Electricity Board and others, with respect to Village Bharot, which has been passed on the basis of another award passed by the Reference Court in Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others, which is under consideration in RFA No. 368 of 2014 in Lot 'A'. Ex. PW-3/M is impugned award No. 614 passed by the Collector. The project proponent has relied upon average Ex. RW-1/A pertaining to Village Hatkoti, which is the same as has been relied upon as Ex. RW-1/B in RFA No. 368 of 2014.

37. In Lot 'C-2', evidence has been led in lead case, Land Reference RBT No. 25-S/4 of 2014/12, titled Vijay Pal versus The Principal Secretary (Power) to the Govt. of Himachal Pradesh and others, which is subject matter of RFA No. 466 of 2015, titled Managing Director and another versus Vijay Pal Singh and another. In these cases also, land owners have relied upon award Ex. PW-1/S, which has been passed by the Reference Court on 2nd January, 2015, with respect to Village Jhalta wherein the value of land has been determined on the basis of Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others, arising out of Award No. 585, which is subject matter of RFA No. 368 of 2014 in Lot 'A'. Ex. PW-1/B is impugned award No. 632 passed by the Collector. Ex. PW-1/L and Ex. PW-1/M are averages which are Ex. PW-7/A and Ex. PW-7/B in RFA No. 368 of 2014. Ex. PW-1/N is an award passed by the Reference Court in Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others. In these cases also, project proponent has relied upon average Ex. RW-1/A, which is Ex. RW-1/B in RFA No. 368 of 2014 in Lot 'A'.

38. In Lots 'C-1' and 'C-2' also, Vidya Singh, Office Kanungo of project proponent has been examined as RW-1 to rebut the claim of the land owners. In his cross-examination, he has stated that it is correct that as per one year average Ex. RW-1/A (Ex. RW-1/B in RFA No. 368 of 2014), first two sale deeds are closest to the date of notification under Section 4 of the Act.

39. In Lot 'C-3' ('C-3A' and 'C-3B'), evidence has been led only in Land Reference No. RBT-52-S/4 of 2015/12, titled Ram Lal and others versus The Principal Secretary (Power) and others, subject matter of RFA No. 14 of 2017. In these appeals, sale deed No. 13/2005 (Ex. PW-1/B), Award No. 1 of 2006 (Ex. PW-1/C) and average value of land of Village Hatkoti (Ex. PW-1/D) are Ex. PW-1/D in RFA No. 166 of 2016, Ex. PW-1/E in RFA No. 368 of 2014 and Ex. PW-7/A in RFA No. 368 of 2014. Award Ex. PW-1/F passed has been passed by the Reference Court on the basis of Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others, subject matter of RFA No. 368 of 2014. Project proponent has again relied upon average value Ex. RW-1/A, which is Ex. RW-1/B in RFA No. 368 of 2014.

40. In these cases, in various Reference Petitions, the land owners have relied upon five sale deeds. Sale deed No. 309, dated 25th September, 2004 of Village Hatkoti has been placed on record in Lot 'A-1' as Ex. PW-6/B in RFA No. 368 of 2014. Sale deed No. 365/2004, dated 7th December, 2004/16th December, 2004 of Village Ghunsa; sale deed No. 12/2005, dated 18th January, 2005; and sale deed No. 13/2005, dated 20th January, 2005, of Village Hatkoti have been placed on record as Ex. PW-1/E, Ex. PW-1/C and Ex. PW-1/D, respectively, in Lot 'A-2' in RFA No. 166 of 2016. Fifth sale deed No. 229/2006, dated 24th November, 2006, has been placed on record as Ex. PW-6/A (also Ex. PW-12/F) in RFA No.

368 of 2014 and Ex. PW-1/E in RFA No. 261/2017 in Lots 'A-1' and 'A-4', respectively. For convenience, these sale deeds hereinafter will be referred through their sale deed numbers.

41. As discussed (supra), none of the appeals in all the lots contains the entire evidence individually. However, entire evidence is available in Lot 'A'. In cases pertaining to Lots 'B' and 'C', main reliance has been put on Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others, evidence led by parties is also the same to that of cases in Lot 'A'. Sale deeds No. 12/2005 and 13/2005 have not been placed on record in RFA No. 368 of 2014 whereas in other RFAs No. 166 of 2016 and 261 of 2017, average value Ex. PW-7/A has not been placed on record. In RFA No. 261 of 2017, sale deeds No. 229/2006 and 365/2004 have also been placed on record whereas in RFA No. 368 of 2014, sale deed No. 309/2004 has been placed on record. However, the fact remains that the appeals in Lot 'A' are arising out of one notification issued under Section 4 of the Act for acquisition of land for common purpose in the same village, therefore, in the interest of justice, evidence in all these cases of major Lot 'A' is being discussed collectively as all the land owners would be entitled for compensation at the rate arrived at in one case, particularly in view of the ratio of law laid down by the apex Court in case titled **Narendra and others versus State of Uttar Pradesh and others,** reported in **(2017) 9 Supreme Court Cases 426,** wherein it has been held as under:

> *"6. The matter can be looked into from another angle as well, viz., in the light of the spirit contained in Section 28A of the Act. This provision reads as under:*
>
> > *"**28-A. Re-determination of the amount of compensation on the basis of the award of the court.** - (1) Wherein an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section II, the persons interested in all the other land covered by the same notification under Section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under Section 18, by written application to the Collector within three months from the date of the award of the court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court:"*
>
> *7. It transpires from the bare reading of the aforesaid provision that even in the absence of exemplars and other evidence, higher compensation can be allowed for others whose land was acquired under the same notification.*
>
> *8. The purpose and objective behind the aforesaid provision is salutary in nature. It is kept in mind that those land owners who are agriculturist in most of the cases, and whose land is acquired for public purpose should get fair compensation. Once a particular rate of compensation is judicially determined, which becomes a fair compensation, benefit thereof is to be given even to those who could not approach the court. It is with this aim the aforesaid provision is incorporated by the Legislature. Once we keep the aforesaid purpose in mind, the mere fact that the compensation which was claimed by some of the villagers was at lesser rate than the compensation which is ultimately determined to be fair compensation, should not be a ground to deny such persons appropriate and fair*

compensation on the ground that they claimed compensation at a lesser rate. In such cases, strict rule of pleadings are not be made applicable and rendering substantial justice to the parties has to be the paramount consideration. It is to be kept in mind that in the matter of compulsory acquisition of lands by the Government, the villagers whose land gets acquired are not willing parties. It was not their voluntary act to sell of their land. They were compelled to give the land to the State for public purpose. For this purpose, the consideration which is to be paid to them is also not of their choice. On the contrary, as per the scheme of the Act, the rate at which compensation should be paid to the persons divested of their land is determined by the Land Acquisition Collector. Scheme further provides that his determination is subject to judicial scrutiny in the form of reference to the District Judge and appeal to the High Court etc. In order to ensure that the land owners are given proper compensation, the Act provides for 'fair compensation'. Once such a fair compensation is determined judicially, all land owners whose land was taken away by the same Notification should become the beneficiary thereof. Not only it is an aspect of good governance, failing to do so would also amount to discrimination by giving different treatment to the persons though identically situated. On technical grounds, like the one adopted by the High Court in the impugned judgment, this fair treatment cannot be denied to them.

9. No doubt the judicial system that prevails is based on adversarial form of adjudication. At the same time, recognising the demerits and limitations of adversarial litigation, elements of social context adjudication are brought into the decision making process, particularly, when it comes to administering justice to the marginalised section of the society."

42. Though, major Lots 'B' and 'C' of appeals pertain to different villages other than Village Hatkoti, but, therein the Collector itself has equated the land of these villages at par with the land of Village Hatkoti and has determined the value of land in these villages equivalent to that of Village Hatkoti in similar fashion. Further, Reference Court has also decided Reference Petitions of these villages on the basis of award of Reference Court passed in Land Reference Petition No. 53-S/4 of 2013/08, titled Sh. Narayan Singh and others versus Himachal Pradesh State Electricity Board and others, of Village Hatkoti arising out of Award No. 585, which is under consideration in RFA No. 368 of 2014 of Lot 'A-1'. So far as evidence led in lead cases in Lots 'B' and 'C' is concerned, parties are banking upon the evidence led in cases of Lot 'A' as evident from succeeding paras.

43. It is also settled law that in absence of sales of the village/area, of which land is under acquisition, transactions relating to acquired land of recent dates or same dates or in the neighbourhood lands that possessed similar potentiality or fertility or other advantageous factors are also relevant piece of evidence. However, for that purpose, nature and potentiality of land in two different villages should be the same for awarding the same rate of compensation in acquisition of land for the same purpose. (See ***Periyar and Parkeekanni Rubbers Ltd. versus State of Kerala, (1991) 4 SCC 195; Jai Prakash and others versus Union of India, (1997) 9 SCC 510; Kanwar Singh and others versus Union of India, (1998) 8 SCC 136;* and *Manoj Kumar etc. versus State of Haryana, 2017 SCC Online SC 1262***). As held by the apex Court in case titled **Special Land Acquisition Officer, Kheda and another versus Vasudev Chandrashankar and another,** reported in **(1997) 11 Supreme Court Cases 218,** the award of the Reference Court relating to the same village of the similar land possessed of same quality of land and potential offers

a comparable base for determination of the compensation. Therefore, award passed with respect to land of a village can be basis of awarding same rate or increased/decreased rate of compensation qua the land of another village acquired for the same purpose based on the evidence of similarity or dissimilarity of the land in both villages.

44. As discussed (supra), project proponent as well as Collector has considered the value of land of Villages Chamsu, Bharot, Mungranadal, Ghunsa and other adjoining villages of the same value by assessing same value of the land of these villages. Therefore, evidence led in Lot 'A' pertaining to Village Hatkoti can certainly be made basis for determining the value of land in these villages and the land owners of these villages are entitled for the value equivalent to that of Village Hatkoti.

45. From evidence referred supra, it is evident that in all cases under consideration, parties have led and relied upon of the common evidence in various Reference Petitions, which is available in appeals of Lot 'A'. Further, in all cases of Lots 'A' and 'B', there is proximity of issuance and publication of notification under Section 4 of the Act as it was issued in July and August, 2005 and last date of publication in these cases was in October and December, 2005. Only in Lot 'C', notification under Section 4 of the Act was issued on 1st August, 2008 and published lastly on 26th September, 2008. Therefore, Collector had given enhancement of 10% to 12% to the rate determined in Lot 'A' and Reference Court has also followed enhancement in the same manner. For close proximity of date of issuance and last publication of notification under Section 4 of the Act, evidence led in Lots 'A' and 'B', with reference to time and place is equally relevant to each other. Appeals of Lot 'C' are to be decided on the basis of appeals of Lots 'A' and 'B'. Therefore, it would be suffice to consider and discuss entire evidence without reference to appeals in Lot 'A' only.

46. The procedure to be adopted by the Collector for working out the estimated rate of land has been provided in Clause 12 of the Financial Commissioners Standing Order No. 28 (hereinafter referred to as 'Standing Orders'), wherein it has specifically been provided that rates of land will be worked out by the District Collector after taking into account average rate determined from the sale transactions in the revenue estate concerned for a period of one year preceding the date of notification under Section 4 of the Act. It is apt to reproduce Clause 12 of the Standing Orders herein:

> *"**12. Collector's rate – how worked out.** On receipt of the application, the Collector of the District will furnish data in the shape of rates per acre of the different kinds of land alongwith a preliminary estimate of the value of trees, buildings and other property, if any, for which compensation will have to be paid. The rates of land per acre will be worked out by the District Collector after taking into account average rate per acre determined from the sale transactions in the Revenue Estate concerned for a period of one year preceding the date of notification under section 4 of the Act. It should also indicate whether these average market rates would be appropriate for the land proposed to be acquired. The fact whether the land to be acquired has any special features such as nearness to the abadi and main road which may justify a higher price than the average rate or where there were any special features in the lands sold during the last one year (e.g. sale of small pieces of land for abadi purposes or near a main road) which may justify approval of rates lower than the average rates, should also be indicated. The sale transactions during the year preceding the notification under section 4 of the Act and the average rates proposed should be indicated by the C.R.O. in the proforma given below while submitting the rate to Collector for approval.*

(i) Data of sale transactions in Village _____, Tehsil _____, District _____ for the period from _____ to _____

_____

Serial No.	*No. and date of Registration of the sale*	*Classwise Area*	*Consideration*	*Remarks*

(ii)	*Particulars of the sale transactions in the vicinity of the land under acquisition during the period under consideration.*	*Give Sl. Nos. of transactions listed in (i) above.*		
(iii)	*Average rate per acre for various kinds of land as worked out from the transactions in Sl. No. (i) above.*			
(iv)	*Average rate per acre for various kinds of land as worked out from the transactions mentioned in Sl. No. (ii) above.*			
(v)	*Particulars of Award announced, if any, in the village during last 5 years*	*Date of Award*	*Date of notification under Section 4*	*Rates per acre for various classes of land*
(vi)	*Particulars of Court decisions announced, if any, in the village during last 5 years*	*Date of decision*	*Class* *Date of notification under Section 4*	*Rate* *Rates for per acre allowed*
(vii)	*State whether the land under acquisition is being used solely for agricultural purposes? If not, indicate details?*	*Class*	*Rule*	
(viii)	*State whether any part of land has any special features as nearness to abadi or main road to justify higher price?*			
(ix)	*State whether there were any special features in the land sold during the last one year which may justify approval of rates lower than the average rates?*			
(x)	*Estimated value of any trees or other structures on the land.*			

(xi)	*Classwise rates proposed with justification specially for any departure from the average rates indicated in (i) or (ii) above.*	
(xii)	*Estimated total cost of acquisition.*	

Kanungos and Patwaris should not be called upon to give their opinion on the market value of the land. The Tehsildar or the Circle Revenue Officer concerned, while making his recommendation in these cases, should personally visit the spot, closely scrutinize the data and ensure all relevant information is supplied in the proforma prescribed for the purpose."

47. The apex Court in case titled **Chandra Bhan (dead) through Legal Representatives and others versus Ghaziabad Development Authority and others,** reported in **(2015) 15 Supreme Court Cases 343,** relying upon *Usha Stud and Agricultural Farms (P) Ltd. versus State of Haryana, (2013) 4 Supreme Court Cases 210* and *Surinder Singh Brar versus Union of India, (2013) 1 Supreme Court Cases 403,* has held that the last date of publication and giving of public notice is treated as the date publication of the notification.

48. On combined reading of Standing Orders and exposition of date of publication by the apex Court, last date of publication of notification under Section 4 of the Act in Lot 'A' is 26th December, 2005 in Lot 'B' is 19th October, 2005, 21st October, 2005 and 25th October, 2005 and one year period preceding thereto in Lot 'A' is from 26th December, 2004 to 26th December, 2005 or at least from December, 2004 to December, 2005 and similarly, the said period in Lot 'B' is from October, 2004 to October, 2005. For convenience, relevant period can be considered with effect from October, 2005 to December, 2005.

49. It is well settled that at the time of determining market value of land for acquisition, the purpose for which the land is acquired is relevant and not nature and classification of land and where nature and classification of the land has no relevance for purpose of acquisition, the market value of the land is to be determined as a single unit irrespective of nature and classification of the land. In such a case, uniform rate to all kinds of land under acquisition as a single unit irrespective of their nature and classification is to be awarded (See ***Dadu Ram vs. Land Acquisition Collector and others, (2016) 2 ILR 636 (HP); H.P. Housing Board vs. Ram Lal and others, 2003 (3) Shim L.C. 64; Union of India vs. Harinder Pal Singh and others, 2005 (12) SCC 564; Executive Engineer and another vs. Dila Ram, Latest HLJ 2008 (HP) 1007; LAC and another vs. Bhoop Ram and others, 1997 (2) SLC 229; Smt. Gulabi and etc. vs. State of H.P., AIR 1998 HP 9; and G.M. Northern Railway vs. Gulzar Singh and others, Latest HLJ 2014 (HP) 775.***

50. As per Section 25 of the Act, the amount of compensation awarded by the trial Court shall not be less than the amount awarded by the Collector under Section 11 of the Act. (Also see – ***Subh Ram and others versus State of Haryana and another, (2010) 1 SCC 444***)

51. In RFA No. 196 of 2017 (in Lot 'A-3'), award dated 9th October, 2015, passed in Land Reference Petition No. RBT-29-R/4 of 14/09 and award dated 9th May, 2014, passed in Land Reference Petition No. 53-S/4 of 2013/08 have been relied upon as Ex. PW-1/B and Ex. PW-1/E, respectively. In RFA No. 466 of 2015 (in Lot 'C-2'), award, dated 2nd January, 2015 (Ex. PW-1/S) passed in Land Reference No. 98-S/4 of 2014/09; in RFA No. 461 of 2015 (in Lot 'B-1'), award, dated 2nd January, 2015 (Ex. PZ) in Land Reference No. 57-S/4 of 2014/09; in RFA No. 186 of 2017 (in Lot 'B-3') and RFA No. 14 of 2017 (in Lot 'C-3'), award,

dated 9th October, 2015 (Ex. PW-3/G) in Land Reference No. 13-R/4 of 2014/09, have been relied upon by the land owners. It is apt to record herein that the award passed in Land Reference Petition No. 53-S/4 of 2013/08 is impugned herein in RFA No. 368 of 2014 (Lot 'A') whereas award in Land Reference Petition No. RBT-29-R/4 of 14/09 has been passed on the basis of award in Land Reference Petition No. 53-S/4 of 2013/08. Therefore, these awards are also not relevant for determining value of land in present appeals.

52. Vide award No. 1 of 2006, dated 24th March, 2006 (Ex. PW-1/E in RFA No. 368 of 2014), land in Village Hatkoti was acquired for beautification of Sri Hatkoti Mata Temple at Hatkoti by initiating the process of acquisition after issuance of notification, dated 8th June, 2005, under Section 4 of the Act, last publication whereof was made in the month of August, 2005. In the said award, the Collector had determined the value of the land in Village Hatkoti on the basis of nature and classification as under:

Name of Revenue Estate	Classification of land	Rate per Centiyar
Hatkoti	1. Kiar Awal	Rs. 1627/-
	2. Gair Mumkin Rasta	Rs. 256/-
	3. Gair Mumkin Kuhal	Rs. 256/-

53. In present case, last publication of notification under Section 4 of the Act was made in October/December, 2005. In award No. 1 of 2006 (Ex. PW-1/E), the Collector has awarded highest amount for kiar awal at the rate of ₹ 1627 per centiare. Value of land increased with passage of time, but, strangely, the Collector, for the land acquired in the same village during the subsequent period, has awarded highest value of irrigated cultivable land (kiar awal) at the rate of ₹ 821 per centiare. Though, award Ex. PW-1/E is close in proximity in time and location, but, the said award can also not be made basis for determining the value of land in question for the reason that the said award has not attained finality and is also stated to be now pending adjudication in time barred appeals filed by the project proponent in this Court wherein, as informed, enhancement made at the rate of ₹ 3151/- per centiare, awarded by the Reference Court in the Land Reference Petitions preferred by the land owners therein, has been assailed and one such award, dated 2nd June, 2015, passed in Land Reference Petition No. RBT-52-R/4 of 2013/06 by learned Additional District Judge (II) Shimla is pending adjudication in this High Court in CMP (M) No. 866 of 2018 in RFAST No. 11012 of 2018, titled State versus Krishan Chand and another.

54. Value of land on the basis of one year average for the period with effect from May, 2006 to 31st May, 2007 has been placed on record as Ex. PW-7/B. The notification under Section 4 of the Act was issued in July and August, 2005, last publicity whereof was made in October and December, 2005. This average value cannot be taken into consideration as it pertains to the period subsequent to the issuance and last publication of notification under Section 4 of the Act.

55. One year average (Ex. PW-7/A) pertains to the time period with effect from September, 2004 to 31st August, 2005, wherein, on the basis of two sale deeds, mutation whereof was attested vide mutations No. 153 and 154, dated 29th January, 2005, average value of land per centiare based on nature and classification has been assessed as under:

Kiar Awal	Kiar Doyam	Kalahu Awal	Kalahu Doyam	Vaakhal Awal	Vaakhal Doyam	Banjar Kadim and Banjar Jadeed
4809.08	4212.91	3577.00	2503.90	2980.83	2424.41	755.14

56. On perusal of award No. 585, dated 18th July, 2007, (Ex. PW-1/D in RFA No. 368 of 2014) passed by the Collector and the average value Ex. PW-7/A and also average value Ex. RW-1/B, it is evident that the sale deed No. 12/2005, dated 18th January, 2005 and sale deed No. 13/2005, dated 20th January, 2005, relied upon for evaluating value of land in Ex. PW-7/A, are the same sale deeds which have been taken into consideration by the Collector for assessing value of land in Award No. 585 and relied upon for calculating the value of land in Ex. RW-1/B, but, alongwith another sale deed No. 309/2004, dated 25th September, 2004. Though, the date and number of the sale deed taken into consideration at the time of calculating the value of the land in Ex. PW-7/A has not been mentioned, but, only details of land and consideration thereof alongwith numbers of mutation 153 and 154, dated 29th January, 2005 have been mentioned. However, in award No. 585 and average value Ex. RW-1/B, number of sale deeds, details of the land and consideration involved therein alongwith mutation Nos. 153 and 154, dated 29th January, 2005, has been mentioned. It is evident from Award No. 585 that sale deed No. 12/2005, dated 18th January, 2005 and sale deed No. 13/2005, dated 20th January, 2005 were executed with respect to area of 0-00-65 hectares and 0-01-78 hectares, respectively, wherein Banjar Kadim land in Village Hatkoti was sold for ₹ 45,500/- and ₹ 1,38,000/-, respectively, whereas in sale deed No. 309/2004, dated 25th September, 2004, executed with respect to area of kiar awal, land measuring 0-01-82 hectares was sold for ₹ 40,000/- in Village Hatkoti. Mutation No. 172 with respect to this sale deed was attested on 9th November, 2005. These three sale deeds No. 309/2004, 12/2005 and 13/2005 are also on record as Ex. PW-6/B in RFA No. 368 of 2014, Ex. PW-1/C and Ex. PW-1/D in RFA No. 166 of 2016.

57. Average value in Ex. PW-7/A has been prepared on the basis of sale deeds No. 12 and 13 of 2005. Value of land in Award No. 585 has been assessed on the basis of aforesaid two sale deeds No. 12 and 13 of 2005 and third sale deed No. 309 of 2004, referred hereinabove.

58. Average value Ex. RW-1/B also pertains to the period with effect from 26th December, 2004 to 25th December, 2005, wherein also, aforesaid two sale deeds No. 12 and 13 of 2005 have been taken into consideration alongwith third sale deed No. 309 of 2004, like Award No. 585.

59. In one year average Ex. RW-1/B, value of the land per centiare determined is the same as in Award No. 585 (Ex. PW-1/D), which is as under:

Kiar Awal	Kiar Doyam	Kalahu Awal	Kalahu Doyam	Vaakhal Awal	Vaakhal Doyam	Gair Majrua Dhaank
1026.79	899.50	763.73	774.33	636.44	517.64	161.23

60. Out of the sale deeds taken into consideration by the Collector, there are only two sale deeds No. 12 and 13 of 2005, dated 18th January, 2005 and 20th January, 2005, mutation with respect to which was attested on 29th January, 2005 vide mutation Nos. 153 and 154, are within twelve months/a year prior to notification under Section 4 of the Act, whereas third sale deed No. 309/2004, taken into consideration at the time of determining the value by the Collector in Award No. 585 as well as in average value Ex. RW-1/B determined by the revenue authority, was executed on 25th September, 2004. One year prior to notification under Section 4 of the Act starts either with effect from 26th December, 2004 or 21st October, 2004, as discussed supra, at the most, relevant period reckons from October, 2004 to December, 2004, and, therefore, for determining value of land, transactions during that period, if available, are to be given priority for consideration. In average Ex. RW-1/B, though, period for calculating average has been taken as 26th December, 2004 to 25th December, 2005, but, sale deed No. 309/2004 has also been considered despite the fact that the same has not been executed during relevant period under consideration, but, beyond that period, i.e. on 25th September, 2004. It appears that the Collector and the revenue authority has erroneously considered the said sale deed within period of one year from publication on the basis of date of attestation of mutation of the said sale deed, which was attested vide mutation No. 172 on 9th November, 2005.

61. Attestation of mutation is not the date of transaction taking place, but, it is only for updating the revenue entries on the basis of transaction already taken place. Therefore, the Collector has acted in violation of the Standing Orders as well as adopted procedure for determining the average value of the land on the basis of Ex. RW-1/B because keeping in view date of last publication, in present case, as per Financial Commissioners Standing Order No. 28, the Collector had to take into consideration the sale transactions taken place during the period with effect from 26th December, 2004 to 25th December, 2005 and sale deed No. 309/2004 does not fall even in extended period from October, 2004 to December, 2005, as this sale deed No. 309/2004, taken into consideration by him, was executed on 25th September, 2004.

62. Average value Ex. RW-1/A has been prepared by the Patwari of the office of HPSEB, i.e. Collector, and has been countersigned by concerned Kanungo as well as Naib Tehsildar wherein average value of land has been calculated by converting the same in terms of land revenue whereby value of one paisa of land revenue has been calculated as 6385.71 and thereafter, it has been applied for calculating the value of land on the basis of Parta Kisamwar, i.e. value of land recorded in register of kisamwar according to its classification. However, at the time of calculating the value of one paisa land revenue, sale deed No. 309/2004, dated 25th September, 2004, as discussed in detail (supra), has been taken into consideration despite the fact that the said average value has been stated to be for the period with effect from 26th December, 2004 to 25th December, 2005 and further, at the time of calculating the value in terms of land revenue, sale deeds pertaining to different kinds of land, i.e. banjar kadeem and kiar awal, executed for anonymous purpose, have been taken into consideration on the same footings. Further, it has been ignored that the market value of land, as prescribed in the Standing Orders, is not to be considered only on the basis of average value of preceding one year from the date of publication of notification under Section 4 of the Act, but, such average value is one of the number of factors, as detailed (supra) in Clause 12 of the Standing Orders.

63. On exclusion of sale deed No. 309/2004 from Ex. RW-1/A, value of land revenue for sale deeds No. 12/2005 and 13/2005 would be 0.06 paisa and value of one paisa would be almost 30583, which is 4.7 points higher than the value of one paisa determined in Ex. RW-1/A. After applying the said factor of 4.7 to the value calculated in Ex. RW-1/A, highest value of the land will be ₹ 4914/- per centiare and the lowest value will

be ₹ 772/- per centiare, which is near to the value determined in average value Ex. PW-7/A. However, again, keeping in view the parameters provided in the Standing Orders, the average value calculated in Ex. PW-7/A also cannot be made basis for determining the market value of land under acquisition.

64. Apart from the parameters in Standing Orders, average value in Ex. PW-7/A cannot be taken into consideration for the reason that the said average value pertains to the period with effect from 1st September, 2004 to 1st August, 2005 whereas the relevant period would have been with effect from 26th December, 2004 to 25th December, 2005. This average value, though, stated to have been prepared in compliance to order passed by the Tehsildar, but, has been prepared and signed by the Patwari concerned only. Unlike Ex. RW-1/A, neither Kanungo nor Tehsildar has countersigned the same. In this average also, instead of date of execution of sale deed, date of attestation of mutation has been taken into consideration at the time of giving reference of relevant sale deeds for the reason that though this average is claimed to be for the period with effect from September, 2004 to 31st August, 2005, but, sale deed No. 309/2004, executed on 25th September, 2004, has not been taken into consideration as it is attested on 9th November, 2005 and sale deeds No. 12/2005 and 13/2005, wherein mutations No. 153 and 154 were attested in January, 2005, have been taken into consideration. It appears that in order to avoid inclusion of sale deed No. 309/2004, which has also been placed on record by the land owners as Ex. PW-6/B in RFA No. 368 of 2014, the concerned Patwari had taken the relevant period with effect from September, 2004 to 31st August, 2005 as the mutation of sale deed No. 309/2004 was attested in November, 2005.

65. As submitted on behalf of the land owners, calculation of market value on the basis of average in Ex. PW-7/A and Ex. RW-1/A is to be made as under:

> *"First of all, the total area is to be taken, then the same is to be multiplied by the factor of land of the sale deed multiplied by hundred. As in the present case, the sale deed is of Banjar Kadeem Land measuring 00-01-78 hectares = 178 per centiare, the same is to be multiplied by the factor of Banjar Kadeem i.e. 0.19 x 100.*
>
> *178 x 0.19 x 100 = 3382. The total 3382 is called as Ashiyan. Now to workout the value of the land, the value of the land is to be multiplied by the relevant factor of Banjar Kadeem into hundred divided by Ashiyan.*
>
> $\frac{1,38,000/- \times 0.19 \times 100}{3382}$ *= Rs. 775.28 per centiare*
>
> *Since the land acquired is of Kiar Awal category, therefore, to work out the exact value of the land by applying the same method as has been done by the Land Acquisition Collector in Exhibit RW-1/B and by Patwari in Exhibit PW-7/A, the value of the land as acquired of the land owners would be calculated in the following manner:*
>
> $\frac{1,38,000/- \times 1.21 \times 100}{3382}$ *= Rs. 4937.31 per centiare"*

The value of land arrived at by making calculations in aforesaid manner also does not appear to be correct as it is based on the basis of only one sale deed and it is again giving fourth average value of the land.

66. Standing Orders provide that Kanungo and Patwari should not be called upon to give their opinion on market value of land and Tehsildar/Circle Revenue Officer

concerned should personally visit the spot, closely scrutinize the data and ensure that all relevant information is supplied in the proforma prescribed for the purpose, before making his recommendation. Ex. PW-7/A prepared by the Patwari is only an average value and not the market value determined by the Collector, Tehsildar/Circle Revenue Officer concerned. Status of Ex. RW-1/A is also the same. In Ex. RW-1/A, average has been calculated on the basis of land revenue whereas in Ex. PW-7/A, the average has been calculated on the basis of amount of consideration in sale deeds under consideration. There is no explanation either on the part of the Collector or on the part of the land owners or the Patwari concerned so as to justify the basis adopted in calculating the average value in these documents. Value of land in Ex. PW-7/A or Ex. RW-1/B, at the most, can be considered equivalent to circle rate. Therefore, market value of acquired land cannot be determined only on the basis of Ex. PW-7/A or Ex. RW-1/B, however, these documents may be one of the factors for determining the same.

67. Sale deed No. 229/2006, dated 24th November, 2006 (Ex. PW-6/A and Ex. PW-12/F in RFA No. 368 of 2014 and Ex. PW-1/E in RFA No. 261 of 2017) pertains to the land situated in Revenue Sub-sector Chanderpur and in the said transaction, land measuring 0-01-56 hectares was sold for ₹ 3,00,000/- only giving value of land at the rate of ₹ 1923/- per centiare. But, this sale deed is not only related to different village, which is not in reference in any appeal either in Lot 'A' or Lots 'B' and 'C', but, has also been executed after issuance and also last publication of notification under Section 4 of the Act and as sale deed of concerned village(s) executed during relevant period are also available, thus, it cannot be taken into consideration.

68. Sale deed No. 309/2004 (Ex. PW-6/B in RFA No. 368 of 2014) was registered on 25th September, 2004, wherein land measuring 0-01-82 hectares was sold for ₹ 40,000/- giving value of land at the rate of ₹ 182/- per centiare. Last publication of notification under Section 4 of the Act is 26th December, 2005 and even if last publication is taken as 21st October, 2005, this sale deed is also beyond twelve months preceding last publication of notification under Section 4 of the Act. However, this sale deed No. 309/2004 may have been relevant in absence of exemplar transaction during one year preceding date of notification under Section 4 of the Act.

69. There are only three sale deeds No. 12/2005, 13/2005 and 309/2004 pertaining to Village Hatkoti on record. As already discussed, sale deed No. 309/2004 was executed prior to twelve months preceding the notification under Section 4 of the Act. Then, only two sale deeds No. 12/2005 and 13/2005 remain for consideration. Sale deed No. 13/2005 is highest in value giving value of land at the rate of ₹ 775.28 per centiare, but, the said value is below the highest value determined by the Collector in Award No. 585. Average of these two sale deeds gives value of land at the rate of ₹ 755.14 per centiare, which is again lesser than the highest rate awarded by the Collector. Therefore, these sale deeds, in either manner, cannot be made basis for determination of value of the land.

70. Even if, third sale deed No. 309/2004 pertaining to the same Village Hatkoti, ignoring the fact that the same was executed beyond the period of twelve months preceding the notification under Section 4 of the Act, is taken into consideration, average value of the land considering these three sale deeds becomes ₹ 525/- per centiare, which is again less than the highest value of land determined in Award No. 585. However, it is a fact that sale deeds No. 12/2005 and 13/2005 pertain to land of the quality banjar kadeem, whereas land under acquisition involves the land of different categories ranging from banjar kadeem to kiar awal, as has also been reflected in Award No. 585. Therefore, the average value on the basis of these sale deeds may be taken as one of the factors for determining the value of land

by applying the procedure provided under the Act as well as the Standing Orders. For that purpose, average value Ex. PW-7/A and/or Ex. RW-1/B may have some relevance.

71. In sale deed No. 365/2004 (Ex. PW-1/E in RFA No. 166 of 2016), land measuring 0-00-38 hectares was sold on 7th December, 2004 for a consideration of ₹ 1,00,000/- in Village Ghunsa, Tehsil Jubbal, District Shimla, which gives the value of land at the rate of ₹ 2631.57 per centiare. Taking relevant preceding one year from October, 2005, this sale deed is in proximity with time. Otherwise also, sale deed was executed on 7th December, 2004 whereas date of last publication is 26th December, 2005 and difference in gap from 25th December is insignificant. But, this sale deed is not in location of Village Hatkoti as it pertains to a different Village Ghunsa. However, land of Village Ghunsa has also been acquired for the same purpose in the year 2008 and appeals arising out of that acquisition are in Lot 'C' wherein also, value of land for the year 2005 has been evaluated at par with that of Village Hatkoti and for acquisition of land in the year 2008, enhanced value of land, by adding 12% of the value of Village Hatkoti determined in the year 2005, has been determined. Therefore, this sale deed, being proximate in time and equivalent in value of land of both villages, is a relevant exemplar transaction, particularly when, as discussed supra, sale deeds No. 12/2005, 13/2005 and 309/2004 cannot be considered as value on the basis of those sale deeds either individually or collectively by taking average is lesser than the rate awarded by the Collector.

72. Section 23 of the Act provides for determination of compensation on the basis of market value of land and not on the basis of average value or circle rate of the land as average rate/circle rate may not depict the fair and just market value of the land under acquisition. The apex Court, though, as discussed hereinabove, sometimes has taken into consideration the circle rate, but, in absence of any other relevant evidence available on record. However, in such cases, the value of land has not been determined exactly as in circle rate, but, after making deduction therein ranging upto 45%.

73. As evidenced hereinabove, on the basis of sale deeds No. 12/2005 and 13/2005, lowest and highest value of the land, adopting either method, i.e. method depicted in Ex. RW-1/A or in Ex. PW-7/A, is almost the same, i.e. ₹ 772/- per centiare and ₹ 4914/- per centiare in Ex. RW-1/B and ₹ 755.14 per centiare and ₹ 4809/- per centiare in Ex. PW-7/A. Reference Court has determined the value of land after taking mean of average value of various kinds of land calculated in Ex. PW-7/A and in my opinion, has committed a mistake as average of average value, that too, calculated on the basis of transaction of small piece of land cannot be fair and just market value of the land under acquisition, particularly when purpose of transaction in the sale deed has not been disclosed. It is not a case where transactions of different qualities of land are available and are being considered for taking average thereof.

74. Further, plea of land owners to consider the highest value, i.e. ₹ 4809/- per centiare calculated in Ex. PW-7/A as market value of the land, is also not justifiable for another reason also as the said value has been arrived at on the basis of sale deeds pertaining to small chunk of land ranging from one biswa to four biswa. Further, purpose of purchase of land is neither disclosed by the Collector or Patwari concerned or in sale deeds nor has been considered by the concerned authority at the time of determining the average value. Therefore, in arriving at the average value either in Ex. PW-7/A or in Ex. RW-1/B, complete application of judicious mind is missing or parameters required to be taken into consideration as also provided in Standing Orders have been deliberately ignored. The highest value of ₹ 4809/- per centiare is not based on actual transaction of land, but, on the basis of proportionate deemed rate on the basis of sale deed of small chunk of land without taking into consideration the similarity of nature and potential of the land involved in the

sale deed under comparison, much less the purpose of the sale. It is not highest value in exemplar transaction, but, highest value in average. Neither average value nor circle rate arrived at without any survey and without application of expert mind considering all relevant factors can be equated with just and fair market value of the land.

75. Land owners/claimants and project proponent are banking upon respective one year average value, i.e. Ex. PW-7/A and Ex. RW-1/B, for determination of value of land. As is apparent from the evidence discussed supra, apart from average value calculated on the basis of Ex. PW-7/A and Ex. RW-1/B, there is no exemplar sale transaction or award on record for taking into consideration for determining the value of land in question except sale deed No. 365/2004, referred (supra).

76. Learned counsel for the project proponent, relying upon the case titled **Government (NCT of Delhi) and others versus Ajay Kumar and others,** reported in **(2014) 13 Supreme Court Cases 734,** wherein it has been held that Government/Administration cannot be compelled to prescribe circle rates as criterion for fixing market value or for determination of the compensation, and also pronouncement of the apex Court in case titled **Union of India versus Savitri Devi and another,** reported in **(2018) 12 Supreme Court Cases 545,** wherein, relying upon *Lal Chand versus Union of India and another,* reported in *(2009) 15 Supreme Court Cases 769,* and *Ajay Kumar's case (supra),* it has been held that circle rates for purpose of stamp duty could not have been made the basis for determining the value, has submitted that in present case also, average value determined by revenue authority in Ex. PW-7/A cannot be made basis for evaluating the compensation for the land under acquisition.

77. The objection of learned counsel for the project proponent that average Ex. PW-7/A cannot be made basis for determining value of land under acquisition is not substantiated mainly for three reasons. Firstly, it is not a circle rate prepared by revenue department for the purpose of calculating stamp duty but is an exercise undertaken in consonance with Standing Orders for determining average value of land for acquisition. Secondly, project proponent itself is relying upon similar average Ex. RW-1/B. Thirdly, the average is based on sale deeds pertaining to relevant time having proximity in location. But, at the same time, this average value cannot be sole basis for determining market value of land, particularly, when there is one other exemplar transaction, i.e. sale deed No. 365/2004, having proximity so as to becoming relevant exemplar transaction.

78. It would be relevant to refer certain pronouncements of the apex Court wherein, for circumstances in those cases, circle rate has been taken into consideration for determining the value of land under acquisition, but, after making appropriate deduction.

79. In **Thakur Kuldeep Singh (dead) through LRs and others versus Union of India and others,** reported in **(2010) 3 Supreme Court Cases 794,** it has been made clear by the apex Court that the market value of acquired land cannot be fixed merely on the basis of circle rate, which implied that circle rate can also be one of the factors for determining the market value of the acquired land.

80. Similarly, in **Haryana State Agricultural Market Board and another versus Krishan Kumar and others,** reported in **(2011) 15 Supreme Court Cases 297,** while observing that normally, it is not safe to proceed to determine the value of land on the basis of circle rates or Collector's rates as they are broad assessments which may or may not be based on proper scientific survey and verification, circle rates relied upon by the parties in evidence have been considered for determining the value of land after making 45% deduction keeping in view the peculiar circumstances of the case.

81. Also, in **Jagdish Prasad Verma (dead) by LRs versus State of Madhya Pradesh and others,** reported in **(2016) 11 Supreme Court Cases 430,** the apex Court, after taking into consideration the fact that amount of compensation awarded was on much lesser side in comparison to the circle rate, had enhanced the rate per square feet. But, in this case also, highest of circle rate was not made basis, rather, middle path was adopted by the Court.

82. Therefore, in view of the fact that the only one exemplar sale deed No. 365/2004 pertains to another village and also that both the parties have relied upon the average calculated by the revenue authority, which is also not exactly a circle rate calculated for purpose of stamp value, average value of land can also be taken into consideration as a relevant factor for calculating market value, but, with appropriate deduction in the given facts and circumstance of the case.

83. Relying upon the pronouncement of the apex Court in case titled **U.P. State Industrial Development Corpn. Ltd. versus Shakti Bhatta Udyog and others,** reported in **(2004) 8 Supreme Court Cases 70,** learned counsel for the land owners/claimants have canvassed that land owners are entitled for notional increase for better quality of land as the land involved in sale deeds No. 12/2005 and 13/2005 is of inferior quality. Plea of land owners is not sustainable as uniform rate for all kinds of land is being awarded on account of common purpose for which land has been acquired.

84. Further reliance has been placed upon apex Court judgment in case titled **Chindha Fakira Patil (dead) through LRs versus Special Land Acquisition Officer, Jalgaon,** reported in **(2011) 10 Supreme Court Cases 787,** wherein after considering previous pronouncements of the apex Court in *M. Vijayalakshmamma Rao Bahadur versus Collector of Madras, (1969) 1 MLJ 45 (SC); State of Punjab versus Hans Raj, (1994) 5 SCC 734; Anjani Molu Dessai versus State of Goa, (2010) 13 SCC 710,* instead of awarding compensation on the basis of average sale price of transactions, sale deeds representing the highest value were preferred for awarding the compensation.

85. Judgment of the apex Court in case titled **Mehrawal Khewaji Trust (Registered) Faridkot and others versus State of Punjab and others,** reported in **(2012) 5 Supreme Court Cases 432,** has also been relied upon in support of the claim for highest price arrived at in Ex. PW-7/A.

86. No doubt, in above referred pronouncements in **U.P. State Industrial Development Corpn. Ltd., Chindha Fakira Patil, Mehrawal Khewaji Trust (Registered) Faridkot's cases (supra),** the sale deeds having the highest value were taken into consideration by the apex Court, but, in present cases, sale deed No. 365/2004 is depicting highest value, i.e. ₹ 2631.57 per centiare.

87. Further, in **U.P. State Industrial Development Corpn. Ltd.'s case (supra),** the higher rate of market value of the land was fixed on the basis of proved superiority of the land in question, both in location and quality, whereas, in present appeals, different kind of land is involved and when uniform rate is to be determined for a land to be acquired for common purpose, the value of land cannot be determined as calculated on the basis of nature and classification of the land.

88. In **Chindha Fakira Patil's case (supra),** the average sale price of transactions was discarded for the reason that the average sale price of the transactions relied upon by the respondent therein was far less than the price for which land was sold in the exemplar sale deed relied upon by the claimants.

89. In **Mehrawal Khewaji Trust (Registered) Faridkot's case (supra),** the highest value fetched by the similar land in the locality in a bonafide transaction was made

basis for awarding compensation with the observation that it is not desirable to take an average of various sale deeds placed before the authority/Court for fixing fair compensation. In this case also, the highest value of sale deed out of the sale deeds pertaining to different transactions relied upon on behalf of the Government was preferred.

90. Judgment passed by this Court in **RFA No. 531 of 2012,** titled **Sukh Dev Singh versus The Land Acquisition Collector Kol Dam and another,** decided on 24th March, 2018, has been referred for claiming highest rate of ₹ 4809.08 per centiare on the basis of average value Ex. PW-7/A.

91. Average value arrived at in Ex. PW-7/A is not the highest value awarded by the Collector. The Collector has awarded the highest value of land at the rate of ₹ 821/- per centiare in present case and highest average value is also ₹ 1026/- per centiare, which is not acceptable to the land owners/claimants whereas in RFA No. 531 of 2012, highest rate awarded by the Collector was made basis for awarding the compensation. Hence, the said judgment is not applicable in present case.

92. In present case, as per relevant sale deeds of village Hatkoti, as relied upon by the Collector, the value of land would be ₹ 755.14 per centiare, which again will be giving erroneous value for the reason that the land under acquisition is not of only one category, i.e. banjar kadeem, as involved in those sale deeds, but, varies from banjar kadeem to kiar awal. In view of procedure to be adopted, provided under the Standing Orders and also for the reason that value of land cannot be determined solely on the basis of sale deeds, considered by the Collector in its award ignoring other factors. Further, value of land on the basis of these sale deeds would be less than highest value awarded by the Collector. Therefore, on the basis of plea for awarding compensation on the basis of highest value of sale deed, value of land, as per sale deed No. 365/2004, becomes ₹ 2631.57 per centiare.

93. Reliance has been placed by the project proponent on the judgment of the apex Court in case titled **Lal Chand versus Union of India and another,** reported in **(2009) 15 Supreme Court Cases 769,** wherein, in absence of evidence of vendors and vendees of documents related to sale instances, average of these transactions with appropriate deductions towards development factor has been taken into consideration.

94. Learned counsel for the project proponent has relied upon **Lal Chand's case (supra); State of Madhya Pradesh and others versus Kashiram (dead) by LR and others,** reported in **(2010) 14 Supreme Court Cases 506; Haridwar Development Authority versus Raghubir Singh and others,** reported in **(2010) 11 Supreme Court Cases 581; Kolkata Metropolitan Development Authority versus Gobinda Chandra Makal and another,** reported in **(2011) 9 Supreme Court Cases 207; Executive Engineer (Electrical), Karnataka Power Transmission Corporation Limited (earlier Karnataka Electricity Board) versus Assistant Commissioner and Land Acquisition Officer, Gadag and others,** reported in **(2010) 15 Supreme Court Cases 60;** and **Indian Council of Medical Research versus T.N. Sanikop and another,** reported in **(2014) 16 Supreme Court Cases 274,** to insist deduction from the highest value of the land on account of development charges.

95. Reliance has also been placed by the learned counsel for the project proponent on the pronouncement of the apex Court in cases titled **Land Acquisition Officer & Sub-Collector, Gadwal versus Sreelatha Bhoopal (Smt) and another,** reported in **(1997) 9 Supreme Court Cases 628; Haryana State Agricultural Market Board's case (supra)** and **Bijender and others versus State of Haryana and another,** reported in **(2018) 11 Supreme Court Cases 180,** to substantiate the plea that deduction from the value arrived

at on the basis of transactions of smaller plots is necessary for determining the actual value of large block of land.

96. Relying upon the pronouncements in cases titled **Hasanali Khanbhai & Sons versus State of Gujarat,** reported in **(1995) 5 Supreme Court Cases 422; Land Acquisition Officer versus Nookala Rajamallu,** reported in **(2003) 12 Supreme Court Cases 334; Viluben Jhalejar Contractor (dead) by LRs versus State of Gujarat,** reported in **(2005) 4 Supreme Court Cases 789** (para 31); **Nelson Fernandes versus Land Acquisition Officer,** reported in **(2005) 4 Supreme Court Cases 789 (para 30); C.R. Nagaraja Shetty (2) versus Land Acquisition Officer,** reported in **(2009) 11 Supreme Court Cases 75** (para 15); **Himmat Singh and others versus State of Madhya Pradesh and another,** reported in **(2013) 16 Supreme Court Cases 392** (paras No. 34 & 35); **Land Acquisition Collector and others versus Jeet Ram,** reported in **Latest HLJ 2014 (HP) Suppl. 225; Peerappa Hanmantha Harijan (dead) by Legal Representatives and others versus State of Karnataka and another,** reported in **(2015) 10 Supreme Court Cases 469** (para 81); and **Bhikulal Kedarmal Goenka (D) By LRs versus State of Maharashtra & anr.,** reported in **2017 (2) Him. L.R. (SC) 635,** it is canvassed that as the area under acquisition is to be submerged in the dam, there was no question of any activity for development to be carried out by the project proponent and thus, in absence of any activity of development to be undertaken by the project proponent, there should not be any deduction from the highest value of land arrived at in Ex. PW-7/A.

97. So far as deduction on account of development charges is concerned, that is not applicable in present case. So far as deduction on account of small area involved in sale deeds No. 12/2005 and 13/2005 is concerned, it is a fact that for arriving at the value determined in Ex. PW-7/A, sale deeds No. 12/2005 and 13/2005, which have also been taken into consideration by the Collector, while passing the award and have also been relied upon by the project proponent in average value Ex. RW-1/B, small area of land is involved, which is 0-01-78 hectares and 0-00-65 hectares, but, at the same time, it is also a matter of fact that the value of the land has not been determined only on the basis of the value arrived at in these transactions, but, the same has been determined by applying factor of classification of land as per value thereof according to method to be adopted by the revenue authorities. Further, at the time of taking into consideration a circle rate for determining the market value, the apex Court has also permitted deduction upto the rate of 45%. For these reasons, it would be proper to calculate the market value of acquired land on the basis of value arrived at in Ex. PW-7/A and/or Ex. RW-1/B, as calculated after excluding sale deed No. 309/2004, but, after making appropriate deduction. Dedection is also necessary as this average value arrived at without considering other relevant factors necessary to be considered, cannot be fair and just market value of land.

98. Learned counsel for the land owners have also relied upon **LAC Parvati Hydro Electric Project versus Jeet Ram and others,** reported in **2018 (1) Shim.L.C. 402,** for substantiating their plea for claiming compensation on the basis of highest value of average Ex. PW-7/A. In the said judgment, average value of land was not in question, but, issue of calculation of amount of compensation of structures, on the basis of two evaluation reports, was in issue. Therefore, reference of this judgment in present case is misconceived. Similarly, judgment in **RFA No. 251 of 2010,** titled **The Himachal Pradesh State Electricity Board versus Smt. Nardu and others,** decided on 30th October, 2017, alongwith other connected matters, referred for insisting no deduction on account of small chunk of land involved in the sale deeds No. 12/2005 and 13/2005, is also of no help to the land owners for the reason that in the said judgment, deduction of 25% was made on account of small chunk involved in the exemplar sale deed for want of evidence with respect to proximity and same potential. Facts in the present case are different. Value of the land

in sale deeds No. 12/2005 and 13/2005, as it is, is not acceptable to the land owners as it is giving value of land, at the most, at the rate of ₹ 775 per centiare and rightly so, the said value is lesser than the highest value determined by the Collector at the rate of ₹ 821.44 per centiare. Therefore, this judgment is also not relevant in present case.

99. In **Viluben Jhalejar Contractor** and **Himmat Singh's cases (supra)** also, for smallness of the plots involved in sale deed, appropriate deduction was approved for determining value of land for awarding compensation. The fact that value of land arrived at relying upon Ex. PW-7/A is not value of land determined directly on the basis of sale deed but applying method as adopted by revenue authority. Deduction for smallness of plot has been permitted up to one third of value arrived at. But, in present case, value on the basis of sale deeds No. 12 and 13 of 2005 would be ₹ 755.14 per centiare for banjar kadeem whereas in Ex. PW-7/A, highest value of the land is ₹ 4809.09. In **Himmat Singh's case (supra),** 50% deduction was permitted on account of smallness of the plot. But, in present case, facts are different.

100. The Reference Court has determined value of the acquired land at the rate of ₹ 3038/- per centiare after calculating the average of value of land determined in average Ex. PW-7/A. The said value comes at about 36.82% less than the highest value of ₹ 4809/- calculated in average Ex. PW-7/A. In **Haryana State Agricultural Market Board's case (supra),** the apex Court had determined the value of land after deducting 45% from the value of property arrived at on the basis of circle rate. As discussed supra, the average value, in present case, is not a value like circle rate calculated for stamp purpose only, however, the fact remains that the said average value has been arrived at on the basis of sale deeds pertaining to small chunks of land without survey and application of expert mind, but, in mechanical manner, wherein the land of quality of banjar kadeem was transferred, average value whereof is ₹ 755.14 per centiare. The said value has not been taken to be a benchmark as the Collector itself, who, despite having considered an irrelevant sale deed of much lesser value, has determined the highest average value at the rate of ₹ 1026/- per centiare and then has determined actual value of land at the rate of ₹ 821.44 per centiare. The said amount is having huge difference to the highest value of ₹ 4809/- per centiare, as calculated in one year average Ex. PW-7/A. On the basis of calculation of Ex. RW-1/A, after excluding sale deed No. 309/2004, highest average value of land becomes at the rate of ₹ 4914/- per centiare.

101. Considering entire facts and circumstances and evidence, in case 45% deduction is made in the highest value of ₹ 4914/-, then value of land will be at the rate of ₹ 2702/- per centiare, which is slightly higher than highest sale deed No. 365/2004. On deduction at the rate of 50%, it would be ₹ 2457/-, which is lesser than highest value in exemplar sale deed No. 365/2004. Mean of these two values will be ₹ 2579/-, which is again less than the value arrived at on the basis of sale deed No. 365 of 2004. The value of land at the rate of ₹ 2702/- per centiare, arrived at after deduction of 45% is ₹ 4914/-, is slightly higher than the value of land at the rate of ₹ 2631/- per centiare arrived at on the basis of highest sale deed No. 365/2004, appears to be just and fair value of land. Therefore, it would be appropriate to determine value of acquired land at the rate of ₹ 2700/- per centiare.

102. In view of above discussion, land owners in appeals in Lots 'A' and 'B' are held entitled for compensation at the rate of ₹ 2700/- per centiare alongwith consequential statutory benefits under the law.

103. The notification under Section 4 of the Act in appeals in Lot 'C' was issued three years later than the notification issued in appeals in Lots 'A' and 'B'. Therefore, in those appeals, land owners are entitled for addition at the rate of 12% to the value of the

land determined in appeals in Lots 'A' and 'B'. Hence, they are held entitled for compensation on the basis of value of land at the rate of ₹ 3024/- per centiare alongwith consequential statutory benefits under the law.

104. Respective awards passed by the Reference Court are modified in aforesaid terms.

105. Accordingly, all appeals are allowed and cross-objections are dismissed in aforesaid terms. No order as to costs.

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

Oriental Insurance Company Limited ..Appellant
Versus
Vinod Kumar and others ..Respondents

FAO(MVA) No. 262 of 2018
Decided on: October 22, 2018.

Motor Vehicles Act, 1988- Sections 149 and 166- Motor Accident – Claim application – Defences of insurer - Claims Tribunal granting compensation to injured and burdening liability on insurer – Appeal by Insurance Company – Insurer arguing that driver of offending vehicle was possessing 'Learner licence" only and at time of accident, no instructor was accompanying him – Insurer however not leading any evidence whatsoever to prove plea – Held, onus to prove breach of conditions regarding driving licence was on insurer – And in absence of any evidence, it can not be held that vehicle was being plied in breach of conditions- Appeal dismissed – Award upheld. (Paras-9 & 10).

Case referred:
National Insurance Company Limited vs. Swaran Singh, AIR 2004 (SC) 1531

For the Appellant : Dr. L.K. Sharma, Advocate.
For the Respondents : Mr. Devender K. Sharma, Advocate, for respondent No.1 and 2.
Mr. D.N. Sharma, Advocate, for respondent No.3.
Mr. Divya Raj Singh, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

On the joint request of the learned counsel representing the parties, who stated that keeping in view the controversy involved in the appeal, same may be disposed of at pre-admission stage, appeal was taken up for hearing and is being disposed of at pre-admission stage.

2. By way of present appeal having been filed under S. 173 of Motor Vehicles Act, challenge has been laid to the award dated 21.9.2017 passed by the learned MACT. (III) Una, District, Una, Himachal Pradesh in M.A.C. Petition No. 103/2014 titled Vinod Kumar and another vs. Bihari Lal and other, whereby learned Tribunal below, held respondents

No.1 and 2-claimants (hereinafter, 'claimants') entitled to compensation to the tune of Rs. 1,50,346/- alongwith interest at the rate of 9% per annum from the date of filing of the petition till its realization. Vide aforesaid award, learned Tribunal below has saddled the liability upon the appellant-Insurance Company, hence, this appeal by the appellant-Insurance Company.

3. Facts, as emerge from the record are that the claimants preferred a claim petition under S. 166 of the Motor Vehicles Act, seeking therein compensation on account of injuries suffered by them in a motor vehicle accident, alleging therein that on 5.5.2013, claimants were coming from Bhanjal to Gagret on Scooter Eterno bearing registration No. HP-19A-1245 and when they reached near Bhanjal, a motorcycle bearing registration No. HP-37A-6277, being driven by respondent No. 3, Bihari Lal came in a high speed and hit their scooter, as a consequence of which, they suffered injuries. Injured were taken to CHC Amb, from where they were referred to Government Medical College and Hospital, Sector 32, Chandigarh. Claimant No.2, Akash remained admitted with effect from 6.5.2013 to 9.5.2013 and during this period, he was operated upon. Claimant No.1 claimed that he spent a sum of Rs. 1.00 lakh on the medical treatment, conveyances and medical expenses on claimant No.2. He also claimed that he was also admitted in CHC Gagret, on account of multiple injuries suffered by him in the accident and in this process, he spent approximately Rs. 30,000/- for his medical treatment.

4. Aforesaid claim petition having been filed by claimants, came to be contested by respondents No. 3 to 5 and present appellant-Insurance Company, by way of filing separate replies. Respondent No.3 Bihari Lal, while admitting factum with regard to accident, denied the allegation of his driving the vehicle rashly and negligently. He claimed before the learned Tribunal below that accident took place due to rash and negligent driving on the part of claimant No.1. Respondent No.4 herein, Sanjeev Kumar claimed that he had sold the motor cycle much prior to the accident. Present appellant-Insurance Company refuted the claim of the claimants on the ground that driver of the motor cycle bearing registration No. HP-37A-6277 was not having a valid and effective driving licence to drive the type of vehicle involved in the accident and as such, it is not liable to indemnify the insured. Appellant-Insurance Company also claimed that since the vehicle in question was being plied in contravention of the terms and conditions of the insurance policy, it could not have been saddled with any liability. Apart from above, appellant-Insurance Company also claimed before the learned Tribunal below that since registered owner had sold the vehicle to one Farooq Mohd., respondent No.5 vide affidavit dated 28.5.2011, he ought to have been impleaded as party respondent. Appellant-Insurance Company further claimed that the number of driving licence was not supplied despite an application to this effect, which clearly proves on record that respondent No.3, Bihari Lal was not having a valid and effective driving licence. Insurance Company also alleged that owner, driver and insurer of Scooter No. HP-19A-1245 (scooter of the claimants), were also required to be impleaded as parties but in the instant case, neither the documents of the same were taken into possession by the police, nor any detail was ever furnished to the appellant-Insurance Company to enable it to verify the genuineness and correctness of the same.

5. On the pleadings of the parties, learned Tribunal below framed following issues:

"1. Whether the petitioners suffered injuries on account of rash and negligent driving of respondent No.1, while driving motorcycle No. HP-37A-6277? OPP

2. If issue No. 1 is proved in affirmative to what amount of compensation, the petitioners are entitled to and from whom? OPP

3. Whether the driver of the offending vehicle was not having valid and effective driving licence as alleged? OPR-3

4. Whether the offending vehicle was being driven in breach of provisions of Motor Vehicles Act 1988 as alleged? OPR-3

5. Whether the petition is bad for non-joinder of owner and insurer of scooter No.HP-19A-1245? OPR

6. Relief"

6. Subsequently, the learned Tribunal below, vide impugned award dated 21.9.2017, held claimants entitled to compensation to the tune of Rs. 1,50,346/-, to be paid by the appellant-Insurance Company alongwith interest at the rate of 9% per annum, from the date of filing of the petition till its realization. In the aforesaid background, appellant-Insurance Company has approached this court, in the instant proceedings, praying therein for setting aside the impugned award passed by learned Tribunal below, in as much as it has been saddled with the amount of compensation.

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

8. Having carefully perused the record vis-à-vis impugned award, this court finds that onus to prove the issue, "*whether the driver of the offending vehicle was not having valid* and effective driving licence as alleged?" was upon the appellant-Insurance Company but the evidence on record clearly suggests that the appellant-Insurance Company was not able to discharge aforesaid onus, as such, issue rightly came to be decided against it. Similarly, this court finds that there is no evidence led on record by the appellant-Insurance Company that the offending vehicle was being driven in breach of the provisions of Motor Vehicles Act. In nutshell, case as projected before this court by the learned counsel representing the appellant-Insurance Company is that appellant-Insurance Company could not be saddled with the compensation on account of injuries suffered by claimants involving offending vehicle being driven by respondent No.3 because on the ill-fated day, respondent No.3 was only having a learner's licence to drive the vehicle. Aforesaid argument having been made by the learned counsel representing the appellant-Insurance Company, deserves to be rejected in view of law laid down by Hon'ble Apex Court in **National Insurance Company Limited** vs. **Swaran Singh**, AIR 2004 (SC) 1531, which has been otherwise taken note by the learned Tribunal below. In the aforesaid judgment, Hon'ble Apex Court has categorically held that breach of policy conditions i.e. disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of S. 149, has to be proved by leading cogent and convincing evidence. Mere absence or fake or invalid driving licence or disqualification of driver for driving the vehicle at the relevant time, are not the defences available to the insurance company against the insured or third party.

9. In the case at hand, it is not in dispute, rather is admitted fact that at the relevant time, respondent No.3, driver of offending vehicle was having learner licence, Ext. RW-3/A. As has been observed herein above, no cogent and convincing evidence has been led on record by appellant-Insurance Company to suggests that at the time of accident, respondent No. 3/driver of the offending vehicle was not having any kind of licence. Another contention of the learned counsel representing the appellant-Insurance Company that since nothing has come in the evidence that at the time of accident, driver of the offending vehicle, who was having learner licence to drive the vehicle, was accompanied by an instructor, learned Tribunal below ought not have placed reliance upon the judgment rendered by Hon'ble Apex Court in Swaran Singh (supra), while holding claimants entitled to compensation, also deserves rejection, because, there is nothing placed on record by

appellant-Insurance Company to substantiate aforesaid argument that person having learner licence is/was required to be accompanied by an instructor.

10. Leaving everything aside, Hon'ble Apex Court in Swaran Singh (supra) has categorically laid down that mere absence, fake or invalid driving licence or disqualification of the driver to drive at the relevant time, can not be a ground available to the insurer against insured or third party. Another argument raised by the learned counsel representing the appellant-Insurance Company that since no positive evidence was led on record by owner of the offending vehicle that at the time of accident, driver of the vehicle, who was having learners licence, was being accompanied by an instructor and there was display of mark, "L" on the offending vehicle showing that the vehicle is being driven by a person having a learner's licence, learned Tribunal below ought not have saddled the appellant-Insurance Company with the liability, rather, liability, if any, ought to have been imposed upon owner of the offending vehicle, can not be accepted because onus to prove that driver of offending vehicle was not having a valid and effective driving licence and vehicle was being driven in breach of provisions of Motor Vehicles Act, was upon the appellant-Insurance Company. Evidence, if any, with regard to breach of terms and conditions insurance policy as well as Motor Vehicles Rules, was to be led on record by the appellant-Insurance Company and not by the owner of the offending vehicle.

11. Consequently, in view of the detailed discussion made herein above, this court finds no occasion to interfere with the award passed by the learned Tribunal below, which deserves to be upheld. Resultantly, appeal is dismissed being without any merits.

Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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

State of H.P. .....Appellant
Versus
Vinay Chandla and Anr. .....Accused/Respondents.

Cr. Appeal No. 220 of 2008
Date of Decision: 22.10.2018.

Indian Penal Code, 1860- Sections 186, 353, 332 read with 34 – Assault on public servant – Meaning – Held, in order to constitute offence assault must have taken place when complainant was acting as such a public servant. (Para-7).

Indian Penal Code, 1860- Sections 186, 353, 332 read with 34- Assault on police officer by accused when he asked them not to park their vehicle in No Parking Zone – Acquittal by Trial Court – Appeal against– State raising plea of non-appreciation of evidence by trial court – On facts, High Court found that (a) name of complainant police officer inserted in between two entries in duty register, (b) other police officers on patrol and traffic duty alongwith complainant, not associated in investigation, (c) complaint of accused made against complainant never investigated and (d) no investigation carried out whether accused had a permit to take their vehicle to Sealed Area – Acquittal recorded by Trial Court upheld – Appeal dismissed. (Paras- 9 to 10).

For the appellant: Mr. Shivpal Manhans, Mr. S.C. Sharma, Dinesh Thakur and

Mr. Sanjeev Sood, Additional Advocate Generals.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal appeal filed under Section 378 of the Cr.PC., is directed against the impugned judgment of acquittal dated 27.11.2007, passed by the learned Judicial Magistrate, Ist Class, Shimla, District Shimla, H.P., in Cr. Case No. RBT 50/2 of 2006/02, whereby the respondents-accused came to be acquitted of the offences punishable under Sections 353, 332 and 186 read with Section 34 of the IPC.

2. Briefly stated facts as emerge from the record are that on 10.1.2002, HC Jia Lal got his statement recorded under Section 154 CrPC, alleging therein that on 10.1.2002, at about 11:40 am, when he was on duty wearing traffic uniform at D.C. Office, Shimla, one Maruti Van bearing No. HP-03-3018, came from command side with two persons. Since occupants/accused tried to park their vehicle in the no-parking zone, complainant asked them to take their vehicle back, but accused instead of following the instructions of the complainant, made an attempt to give beatings to the complainant. Complainant also alleged that other accused namely Janender Nath Chandla after parking the vehicle also came there and started abusing him. Allegedly, complainant was rescued by persons namely Prem Singh and constable Ramesh Kumar from the clutches of the accused. Since accused made an attempt to obstruct the complainant from discharging his official duties, he, by way of aforesaid complaint, prayed that case be registered against both the accused. On the basis of aforesaid statement recorded under Section 154 Cr.PC, FIR Ext.PW6/A came to be registered against the accused persons. Police after completion of investigation presented challan in the competent court of law, who on being satisfied that prima-facie case exists against the respondents-accused charged them for having committed offence punishable under Section 353 read with Section 134 of the IPC, to which they pleaded not guilty and claimed trial.

3. Learned trial Court on the basis of evidence adduced on record by the prosecution held the accused not guilty of having committed offences punishable under aforesaid provisions of law and accordingly, acquitted them vide judgment dated 27.11.2007. In the aforesaid background, being aggrieved and dis-satisfied with the aforesaid judgment of acquittal recorded by the court below, appellant-State has approached this Court by way of instant proceedings, seeking therein conviction of the respondent-accused after setting aside the judgment of acquittal recorded by the court below.

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

5. Having carefully perused evidence, be it ocular or documentary, led on record by the prosecution vis-à-vis impugned judgment of acquittal recorded by the court below, this Court is not persuaded to agree with contention of Mr. Shivpal Manhans, learned Additional Advocate General, that court below has not appreciated the evidence in its right perspective, rather this Court is convinced and satisfied that the court below while ascertaining the guilt, if any, of the accused, has dealt with each and every aspect of the matter meticulously and there is no illegality and infirmity in the finding recorded by the court below. It is admitted case of the prosecution that alleged incident took place at 11:40 am, near D.C. Office, Shimla and many people had gathered there. PW1 HC Prem Singh and PW4 Jiya Lal, complainant, categorically deposed before the court below that many

people had gathered at the time of alleged incident, but only one independent witness came to be associated by the prosecution i.e. PW2 Rajinder Kumar, who also not supported the case of prosecution. Rajinder Kumar PW2 feigned ignorance with regard to the alleged incident. He in his statement categorically deposed that nothing happened in his presence. Though he was declared hostile, but even cross-examination conducted upon him nowhere suggests that proseuciton was able to shatter his testimony. He in his cross-examination specifically denied that on 10.1.2006, he was at mall road. He also denied suggestion put to him that there was exchange of hot words between the accused and HC Jiya Lal. He further denied suggestion put to him that one of the accused had assaulted Jiya Lal complainant, while he was discharging his official duties.

6. True it is that in the instant case, official witnesses PW1 Prem Singh and complainant (PW4) Jiya Lal had corroborated the version of each other, but since it has specifically come in their statement that aforesaid incident was seen by independent witnesses i.e.PW2 Rajinder Singh, statement, if any, made by PW2, gains importance and as such, cannot be ignored. PW1 HC Prem Singh stated that in the year, 2002 he was posted as temporary driver with SP office, Shimla and on 10.1.2002, he had parked the vehicle in question near CTO. He further stated that HC Jiya Lal was on traffic duty at that time and checking the vehicles. It has also come in his statement that at about 11:40 am, one Maruti Car bearing No. HP -03-3018, , came from command side with two persons. HC Jiya Lal stopped them from parking their vehicle below the police Gumti, but one of the occupant of the vehicle took the vehicle away, whereas other person started asking how the other vehicles were parked there. He further stated that in the meantime, driver of the vehicle also reached there and started manhandling HC Jiya Lal. He also deposed that he along with constable Ramesh rescued HC Jiya Lal and many people had gathered on the spot. It has also come in his statement that person namely Desh Raj and Rajinder were also present on the spot, but if the statement having been made by the this witness is perused juxtaposing the statement of PW2 Rajinder Kumar, it totally destroys the case of the prosecution because PW2 Rajinder Kumar nowhere stated that persons namely Deshraj and Rajinder were also present on the spot. PW1 HC Prem Singh in his examination-in-chief deposed that accused person had threatened HC Jiya Lal, but in his cross-examination he admitted that incident took place near CTO from where one path leads to mall road and other to the lower bazaar.

7. Leaving everything aside, very presence of HC Jiya Lal i.e.complainant on the spot is itself doubtful. PW5 Constable Hari Krishan while proving on record Ext.PW 5/A and Ext.PW5/B categorically deposed that on 10.1.2002, HC Jiya Lal was on duty from 8:00am to 8:00 pm near DC Office, Shimla. He also admitted in cross-examination that name of the complainant Jiya Lal was inserted between Sr. No. 11 and 12 in the duty register. It has also come in his cross-examination that HHC Bal Mukund and constable Parveen Kumar was on duty with HC Jiya Lal on that day but for the reasons best known to the prosecution, these officials never came to be examined by the prosecution, who could be the material prosecution witnesses to the alleged incident. Since it has specifically come in the statement of Hari Krishan that name of the complainant was inserted between Sr. No. 11 and 12 in the duty register, learned court below while ascertaining the guilt, if any, of the accused rightly observed that in view of the specific stand taken by the accused that they had gone to lodge report with the police with regard to misbehavior of HC Jiya Lal, their statement cannot be ignored, rather needs to be scrutinized minutely. If the statement of PW5 Hari Krishan, who is an official witness, is taken to be correct, it suggests that HC Jia Lal was actually not performing his duty at CTO point, the Mall, at that relevant time, rather his name subsequently came to be inserted in the duty register that too with a view to save him on account of complaint having been lodged against him by the accused. Perusal of

Ext.D/A suggests that statement of both the accused with regard to the alleged misbehavior of HC Jiya Lal was also recorded at 3:30 pm, but PW9 Jagdish Ram categorically admitted in his cross-examination that he had not made any attempt to investigate the matter from Smt. Harinder, lady named by the accused in their rapat.

8. Careful perusal of Ext.DA suggests that at the time of alleged incident, lady namely Smt. Harinder was also present but no attempt, if any, was ever made by the Investigating Agency to associate that lady to ascertain the factum, if any, with regard to the misbehavior of the HC Jiya Lal with the accused. PW9 Inspector Jagdish Ram feigned ignorance whether complainant had abused the accused persons. He failed to state whether complainant misbehaved with the accused. He also admitted in his cross-examination that he had not tried to ascertain whether vehicle was having permit of DC office or not. Most importantly, it has come in his statement that vehicle was not challaned on that day. It is not understood that if vehicle was being parked unauthorisedly on the restricted/sealed road by the accused, what prevented HC Jia Lal (complainant) from challaning the vehicle, meaning thereby, false story came to be concocted by HC Jiya Lal after lodging of complaint by the accused with regard to the misbehavior of HC Jiya Lal at 3:30 pm on 10.1.2002.

9. True, it is that testimony of official witnesses cannot be brushed aside solely on the ground of non-association of independent witnesses, but in the instant case, independent witnesses associated by the prosecution have not supported the story of prosecution, rather he has denied the case of the proseuciton in toto. Even if the statement of official witnesses are read juxtaposing each other, it creates doubt with regard to the correctness of the story put forth by the prosecution and as such, learned court below rightly held the accused not guilty of having committed offences.

10. Consequently, in view of the detailed discussion made herein above, 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. Consequently, the appeal is dismissed being devoid of any merits.

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

Duncan Glen Smith .....Petitioner
Versus
State of H.P. .....Respondent

Cr.MMO No. 416 of 2018
Decided on: 23.10.2018.

Constitution of India, 1950- Article 21- **Code of Criminal Procedure, 1973-** Section 482- Fair trial-Scope – Special Judge dismissing application of accused seeking comparison by expert of signatures appended on Sample Seal with his specimen signatures – Petition against – Held, Accused should get fair chance to prove his innocence –Accused simply seeking comparison of his signatures by an expert - Petition allowed – Order of Special Judge set aside. (Paras-8 and 9)

Case referred:
V.K. Sasikala v. State (2012) 9 SCC 771

For the Petitioner : Mr. Prem P. Chauhan, Advocate.
For the Respondent : Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dis-satisfied with the passing of order dated 18.8.2018, whereby learned Special Judge-II Kullu, District Kullu, H.P., dismissed the application having been filed by the petitioner–accused (herein after referred to as the accused), praying therein for sending the sample seal Ext.PW7/B dated 18.4.2018, for comparison of the signature of the accused to some expert, accused has approached this Court in the instant proceedings filed under Section 482 Cr.PC.

2. Accused, who is behind bars since 18.3.2017, in case FIR No. 47/2017, dated 18.3.2017, under Sections 20 and 29 of NDPS Act registered at PS Kullu, H.P., filed an application in the court of learned Special Judge, Kullu, H.P., praying therein for sending the sample seal Ext.PW7/B dated 18.4.2018, for comparison of his signatures to some expert. He averred in the application that during trial, it transpired that sample seal Ext.PW7/B dated 18.4.2018, is not signed by him, whereas I.O. in his statement recorded before the court below, claimed that accused had appended his signature on the sample seal. Accused, also claimed before the court below that Investigating Officer pressurized him to append his signature on Ext.PW7/B, in the police station. In the aforesaid background, accused prayed before the court below that for fair and just adjudication of the case, comparison of signature of the accused on the sample seal Ext.PW7/B dated 18.4.2018, by an expert is necessary. Apart from above, accused also denied his signature upon Ext.PW7/B, while getting his statement recorded under Section 313 Cr.PC.

3. Aforesaid application came to be resisted and contested by the respondent-State, by way of written reply, wherein it specifically denied that signatures of the accused, were obtained by the Investigating Officer on the memo Ext.PW7/C, under coercion. Respondent claimed that signatures of the accused were obtained by the Investigating Officer on sample seal taken on separate piece of cloth on spot after sealing the contraband. Respondent also claimed that application has been moved at a belated stage to protract the trial and as such, there is no necessity for sending the signatures of the accused to the expert. Moreover, both the memos were signed by the accused at that relevant time on the spot.

4. Learned court below on the basis of aforesaid pleadings adduced on record by the respective parties, dismissed the application having been filed by the accused. Learned court while dismissing the application arrived at a conclusion that careful perusal of record reveals that signatures of the accused were obtained by the Investigating Officer on sample seal taken on separate piece of cloth on the spot after sealing the contraband. Learned court below further arrived at a conclusion that statement of the accused has already been recorded and case is fixed for defence evidence and at this stage, application having been filed by the accused cannot be allowed because same has been filed with sole motive to prolong the trial.

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

6. Application having been filed by the accused has been dismissed by the court below solely on the ground that same has been filed at a belated stage with a view to protract the trial, but it is not in dispute that accused is already behind the bars since 18.3.2017, and as such, this Court is in agreement with Mr. P.P. Chauhan, learned counsel for the petitioner-accused that accused would not gain anything by delaying the trial, rather, he would be happy and satisfied in case trial is concluded at the earliest.

7. Otherwise also, reasoning rendered by the court below while dismissing the application having been filed by the accused, does not appear to be plausible because court below has blindly accepted the statement of Investigating Officer, wherein he has stated that accused had appended his signature on memo Ext.PW7/B.

8. This Court further finds from the record that specific suggestion has been put to Investigating Officer by the defence that accused had not put his signature on memo Ext.PW7/B and as such, it cannot be said that application for sending the signature of the accused to the expert is an afterthought. Record further reveals that sole independent witness associated by the prosecution at the time of recovery has turned hostile. True it is that there are other spot witnesses, but this court is of the view that no prejudice, whatsoever, would be caused to the opposite party, in case prayer made in the application for sending the signatures of the accused for comparison to the expert is accepted, rather opinion, if any, rendered by the expert would be helpful and beneficial for the court below to arrive at just and fair decision of the case. Moreover, by now it is well settled that accused should get fair chance to prove his/her innocence, especially in a case, where he /she, if held guilty, would be served with severe punishment as is in the present case i.e. NDPS Act.

9. In the case at hand, admittedly, petitioner is facing trial for an offence, which may entail him punishment i.e. imprisonment for a minimum of ten years. By way of application, the accused is simply seeking comparison of his signatures by an expert, which according to the prosecution is not necessary, but it has been repeatedly held by the Hon'ble Apex Court as well as this court that in a criminal trial, prosecution has to be absolutely fair and impartial because main purpose of criminal trial is not to get someone convicted, rather its object is to discover truth and punish the accused, if found guilty. In ***V.K. Sasikala v. State (2012) 9 SCC 771***, Hon'ble Apex Court has held that courts must ensure fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also active role of the court in a criminal trial. In the aforesaid judgment, it has been categorically held that it is the responsibility of the investigating agency as well as of Court to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. (*See. Cr.MMO No. 484 of 2017 decided on 16.4.2018, titled as Ishwar Dass v. State of Himacahl Pradesh*)

10. Consequently, in view of the above, present petition is allowed and impugned order dated 18.8.2018, passed by the court below, is set-aside and court below is directed to send the specimen signature of the accused to the expert for getting the same compared with the alleged signatures of the accused on sample seal Ext.PW7/B. Petition stands disposed of, so also pending applications, if any.

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

Shri Duni Chand .....Petitioner

Versus

Sh. Budhi Prakash and another .....Respondents

CMPMO No. 283 of 2017
Decided on: October 23, 2018.

Code of Civil Procedure, 1908- Order XXXIX Rules 1 & 2- Temporary injunction – Grant of – Principles – Defendant leasing out his hotel to plaintiff for certain period subject to payment of Rs. One crore and deposit of electricity, water and garbage charges with authorities concerned –Plaintiff alleging forcible dispossession - Agreement however providing for automatic termination of lease in case of breach of terms – Plaintiff neither paying rent to lessor nor depositing charges of electricity, water etc. – Held, Plaintiff not entitled for temporary injunction against lessor – Order of lower Court upheld. (Paras-6 to 8).

For the petitioner Mr. R.L. Chaudhary, Advocate.
For the respondents Mr. V.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Present petition under Article 227 of the Constitution of India, is directed against the judgment dated 8.5.2017 passed by the learned District Judge, Kullu, District Kullu, H.P. in Civil Misc. Appeal No. 04/2017 affirming the order dated 17.12.2016 passed by the learned Civil Judge (Junior Division), Manali, District Kullu, Himachal Pradesh in CMA No. 99-vi/2016(Civil Suit No. 96/2016) titled as Duni Chand & another Versus Budhi Prakash and another, whereby application having been filed by the petitioner-plaintiff (hereinafter, 'plaintiff') under Order 39 Rules 1 and 2 CPC, for grant of interim injunction came to be dismissed.

2. For having a bird's eye view, the facts as emerge from the record are that the plaintiff filed a suit simpliciter for injunction restraining the respondent from dispossessing them forcibly from the Hotel in question, averring therein that the respondents are owners of the hotel "Morning Star", located at Village Simsa, Tehsil Manali, District Kullu, Himachal Pradesh. Plaintiff further averred that the hotel in question was leased out by the respondents in favour of the plaintiff for a period of three years with effect from 1.4.2016 to 31.3.2019 vide lease deed dated 7.1.2016. Possession of the hotel was delivered to the plaintiff immediately after execution of aforesaid lease deed. Plaintiff further averred that they paid lease amount to the respondents on yearly basis but despite that respondents were causing interference as well as dispossessing them from the aforesaid hotel during the pendency of the lease deed. Alongwith aforesaid suit, plaintiff also filed an application under Order 39 Rules 1 and 2 CPC, praying therein for grant of interim injunction restraining the respondents from dispossessing the plaintiff from the hotel during the pendency of the suit.

3. Aforesaid suit and application came to be resisted by the respondents by way of filing written statement to the suit and reply to the application. While admitting the factum with regard to leasing out of the hotel in question to the plaintiff on yearly basis, respondents claimed before the court below that yearly amount was settled at Rs. 23.50 Lakh, and during peak tourist season with effect from 1.4.2016 to 15.7.2016, plaintiff had run the hotel. Respondents further averred before the learned Court below that the plaintiff violated terms and conditions of the lease deed and committed fault in making payment to the respondents, as per agreed schedule and as such they were liable to be evicted from the premises during the subsistence of the lease deed. Respondents further claimed that the

plaintiff failed to pay electricity, water, garbage bills and luxury tax of the hotel, as a consequence of which, authorities concerned, initiated proceedings for disconnection of electricity and water connections on account of non-payment of dues. Respondents, further claimed that the plaintiff(s) had issued two cheques bearing No. 577970 dated 15.5.2016 amounting to Rs. 5,00,000 and No. 577871 dated 10.6.2016 amounting to Rs. 8.50 Lakh in favour of respondents towards discharge of aforesaid liability but both these cheques were dishonoured on account of insufficient funds in the account of plaintiff. Respondents specifically denied the allegations with regard to forcible dispossession of the plaintiff and claimed that plaintiffs themselves had abandoned the hotel.

4. Learned trial Court, on the basis of aforesaid pleadings as well as documentary evidence adduced on record by respective parties, dismissed the application under Order 39 Rules 1 and 2 CPC, filed by the plaintiffs, vide order dated 17.12.2016. Being aggrieved by order dated 17.12.2016 passed by learned trial Court, plaintiff preferred an appeal under Order 43 Rule 1 CPC, before the learned District Judge, Kullu, who, vide judgment dated 8.5.2017, dismissed the appeal, as a consequence of which, order dated 17.12.2016 passed by the learned trial Court came to be upheld. In the aforesaid background, plaintiff has approached this court in the instant proceedings, praying therein to allow the application filed under Order 39 Rules 1 and 2 CPC, after setting aside order and judgment passed by the learned Courts below.

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

6. Having carefully perused the material available on record vis-à-vis impugned judgment passed by learned District Judge, Kullu, this court is not persuaded to agree with the contention of the learned counsel representing the plaintiff that the learned Courts below have failed to appreciate the pleadings as well as documentary evidence adduced on record by respective parties, in right perspective, rather, this court is of the view that the learned Courts below have dealt with each and every aspect of the matter meticulously. Careful perusal of the record reveals that as per agreed terms, plaintiff was bound to deposit a sum of Rs. 10.00 Lakh on or before 15.5.2016, whereas, balance amount of Rs. 8,50,000/- was to be paid in the first week of June, 2016, but, as has been taken note above, two cheques issued by plaintiff for discharge of aforesaid liability were dishonoured. Careful perusal of the lease agreement clearly suggests that in the event of lessee failing in making payment within stipulated period, lessor is/was well within his right to take back the possession and lease is/was bound to be cancelled automatically. Careful perusal of order/judgment having been passed by learned Courts below clearly reveals that the plaintiff failed to place on record any document suggestive of the fact that they had actually made payment towards electricity and water charges. It appears that during the pendency of the appeal before the learned District Judge, plaintiff made an endeavour to place on record copies of certain documents, but those were rightly not taken into consideration because same were not sought to be placed on record by way of a proper application.

7. Leaving everything aside, once it stands duly proved on record that plaintiff failed to make payment as per agreed schedule, they have been rightly held not entitled for discretionary relief, especially when it stands specifically provided in the terms and conditions of lease deed that in the event of non-payment of lease amount, as per agreed terms, lease shall stand terminated automatically.

8. Consequently, in view of the detailed discussion made herein above, this court finds no illegality or infirmity in the judgment passed by learned District Judge, Kullu, which deserves to be upheld. Petition is dismissed being devoid of any merit. Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Lachhmi Singh .....Appellant.
Versus
Sohan Singh and others ... ..Respondents.

RFA No.154 of 2015.
Date of decision: 23rd October, 2018.

Land Acquisition Act, 1894- Sections 18 and 30- Reference-Dispute as to apportionment – Petitioner praying compensation of acquired land by claiming its ownership by way of oral sale and in alternative by adverse position – Disputing revenue entries showing respondent as owner of land – Reference Court declining plea of petitioner – RFA – In his evidence, petitioner taking stand of sale of land by way of written document contrary to his pleaded case - Pleadings found insufficient to raise plea of adverse possession- RFA dismissed– Award of District Judge upheld. (Paras-7 and 13 to 19).

Limitation Act, 1963- Articles 64 & 65- Adverse Possession - Proof– Held, who pleads adverse possession should be very clear about origin of title over property – Burden of proof on person who alleges his adverse possession particularly when opposite party has proved its title – Claimant must acknowledge and attorn to title of other party and thereafter lay foundation for his plea of adverse possession. (Paras-15 to 18)

Limitation Act, 1963- Articles 64 & 65- Adverse possession – Pleadings and proof- Petitioner simply averring that his possession is continuous peaceful in denial of title of respondents – However, no exact date of such possession set out in pleadings – Held, plea of adverse possession is of stereo-type – Mere long possession not enough to prove plea of adverse possession and it does not result in conversion of peaceful possession into adverse possession. (Para-10)

Cases referred:

M. Chinnasamy versus K.C. Palanisamy and others (2004) 6 SCC 341
P. Periasami vs. P. Periathambi (1995) 6 SCC 523
Karnataka Board of Wakf vs. Government of India and others (2004) 10 SCC 779
Md. Mohammad Ali v. Jagadish Kalita (2004) 1 SCC 271
P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 59

For the Appellant : Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashisht, Advocate.
For the Respondents: Mr. Virender Singh Chauhan, Advocate, for respondents No.1 to 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Aggrieved by the award passed by the learned Additional District Judge (I), Shimla, Camp at Rohru, on 21.03.2015, whereby the application for making reference under

Section 30 of the Land Acquisition Act (for short the 'Act') came to be dismissed, the appellant has filed the instant appeal.

2. Brief facts are that award bearing No.579 dated 31.05.2006 came to be passed by the Collector for the acquisition of land for the construction of drift to Chirgaon Majhagaon Project in Village Peja Chirgaon,District Shimla. However, the payment of amount of compensation was with-held till the title of the acquired land was cleared. The appellant claimed himself to be the owner of Khasra No.1475/1 and in possession of Khasra Nos.1468/1 and 1471/1. As regards Khasra No.1471/1, the appellant claimed to have purchased the same. However, as regards Khasra No.1468/1, it was claimed that this Khasra Number is recorded under the ownership of respondents, but has remained in exclusive possession of the appellant as per revenue records and the possession of the appellant is also recorded in the order dated 24.02.1987 passed by the Assistant Collector 2nd Grade. The said Khasra Number was sold by the predecessor of the respondents to the appellant through oral sale, but it could not be reflected in the revenue records due to inadvertence. It was further contended that even otherwise the appellant has remained in peaceful and un-interrupted possession after the oral sale which ripened into ownership by way of adverse possession and, therefore, he was entitled to the entire compensation of the aforesaid Khasra Number i.e. Khasra No.1468/1.

3. The respondents contested the application on the ground of maintainability. It was pleaded that they were in possession of the land and the present application was rather time barred. The appellant taking undue advantage of the wrong revenue entries was un-necessarily trying to lay claim over the land in question and further that no order was passed by the Assistant Collector on 24.02.1987, as alleged.

4. Out of the pleadings of the parties, the reference Court on 18.03.2009 framed the following issues:-

> "1. Whether the petitioner is entitled to the entire compensation of the acquired land? OPP.
>
> 2. Whether the petition is not maintainable as alleged? OPR.
>
> 3. Whether the petition is time barred? OPR.
>
> 4. Whether the petition is bad for non-joinder of necessary parties? OPR.
>
> 5. Relief."

5. After recording evidence and evaluating the same, the reference petition came to be rejected, constraining the appellant to file the instant appeal.

6. It is vehemently argued by Shri Ajay Kumar, Senior Advocate, assisted by Shri Dheeraj K. Vashisht, Advocate, for the appellant that the findings recorded by the learned reference Court are perverse and, therefore, liable to be set aside. Whereas, Shri Virender Singh Chauhan, learned counsel for respondents No.1 to 6, would contend that since the claim raised by the appellant was apparently false, therefore, the same has rightly been rejected by the learned reference Court.

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

8. At the outset, it may be observed that the specific plea of the appellant in the reference petition filed under Section 30 of the Act was to the effect that it was by virtue of oral sale that he had become owner of the suit land. However, while appearing as a witness, he stated on oath that he is coming in possession of Khasra No. 1468/1 since 1985 and said Khasra Number was purchased by him from Chatter Singh through written

agreement Mark X. The land was also sold to him by Ram Dass vide written agreement Mark Y and thus the evidence so led by the appellant is at complete variance with the pleadings and by now it is well settled principle of law that the evidence which is beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. (Refer: ***M. Chinnasamy*** *versus* ***K.C. Palanisamy and others (2004) 6 SCC 341).***

9. Apart from the above, it would be noticed that the appellant claimed himself to be the owner of the land by way of adverse possession. The plea of adverse possession is contained in the following terms:-

> *".....Even otherwise the applicant/claimant remained in continuous, peaceful and uninterrupted possession of Kh. No.1468/1 after the said oral sale in clear denial of the title of the said respondents or their predecessor in interest exhibiting hostile title to the said land and as such he has acquired the title to the said land by adverse possession in case the said oral sale is held to be void. Thus the applicant/claimant is entitled to the entire compensation of the acquired land."*

10. From the above, it is abundantly clear that the plea of adverse possession as raised by the appellant is very stereo-type wherein he claimed that the land in question is in his open, peaceful, continuous and exclusive possession and no exact date of such possession has been set out in the pleadings. As per settled law, mere long possession is not enough to prove the plea of adverse possession and it does not result in conversion of peaceful possession into adverse possession.

11. The issue, in question, has been considered in detail by a Learned Division Bench of this Court in ***CWP No.306 of 2016 titled Satpal Vs. State of H.P decided on 8.8.2016***, wherein it was observed as under:-

> "22. Moreover, the plea of adverse possession as raised by the petitioner is absolutely vague as the petitioner has not cared to mention the date from which his possession in fact became adverse. This question assumes importance as the petitioner initially had set up a lawful title in himself.
>
> 23. In **Kamla and others vs. Baldev Singh and others 2008(1) Shim. LC 215**, this court has held as under:-
>
> > *".....Moreover, in case defendant or his father were in possession of the suit land as owner and the possession was never taken by the plaintiffs in pursuance of the decree, they can be said to be in possession as owner, but they cannot be treated to be in adverse possession of the suit land in any manner. The learned trial Court has not given its findings that the defendant or his father continued to be owner of the suit land even after passing of the decree since the decree was never executed, but has given the findings in the alternative that the defendant has become owner by way of adverse possession. <u>This plea was taken by the defendant in the alternative but he never pleaded as to from which date his permissive possession as owner became adverse to the true owners i.e. plaintiffs and what overt act was done by him to show his hostile title to the suit land</u>. There were no allegations as to when the possession became adverse, in which year or month or in what manner and the simple general allegation made by the defendant in the alternative were accepted by the trial Court without looking into the question that the original possession of*

the defendant over the suit land or that of his father was permissive being an owner and it never became adverse as against the true owner and if it became adverse in what manner and from which date, month or year. The permissive possession as owner does not itself become adverse as against the true owner until and unless some overt act is done by the defendant to show his hostile title towards the true owner which pleadings were very much lacking in the written statement and as such, the defendant was never proved to be in adverse possession of the suit land as owner. Those findings were rightly reversed by the learned first Appellate Court and the learned first Appellate Court had rightly observed that there was complete lack of animus on the part of the defendant to hold the suit land adversely to the plaintiffs. It was also observed that it has also not been shown as to what time possession of the defendant became hostile to that of the plaintiffs which had ripened into ownership. To my mind, there was nothing for the trial Court to conclude that the defendant has become owner by way of adverse possession in the absence of specific pleadings or proof and, therefore, the learned first appellate Court had come to a right conclusion in reversing the findings under Issue No. 1 in regard to the plea of adverse possession. Once the defendant had failed to prove adverse possession over the suit land, the only conclusion that can be drawn is the plaintiffs were entitled to the relief of possession and it was rightly given by the first appellate Court."

24. This court in **Brij Mohan Sood** vs. **Parshotam Singh and others 2014(1) Him. L.R. 556,** has held as follows:-

"11. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is " nec vi, nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual visible, exclusive, hostile and continued over the statutory period. Therefore, a person who claims adverse possession has to show (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party ; (d) how long his possession is continued; and (e) his possession was open and undisturbed. It has to be remembered that the person pleading adverse possession has no equity in his favour since he is trying to defeat the right of the true owner, therefore, it is for him to clearly plead and establish all facts necessary to establish his adverse possession (Refer Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others (1996) 8 SCC 128).

12. Having observed so, it is clear from the pleadings of the defendant that he has "11. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is " nec vi, nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be

adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual visible, exclusive, hostile and continued over the statutory period. Therefore, a person who claims adverse possession has to show (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party ; (d) how long his possession is continued; and (e) his possession was open and undisturbed. It has to be remembered that the person pleading adverse possession has no equifailed to plead the essential ingredients of adverse possession. In absence of the essential ingredients of adverse possession, no amount of evidence can be looked into by this Court. Even otherwise, the defendant has set-up a title in himself and has not acknowledged or attorned the plaintiffs to be the owners. Apart from preliminary objection No.1 (supra), in paragraph-3 of the preliminary objection, the defendant has made the following averments:

"The plaintiffs are not the owners of the land rather the defendants are its owners and the plaintiffs have got no locus standi to file the suit." Throughout in the written statement, the defendants have claimed themselves to be the owners of the suit property and thus the plea of adverse possession is not available to them."

25. This court further in **Deepak Parkash** vs. **Sunil Kumar 2014(1) Him. L.R. 654** has emphasized on the requirement of law of pleading the exact date from which the possession became adverse, in the following terms:

"14. It appears that the learned lower Appellate Court completely ignored the pleadings of the parties or else the judgment and decree passed by the learned trial Court on the basis of such pleadings would not have been disturbed much less reversed. A perusal of the written statement would show that pleadings with regard to adverse possession were not only deficient but in fact did not meet the requirement of law. The defendant even failed to specify the definite date on which his possession became adverse.

16. Faced with such situation, learned counsel for the respondent/ defendant would contend that he had led sufficient evidence to prove his plea of adverse possession. I am afraid that I cannot agree with the submissions made by learned counsel for the respondent/ defendant.

17. It is settled law that no amount of evidence beyond pleadings can be looked into. It is further well settled principle of law that the evidence adduced beyond the pleading would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The Court at the later stage of the trial as also the Appellate Court having regard to the rule of pleading would be entitled to reject the evidence wherefor there does not exist any pleading."

26. In **Om Parkash & ors.** vs. **Gian Chand & ors. 2014(2) Him.L.R. 1071** one of us (Tarlok Singh Chauhan, J) dealt in detail with the

question of adverse possession particularly when the defendant therein had not spelt out any specific date from which his possession became adverse and it was observed as follows:-

> *"11. Therefore, the moot question is as to whether the pleadings set out by the defendants can meet the requirement of law or not. This question assumes importance, because admittedly, the defendants have not spelt out any specific date from which their possession became adverse."*

12. What is adverse possession has been dealt with by a learned Division Bench in ***Satpal's case supra*** in Para No.10 of the judgment and the same reads thus:-

> *"10. Now, adverting to the question of adverse possession, it is well recognized proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. It is equally settled that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. In the eyes of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Even non-use of the property by the owner for a long time won't affect his title."*

13. Not only this, it would be further noticed that the appellant has not even acknowledged either the official respondents or the private respondents or some other person to be the actual owner(s) of the land and has set up a title in himself.

14. In ***P. Periasami*** vs. ***P. Periathambi (1995) 6 SCC 523***, the Hon'ble Supreme Court ruled that:

> *"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."*

15. In ***Karnataka Board of Wakf*** vs***. Government of India and others (2004) 10 SCC 779***, the Hon'ble Supreme Court held that one who pleads adverse possession should be very clear about the origin of title over the property. He must specifically plead it.

16. Over the years there has been a new paradigm to Limitation Act as the same has undergone a change. The burden of proof is now on the person who alleges his adverse possession, particularly once a party has proved its title. The starting point of limitation commences not from the date when the right of ownership arises in favour of the original owner but from the date a party claims his possession to have become adverse.

17. In view of the aforesaid exposition of law, it was incumbent upon the appellant to have not only stated the specific date on which his possession came hostile but have acknowledged and attorned to the title of the ownership of the respondents and thereafter, led foundation for the plea of adverse possession. Having failed to do so, I am

afraid that the plea of the adverse possession raised by the appellant was not at all sustainable in the eyes of law.

18. Lastly, it was not open to the appellant to have claimed himself to be in lawful owner of the land and at the same time claimed to be in adverse possession thereof. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (Vide ***P. Periasami v. P. Periathambi (1995) 6 SCC 523, Md. Mohammad Ali v. Jagadish Kalita (2004) 1 SCC 271 and P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 59.).***

19. Even if it is to be assumed, though not conceded that the appellant had purchased the property by entering into an agreement of sale as alleged, even then, it is more than settled that agreement to sell by itself does not confer any title upon a party and, therefore, the appellant is not entitled to any compensation whatsoever.

20. The order passed by the learned reference Court does not suffer from any illegality, irregularity much less any perversity and, therefore, calls for no interference.

21. In view of the aforesaid discussion, I find no merit in this appeal and the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

The Himachal Pradesh State Financial Corporation Limited ...Appellant

Versus

Vidya Devi and others ...Respondents

RSA No. 380 of 2008
Decided on: October 23, 2018

Specific Relief Act, 1963- Section 20- Suit for recovery – Corporation entering into agreement with 'JR' for extraction of resin from blazes – Filing suit for recovery on account of short fall in extraction of resin and other charges – Trial Court partly decreeing suit but District Judge allowing appeal and dismissing suit in toto- RSA – Evidence revealing of forest fire having taken place in allocated area and destroying some blazes in it – As per practice, Corporation had been doing resetting of blazes after fire so as to enable contractor to extract resin – No resetting was done in this case – Money value of blazes destroyed in fire exceeded amount decreed by Trial Court – Held, Judgment of District Judge based on correct appreciation of evidence – RSA dismissed. (Paras-8 to 10).

For the appellant Mr. Rajesh Verma, Advocate.
For the respondents: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral**):**

Instant Regular Second Appeal is directed against judgment and decree dated 1.5.2008 passed by the learned District Judge, Hamirpur, District Hamirpur, Himachal Pradesh in Civil Appeal No. 79 of 2006, reversing the judgment and decree dated 30.3.2006 passed by the learned Civil Judge (Senior Division), Division Hamirpur, HP in Civil Suit No. 84 of 1997, whereby suit filed by the appellant-plaintiff (hereinafter, 'plaintiff') for recovery of Rs. 82,930/- against the respondents/defendants (hereinafter, 'defendants'), has been dismissed.

2. Facts, in brief, as emerge from the record are that Jagat Ram (predecessor-in-interest of the respondents-defendants) had entered into an agreement with the plaintiff for extraction of resin from Lot No. 29/R/94. As per aforesaid agreement, Jagat Ram was required to extract 188.42 quintals of resin from 4096 blazes but the defendant could achieve the yield to the tune of 142.08 quintal and as such, there was shortfall of 46.34 quintals, hence, as per agreement *inter se* parties, defendant was liable to pay Rs. 2500/- per quintal to the plaintiff on account of shortfall. In the aforesaid background, plaintiff claimed a sum of Rs. 1,15,850/-. Plaintiff also claimed that 2670 blazes of defendant were found defective as such, penalty at the rate of Rs. 2/- per blaze is also liable to be paid by the defendant i.e. 2670x 2=5340. Apart from above, plaintiff also claimed that the defendant had caused illicit extraction from 194 blazes, as such, he is liable to pay penalty to the tune of Rs. 29/- per blaze, which comes out to 194x29=5626. Plaintiff further claimed that for the aforesaid extraction of resin, a sum of Rs. 21,000/-as charges for work done was paid to the defendant. Plaintiff had also paid income tax to the tune of Rs. 1244/-. Plaintiff in total claimed a sum of Rs. 22,784/- on account of cost price of the tools, which were handed over to the defendant by it as well as money paid to the defendant. Though as per calculation made by the plaintiff, defendant was liable to pay a sum of Rs. 1,49,602/-, but since a sum of Rs. 66,672/- stood already deducted from the account of the defendant, it claimed a sum of Rs. 82,930/- as decreetal amount by way of aforesaid suit for recovery.

3. Legal representatives of Jagat Ram, who had actually entered into agreement with the plaintiff, repudiated the claim of the plaintiff on the ground that they have no knowledge regarding agreement, if any, *inter se* parties. They also stated that no recovery was pending against deceased Jagat Ram and there was no shortfall of resin, on the part of Jagat Ram, as such, suit having been filed by the plaintiff deserves to be dismissed. Plaintiff by way of replication, denied the contents of written statement and reaffirmed its claim as put forth in the plaint.

4. Learned trial Court, on the basis of pleadings of the parties, framed following issues for determination:

> "1. Whether the plaintiff/corporation is entitled to recover a sum of Rs.82930/- from the defendant with costs alongwith interest @18% p.a. being price, damages and cost of tools for non-supply of pure resin as per agreement deed dated 5.3.1994 as alleged? OPP.
>
> 2. Whether the plaintiff has no cause of action and locus-standi to file the suit? OPD
>
> 3. Whether the plaintiff is estopped from filing the suit by its act and conduct? OPD
>
> 4. Whether the suit is barred by time? OPD.
>
> 5. Relief."

5. Subsequently, the learned trial Court, on the basis of evidence led on record by respective parties, decreed the suit of the plaintiff for a sum of Rs. 49,178/- against the

defendants alongwith interest at the rate of 5% per annum. Defendants, being aggrieved and dissatisfied with the judgment and decree passed by learned trial Court, preferred an appeal before the learned District Judge, Hamirpur, Himachal Pradesh, who, vide judgment and decree dated 1.5.2008, allowed the appeal, as a consequence of which, judgment and decree passed by learned trial Court came to be reversed. In the aforesaid background, plaintiff has approached this court in the instant proceedings, praying therein to decree its suit in toto, after setting aside the judgment and decree passed by learned first appellate Court.

6. The Regular Second Appeal came to be admitted by this court on 8.8.2008 on the following substantial questions of law:

> "1. Whether the provisions of Section 56 of the Contract Act are attracted to the facts and circumstances of the present case?.
>
> 2. Whether an adverse inference should have been drawn against the respondent/defendant for not appearing as his own witness?"

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

8. Having heard the learned counsel representing the parties and perused the evidence, be it ocular or documentary vis-à-vis impugned judgment and decree passed by the learned first appellate Court, this court is not inclined to agree with the contention of Mr. Rajesh Verma, learned counsel representing the plaintiff that the learned first appellate Court has failed to appreciate the evidence in its right perspective, rather, this court finds that the learned first appellate Court has dealt with each and every aspect of the matter meticulously and there is no scope of interference by this court. Factum with respect to execution of agreement, Ext. PW-1/1 *inter se* plaintiff and defendant is not in dispute, rather, same stands duly proved in accordance with law. Similarly, this court finds that notices allegedly issued to the predecessor-in-interest of the defendants i.e. Jagat Ram, Ext. PW-1/2 to Ext. PW-1/4 have been duly proved in accordance with law. Agreement, Ext. PW-1/1 clearly reveals that with effect from 15.2.1994 to 31.12.1994, defendant was to extract 188.42 quintals of resin from 4096 blazes at the approved rate of Rs. 391/- per quintal. Evidence on record clearly suggests that defendant was unable to extract aforesaid agreed yield and there was a shortfall of 46.34 quintals. Though, as has been taken note herein above, defendant, by way of notices was duly apprised of the shortfall but testimony of PW-6 Bhagirath, Assistant Manager of the plaintiff clearly reveals that there was a fire in the jungle, which was allotted to the defendant. PW-6 Bhagirath, has admitted that as per record, 460 blazes were burnt in the fire. He also admitted in his cross-examination that after fire, resetting of blazes used to be done, whereafter resin could be extracted but, unfortunately, no material evidence has been led on record by plaintiff that after aforesaid fire, blazes were reset and defendant was authorized to extract resin. Though, in his cross-examination, this witness has denied that due to fire, contractor used to be compensated but he categorically admitted that after fire, resetting was to be done by the plaintiff. Interestingly, in the case at hand, though learned trial Court took note of aforesaid candid admission having been made by PW-6, Bhagirath, with regard to fire in the forests, but it failed to return specific finding, if any, qua the same, as a consequence of which, erroneous finding came to the fore that too, to the detriment of the defendants, who successfully proved on record that due to fire in the area/forest, 460 blazes were burnt and as such, he(defendant) was unable to extract agreed quantity of resin. Learned trial Court decreed the suit of the plaintiff for recovery of Rs. 49,178/- but it has not deducted any amount on account of loss of blazes in the accidental fire, which admittedly took place in the jungle in question. As has been noted herein above, there is no evidence led on record by the plaintiff to prove that blazes were reset. Though the learned counsel representing the plaintiff stated

that the defendant did not report the incident of fire to the plaintiff, but from the testimony of PW-6, it is clear that the incident of fire was very much in the knowledge of the plaintiff.

9. As per own case of the plaintiff, cost of one quintal is Rs. 2500/- and as such, for such loss, while calculating loss, if any, accrued to Jagat Ram was to the tune of Rs. 52,500/-, as has been calculated by the learned first appellate Court. Had learned trial Court taken trouble to calculate aforesaid amount, it would not have decreed the suit of the plaintiff for a sum of Rs. 49,178/-.

10. Having carefully perused the material evidence available on record, especially the statement of PW-6, Assistant Manager of the plaintiff, this court has no hesitation to conclude that the trial court failed to appreciate evidence in its right perspective as such, learned first appellate Court rightly reversed its findings. Reasoning recorded by the learned first appellate Court, while reversing finding of the learned trial Court is based upon correct appreciation of evidence adduced on record by the respective parties and as such, same calls for no interference by this court.

11. Though the appeal stands admitted on two substantial questions of law, as reproduced herein above, but after careful perusal of record and hearing the arguments of the learned counsel representing the parties, this court finds that in fact no question of law, much less, substantial question of law arises in the present appeal for determination and as such, no findings qua the aforesaid issues are being recorded specifically.

12. In view of the detailed discussion made herein above, appeal does not have any merit and as such, is dismissed.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

National Insurance Company Limited (Himland) .....Appellant
Versus
Vinay Kumar and others .....Respondents

FAO(MVA) No. 145 of 2016
Decided on: October 24, 2018.

Motor Vehicles Act, 1988 (Act) - Section 163-A- 2nd Schedule – Compensation on structural formula – Whether claimants entitled for enhancement towards future prospects ? – Held – No- Legal representatives of deceased driver filing claim application under Section 163-A of Act – Claims Tribunal assessing income of deceased at Rs.3,000/- p.m. and then giving 30% increase towards future prospects on it – Also granting Rs.25,000/- towards funeral expenses – Appeal by insurer – Held, 2nd schedule of Act nowhere provides for grant of any increase on account of future prospects – Tribunal erred in granting 30% increase towards future prospects – Compensation toward funeral charges under 2nd schedule of Act can only be of sum of Rs.2,000/- Appeal partly allowed – Award modified. (Paras-10, 11 & 16)

Cases referred:
United India Insurance Co. Ltd. versus Sunil & Anr., 2018 ACJ 1

Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639

For the Appellant	:	Mr. Jagdish Thakur, Advocate.
For the Respondents	:	Mr. V.S. Chauhan, Advocate, for respondent No.1 to 4. Nemo for respondent No.5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant appeal under S. 173 of the Motor Vehicles Act (hereinafter, 'Act') is directed against the Award dated 8.9.2015 passed by the learned Motor Accident Claims Tribunal-II, Shimla, HP in MAC Petition No. 40-S/2 of 2012, whereby appellant-Insurance Company has been directed to pay a sum of Rs.4,30,600/- alongwith interest at the rate of 7.5% per annum, from the date of filing of the petition till deposit, to respondents No.1 to 4/claimants (hereinafter, 'claimants').

2. Facts, as emerge from the record are that the claimants, claiming themselves to be legal heirs of deceased Ramesh Chand, filed a claim petition under S. 163A of the Motor Vehicles Act, praying therein for grant of compensation on account of death of Ramesh Chand, who was driving a Maruti car bearing registration No. HP-09A-2934, which unfortunately met with an accident at place Gazeri, Tehsil Theog, District Shimla, Himachal Pradesh on 29.12.2009 at about 4.00 pm. Ramesh Chand suffered multiple injuries in the accident and died on the spot. Claimants specifically averred in the claim petition that the monthly income of the deceased Ramesh Chand was about Rs.3,000/- per month and they being his son, daughter and parents were dependent upon the income of the deceased, as such, entitled to compensation on account of death of Ramesh Chand.

3. Respondent No.5, Sunita Devi, refuted the claim of the claimants and averred that the vehicle was insured with the appellant-Insurance Company and as such, it was the insurance company, which was liable to compensate the claimants. Aforesaid respondent further claimed that since damage of the vehicle in question was settled by the insurance company, there was no breach of policy.

4. Appellant-Insurance Company contested the claim petition having been filed by the claimants on the ground of maintainability and claimed that the deceased Ramesh Chand was not having a valid and effective driving licence to drive the vehicle and vehicle was being plied in violation of terms and conditions of the insurance policy, as such, it is not liable to pay compensation to the claimants.

5. On the basis of pleadings of the parties, learned Tribunal below framed following issues on 26.2.2015 for determination:

> "1. Whether deceased Ramesh Chand died in the accident involving vehicle no. HP-09A-2934, as alleged? ...OPP
>
> 2. If issue no.1 is proved in affirmative, what amount of compensation the petitioners are entitled to and from whom? ...OPP
>
> 3. Whether the petition is not maintainable? ...OPR-2
>
> 4. Whether the driver of the vehicle was not holding valid and effective driving licence at the time of accident, as alleged? ...OPR-2

5. Whether the vehicle in question was being driven in violation of the terms and conditions of the insurance policy, as alleged? ...OPR-2

6. Whether the present petition is filed in collusion with respondent no.1, as alleged? ...OPR-2

7. Relief."

6. Subsequently, the learned Tribunal below, on the basis of the pleadings as well as evidence adduced on record by the respective parties, allowed the claim petition vide award dated 8.9.2015 and held appellant-Insurance Company liable to pay a sum of Rs.4,30,600/- to the claimants, alongwith interest at the rate of 7.5% per annum. In the aforesaid ground, appellant-Insurance Company has approached this court in the instant proceedings, praying therein for setting aside the impugned award passed by learned Tribunal below.

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

8. At the very outset, it may be noticed that the learned counsel representing the appellant-Insurance Company fairly submitted that though Award was initially challenged on two grounds i.e. (a) claim petition was not maintainable at the behest of the legal heirs of the person, whose rash and negligent driving had resulted into the accident; and (b) learned Tribunal below erred in granting 30% increase on account of future prospects while calculating the compensation, however, in view of judgment rendered by the Hon'ble Apex Court in **United India Insurance Co. Ltd.** versus **Sunil & Anr.**, 2018 ACJ 1, first ground is rendered infructuous and as such he shall confine his arguments to the second ground only i.e. learned Tribunal below having acted beyond its jurisdiction while granting 30% increase on account of future prospects, because, there is no such provision under S. 163A of the Act, wherein a complete structure formula has been provided for granting compensation.

9. Since, controversy with regard to maintainability of the petition having been filed on behalf of legal heirs of the person, whose rash and negligent driving has resulted into accident, has been set at rest by Hon'ble Apex Court in **United India Insurance Co. Ltd.** versus **Sunil & Anr**. (supra), this court shall not elaborate upon aforesaid issue and shall confine discussion to the second issue only i.e. grant of 30% addition on account of future prospects. Mr. V.S. Chauhan, learned counsel representing the claimants fairly stated that the award passed by learned Tribunal below to this extent requires to be modified.

10. Careful perusal of 2nd Schedule of Motor Vehicles Act, as referred to in S. 163A of the Act, nowhere provides for grant of any increase on account of future prospects and as such, learned Tribunal below has definitely erred in granting 30% increase to future prospects, while calculating compensation on account of death of Ramesh Chand and as such, total loss of dependency, would be as follows:

Established/proved monthly income of deceased	Rs.3,000
1/3rd deduction	Rs.3,000 - Rs.1,000
Net income for the purpose of loss of dependency	Rs.2,000 per month
Annual loss of income	Rs.24,000

Total loss of dependency after applying multiplier of 13 = 24,000 x 13 Rs.3,12,000/-

11. Similarly, this court finds that the learned Tribunal below, while awarding amount under the head of 'funeral charges' has awarded excessive amount because as per

2nd Schedule as referred to above, a sum of Rs.2,000/- could have been awarded, whereas, learned Tribunal below has awarded a sum of Rs.25,000/-, which also needs to be modified.

12. However, no amount has been awarded under the head of loss of estate and as such, this court deems it proper to award an amount of Rs.2,000/- under the head of loss of estate. Otherwise also, the Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, has held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. 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."

13. Consequently, in view of aforesaid modification made herein above, claimants are held entitled to following amounts under various heads:

1.	Loss of dependency	**Rs.3,12,000/-**
2.	Loss of estate	**Rs.2,500/-**
3.	Funeral charges	**Rs.2,000/-**
	Total	**Rs.3,16,500**

14. Apportionment of awarded amount amongst the claimants shall remain as determined by the learned Tribunal below.

15. This Court however does not see any reason to interfere with the rate of interest awarded on the amount of compensation and multiplier applied, and as such, same are upheld.

16. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and Award dated 8.9.2015 passed by the learned Motor Accident Claims Tribunal-II, Shimla, HP in MAC Petition No. 40-S/2 of 2012, is modified to the aforesaid extent only.

Pending applications, if any, are also disposed of. Interim directions, if any, are vacated.

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

Parshotam Dutt Gautam .....Petitioner
Versus
Ashwani Gautam and others .....Respondents

CMPMO No. 82 of 2017
Reserved on 01.10.2018
Decided on: 24.10.2018.

Code of Civil Procedure, 1908- Order 1 Rule 10- Impleadment of additional defendant – Trial Court summoning 'P' as additional defendant - Suit filed for damages for causing defamation – 'P' having sent complaints against plaintiff to Vigilance &Anti Corruption Bureau, which were found to be false – Petition against – 'P' contending that suit against him on day he was summoned, was barred by limitation and praying of setting aside of summoning order – Held, Allegations against 'P' make out prima facie case against him – He can raise plea of limitation before trial Court – Petition dismissed - Order upheld. (Paras-7 & 8).

For the petitioner: Mr. Jeevesh Sharma, Advocate.
For the respondents: Mr. Suneet Goel, Advocate, for respondents No. 1 and 2.
Mr. Ajay Shandil, Advocate, for respondent No. 3.
Nemo for respondent No. 4.

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, against the order dated 20.08.2016, passed by learned Civil Judge (Sr. Div.), Sirmaur District at Nahan, H.P. in CMA No. 190/6 of 2016 filed in case No. 35/1 of 2011, whereby an application under Order 1, Rule 10(2) CPC has been allowed and the present petitioner has been arrayed as defendant No. 3 in the suit.

2. Briefly stating facts giving rise to the present petition are that present respondents No. 1 and 2/applicants (for short "the applicants") filed an application under Order 1 Rule 10(2), read with Section 151 CPC for addition of Parshotam Dutt, S/o late Sh. Laxmi Dutt as party to the suit. It has been averred in the application filed by the applicants that they have filed civil suit against present proforma respondents No. 3 and 4/defendants (for short "defendants) for recovery of Rs. 10 lac on account of defamation, mental and physical torture committed by them by publishing defamatory statements in their daily Hindi Newspaper 'Aapka Faisla' on 11.05.2010 and 17.05.2010. It has been further averred by the applicants that vide their application dated 21.11.2012, filed under Order 7, Rule 14 CPC, they have sought permission to file certain documents i.e. complaint and inquiry report etc. based on the aforesaid complaint. During preparation of case, it has been found that Sh. Parshotam Dutt Gautam S/o lat Sh. Laxmi Dutt Gautam, R/o Chhota Chowk, Nahan has also made complaints against them to the office of Additional Director General, State Vigilance and Anti Corruption Bureau, H.P. Shimla, which in routine had come to Dy. S.P. P.S. S.V. and Anti Corruption Bureau, Nahan for inquiry and investigation. The Dy. S.P. conducted inquiry and investigation upon the said complaints, however during the inquiry, the complaint containing defamatory and false allegations, was found to be false.

Accordingly, the applicants prayed in the application that as Parshotam Dutt Gautam is guilty of committing defamation, he is also required to be arrayed as party defendant in the suit.

3. In reply to the application, the defendants raised preliminary objection qua maintainability. On merits, it has been averred that the defendants did not publish any defamatory news against the applicants. It has been further averred that complaint, if any, filed by Parshotam Dutt Gautam against the defendants, cannot be made subject matter of the present case and prayer for dismissal of the application has been made.

4. Learned trial Court, vide order dated 20.08.2016, allowed the application filed by the applicants, under Order 1, Rule 10(2), read with Section 151 CPC and impleaded Parshotam Dutt Gautam as party defendant No. 3 in the suit, hence the present petition.

5. Learned counsel for the petitioner has argued that the suit against the present petitioner and proforma respondents could not have been filed, as it was beyond limitation and on this ground only, learned Court below could not have made the petitioner as defendant, in these circumstances, the present petition may be allowed and order passed by the learned Court below on an application, under Order 1, Rule 10(2) be set aside. On the other hand, learned counsel for respondents No. 1 and 2 has argued that even after becoming the party in the learned Court below, the present petitioner can always raise the issue of limitation, but there is no reason to say that he is not necessary party. In rebuttal, learned counsel for the petitioner has argued that making party to the petitioner in suit is abuse of the process of Court.

6. To appreciate the arguments of learned counsel for the parties, this Court has gone through the records in detail.

7. It has come on record, that prior to filing application under Order 1, Rule 10(2) the applicants/plaintiffs had also filed an application, under Order 7, Rule 14 CPC for placing on record the documents i.e. complaint and inquiry report, which was allowed on 01.04.2013. Wherein, Parshotam Dutt Gautam has filed a complaint against present respondent No. 1, which shows his involvement in the case and prima facie the view taken by the learned trial Court that the present petitioner is necessary party in the suit, is in accordance with law and on the basis of record and the libel/defamation, as pleaded in the plaint. So, this Court finds no illegality in the order passed by the learned trial Court, impleading the present petitioner as defendant No. 3.

8. Now coming to the second aspect i.e. the suit is not maintainable, as it was barred by limitation, the plaintiffs can take challenge the said point in the learned trial Court and can even raise the preliminary objection to that regard. But, this Court finds that the order passed by the learned trial Court need not required to be interfered with, for the reason that the allegations, which have come in the pleadings, *prima facie* makes out a case against the present petitioner. So, the order passed by the learned trial Court, impleading the present petitioner as defendant No. 3 in the suit, is as per law and needs no interference.

9. In view of the above discussion, the petition, which sans merits, deserves dismissal and is accordingly dismissed. Pending application(s), if any, stands disposed of. Parties are directed to appear before the learned trial Court on **20th November, 2018**.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Jagdish Chand Sapehia ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWP No. 1735 of 2018
Reserved on: 06.09.2018
Date of Decision: October 25, 2018.

Himachal Pradesh Co-operative Societies Act, 1968 (Act) - Sections 37(1) and 37(1-A)- Whether Section 37(1-A) is subject to Section 37(1) of Act? – Held- No - Language of Sub-section (1-A) is plain, simple and unambiguously clear - It uses expression "while proceeding to take action under Sub-section (1)" Registrar is of the opinion that suspension of Committee or any Member is necessary he may take action of suspending Committee or such Member and thereafter make proper arrangements for management and affairs of Society till proceedings are completed (Para-40)

Himachal Pradesh Co-operative Societies Act, 1968 (Act)- Section 37(1) and 37(5) – Suspension of committee – Procedure – Whether prior consultation with Institution financing Society, is mandatory before issuing show cause notice?- Held - No - On basis of reports regarding financial irregularities, Registrar issuing show cause notice to Chairman and other members of the Board of Governors to explain irregularities, and simultaneously suspending Board of Governors during pendency of enquiry – Registrar also directing Deputy Commissioner to take charge of management of Bank as a interim measure – Challenge thereto - Petitioner, Chairman assailing said notice on ground that prior consultation with Institution financing Bank as required under Section 37(5) of Act, not done and suspension of Board of Directors being bad in law – Held, Sub-section (5) does not refer to Sub section (1-A) – It only refers to Sub-section (1) of section 37 – Expression "any action" stipulated therein necessarily means consequential action of removal of Committee, which is to be after issuance of show cause notice calling upon noticee to show cause and state his objection- Registrar may after affording opportunity, himself come to conclusion that no action for removal required to be taken in view of justification furnished by noticee - For formation of opinion in issuance of notice, no prior consultation is required - Sub-section (1) of Section 37 provides for (a) formation of an opinion in issuance of show cause notice; and (b) passing written order in removing Committee - It is only when Registrar deems it appropriate to remove Committee, he has to necessarily consult Financial Institution to which a Cooperative Society is indebted. (Paras- 27 & 38).

Interpretation of Statute – Principles – Held, statute is an edit of legislature and conventional way of interpreting or construing statute is to seek 'intention' of its maker - Statute must be read as a whole and one provision of Act should be construed with respect to other provisions in same Act, so as to make a consistent construction of whole statute. This is elementary rule of interpretation (Paras-28 & 31).

Interpretation of statutes - Words suspension and supersession- Meaning – Held, "supersession" is replacement whereas "suspension" is stop gap temporary measure. (Para-42).

Malice in Law- What is? – Held, Malice in law can be inferred when Authority concerned had acted without jurisdiction – But petitioner must plead and prove that Authority had acted without jurisdiction. (Para- 10)

Cases referred:

Mukesh Kumar Agrawal v. State of Uttar Pradesh & others (Two Judges), (2009) 13 SCC 693
Smt. S.R. Venkataraman v. Union of India & another (Two Judges), (1979) 2 SCC 491
Ravi Yashwant Bhoir v. District Collector, Raigad & others (Two Judges), (2012) 4 SCC 407
State of Uttar Pradesh v. Brahm Datt Sharma & another (Two Judges), (1987) 2 SCC 179
Union of India & another v. Vicco Laboratories (Two Judges), (2007) 13 SCC 270
Special Director & another v. Mohd. Ghulam Ghouse & another (Two Judges), (2004) 3 SCC 440
Union of India & another v. Kunisetty Satyanarayana (Two Judges), (2006) 12 SCC 28
M/s Girdhari Lal & sons v. Balbir Nath Mathur & others (Two Judges), (1986) 2 SCC 237
T.M.A Pai Foundation & others v. State of Karnataka & others (Eleven Judges), (2002) 8 SCC 481
Shadi Singh v. Rakha (Two Judges), (1992) 3 SCC 55
Bhatia International v. Bulk Trading S.A. & another (Three Judges), (2002) 4 SCC 105
Sam Built Well Private Limited v. Deepak Builders & others (Two Judges), (2018) 2 SCC 176
Reliance Airport Developers (P) Ltd. v. Airports Authority of India & others (Two Judges), (2006) 10 SCC 1
Commercial Tax Officer & another v. Canara Bank (Three Judges), (2001) 10 SCC 638
B.C. Chaturvedi v. Union of India & others (Three Judges), (1995) 6 SCC 749
G. Jayalal vs. Union of India & others (Two Judges), (2013) 7 SCC 150
Boddula Krishnaiah & another v. State Election Commissioner, A.P. & others (Three Judges), (1996) 3 SCC 416
Indian Administrative Service (S.C.S.) Association, U.P. and others vs. Union of India and others, 1993 Supp (1) SCC 730
Vishnu Pratap Sugar Works (Private) Ltd. v. Chief Inspector of Stamp, U.P., AIR 1968 SC 102
RMD Chamarbaugwala v. Union of India, AIR 1957 SC 628
Abhiram Singh v. C.D. Commachen (Dead) by Legal Representatives & others, (2017) 2 SCC 629
AG v. HRH Prince Ernest Augustus, (1957) 1 All ER 49
Philips India Ltd. v. Labour Court, (1985) 3 SCC 103
M. Pantiah and others v. Muddala Veeramallappa and others, AIR 1961 SC 1107
Newspapers Ltd. v. State Industrial Tribunal, U.P. & others, AIR 1957 SC 532
D.N. Banerji v. P.R. Mukherjee, AIR 1953 SC 58
Ramnarayan Mor v. State of Maharashtra, AIR 1964 SC 949
Anand Nivas (P) Ltd. v. Anandji Kalyanji, AIR 1965 SC 414
Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited, (2018) 2 Supreme Court Cases 674
K.P. Sudhakaran and another Vs. State of Kerala and others, (2006) 5 Supreme Court Cases 386
Veerpal Singh vs. Registrar, Co-Operative Societies U.P. and others, (1973) 1 SCC 456

For the Petitioner:	Mr.Ajay Sharma, Advocate, for the petitioner.
For the Respondents:	Mr.Ashok Sharma, Advocate General, with M/s Ajay Vaidya, Senior Additional Advocate General, J.K. Verma, Adarsh Sharma, Ms.Rita Goswami and Nand Lal Thakur, Additional Advocate Generals, for the respondents-State. Mr.Rakesh Thakur, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sanjay Karol, Judge.

In the present petition, following important issues arise for consideration:-

(a). As to whether issuance of notice under Sub-Section (1) of Section 37 of the Himachal Pradesh Co-operative Societies Act, 1968 (hereinafter referred to as the Act), requires consultation in terms of Sub-Section (5) of the very same Section?

(b). As to whether provisions of Sub-Section (1-A) of Section 37 is independent of and not subject to Sub-Section (1) of the very same Section?

(c). As to whether after formation of opinion and issuance of notice calling upon the noticee to show cause as to why no adverse action be taken, is it open for the Registrar to take action for suspension of the noticee and make arrangements for proper management of the affairs of the Society?

(d). As to whether action of the respondents is contrary to the mandate of law laid down by the Apex Court in *State of Madhya Pradesh vs. Sanjay Nagayach & others,* (2013) 7 SCC 25?

(e). As to whether nature of inquiry to be conducted and the power to be exercised by the Registrar under Sections 37 and 67 of the Act are different, distinct and independent of each other?

(f). As to whether action of the respondents in passing the order of suspension is based on no material and without application of mind?

(g). As to whether action of the respondents is malafide and ultra vires the Statute or not?

Brief facts

2. Petitioner Sh.Jagdish Chand Sapehia, who had been officiating as the Chairman of the Kangra Central Cooperative Bank Limited, Dharamshala (respondent No.3) lays challenge to the show cause notice dated 19.07.2018 (Annexure P-5), issued under Section 37 (1) (a) of the Act by the Registrar Co-operative Societies, Himachal Pradesh, calling upon him to show cause as to why he should not be removed for having committed various acts of omissions and commissions. Also in terms of the very same notice, the Board of the respondent-Bank is placed under suspension and the Deputy Commissioner, Kangra, appointed as an Administrator to manage its affairs till such time such proceedings are completed. As per averments made in the petition, with the change of the political executive, with malafide intent and object, prompted by the political executive, on 06.04.2018 the Registrar Cooperative Societies had issued similar notice to show cause dated 06.04.2018 (Annexure P-1), which was subject matter of CWP No.862 of 2018, titled as *Jagdish Chand Sapehia vs. State of Himachal Pradesh & others*. Since such action was unsustainable in law, the said notice stood withdrawn vide order dated 19.07.2018, though on a pretentious plea of "technical grounds" and as such the petition disposed of. However, same day, vide fresh show cause notice (impugned herein as Annexure P-5) respondents initiated similar action under Sections 37 and 37 (1-A).

3. From the pleadings made out by the petitioner, such act, on the "askance of the political bosses" is executed by Dr.Ajay Sharma, Registrar Cooperative Societies, Himachal Pradesh, Shimla (respondent No.2) and The Kangra Central Co-operative Bank

Limited, Dharamshala, District Kangra, H.P. (respondent No.3), who did so "malafidely" and "without application of mind". With such mis-utilization of power, respondent No.2 has placed a democratically elected Board under suspension. Impugned notice stands issued without prior consultation as required under Sub-Section (5) of Section 37 of the Act. In any event, action, motivated in nature, is with the object of stifling democratically elected institutions and stop their functioning. The action is *ex facie* contrary to the principles of law laid down in *Sanjay Nagayach* (supra). In any event, malafides stand demonstrated by the selective nature of action, for Government officers nominated on the Board of the Bank are allowed to function.

4. It is with these pleadings, petitioner lays challenge to the show cause notice dated 19.07.2018 (Annexure P-5) with a further direction that the fresh election programme for constitution of a Board so notified vide order dated 26.09.2018 (Annexure P-6) be quashed and set aside and that petitioner be allowed to complete his full tenure, including the period for which the Board was kept under suspension, continuously with effect from 06.04.2018.

5. In response, respondents have filed their affidavit explaining the background in which the Registrar initiated action by issuing notice dated 06.04.2018 (Annexure P-1) and 19.07.2018 (Annexure P-5). Allegations of abuse of power; malafides; political pressure; non application of mind etc. are categorically denied. Also it stands explained that on account of technical defects, notice dated 06.04.2018 was withdrawn, whereafter only fresh notice was issued. The Registrar has explained the basis leading to the formation of his opinion, for issuing show cause notice and suspending the Board and that being the statutory inspection reports of NABARD, audit reports and statutory inquiry reports, all revealing persistent irregularities of serious nature committed in the management of the affairs of the bank, coupled with the violation of law and actions detrimental to the interest of the bank and its depositors at large. Allegation of malice in law or fact are clearly denied and disputed.

6. Assailing the action, Mr. Ajay Sharma, learned counsel for the petitioner, argues that the action is politically motivated; malafide; ultra vires the provisions of the Statute, inasmuch as no prior consultation or consent was obtained from the funding bank as envisaged under Sub-Section (5) of Section 37 of the Act; no action stands taken against all the Members of the Governing Body; and the inquiry contemplated under Section 37 necessarily has to be the one contemplated and in terms of the procedure contained under Section 67 of the Act.

7. Further nothing was wrong till 24.12.2017, whereafter only on account of differences, trivial in nature, having arisen between the Members of the Board, respondent No.2 with a malafide intent, took the impuged action. Action of suspension of a duly elected body under Sub-Section (1-A) of Section 37 of the Act, draconian in nature, can be taken only after formation of opinion as envisaged under Sub-Section (1) of Section 37, which in any event cannot be prior to the consultation under Sub-Section (5) of the very same Section. In support, he has referred to and relied upon decisions rendered in *Sanjay Nagayach* (supra) and *Ragho Singh vs. Mohan Singh and others,* (2001) 9 SCC 717**.**

8. Defending the action, Mr.Ashok Sharma, learned Advocate General, invites attention to the factual matrix set out in the show cause of notice, indicating conduct of the petitioner to be *ex-facie* illegal, also explaining the object, intent and scope of Section 37 of the Act. In support he referred to and relied upon the following decisions: *Mukesh Kumar Agrawal v. State of Uttar Pradesh & others* (Two Judges), (2009) 13 SCC 693; *Smt. S.R. Venkataraman v. Union of India & another* (Two Judges), (1979) 2 SCC 491; *Ravi Yashwant Bhoir v. District Collector, Raigad & others* (Two Judges), (2012) 4 SCC 407; *State of Uttar*

Pradesh v. Brahm Datt Sharma & another (Two Judges), (1987) 2 SCC 179; *Union of India & another v. Vicco Laboratories* (Two Judges), (2007) 13 SCC 270; *Special Director & another v. Mohd. Ghulam Ghouse & another* (Two Judges), (2004) 3 SCC 440; *Union of India & another v. Kunisetty Satyanarayana* (Two Judges), (2006) 12 SCC 28; *M/s Girdhari Lal & sons v. Balbir Nath Mathur & others* (Two Judges), (1986) 2 SCC 237; *T.M.A Pai Foundation & others v. State of Karnataka & others* (Eleven Judges), (2002) 8 SCC 481; *Shadi Singh v. Rakha* (Two Judges), (1992) 3 SCC 55; *Bhatia International v. Bulk Trading S.A. & another* (Three Judges), (2002) 4 SCC 105; *Sanjay Nagayach* (Two Judges) (supra); *Sam Built Well Private Limited v. Deepak Builders & others* (Two Judges), (2018) 2 SCC 176; *Reliance Airport Developers (P) Ltd. v. Airports Authority of India & others* (Two Judges), (2006) 10 SCC 1; *Commercial Tax Officer & another v. Canara Bank* (Three Judges), (2001) 10 SCC 638; *B.C. Chaturvedi v. Union of India & others* (Three Judges), (1995) 6 SCC 749; *G. Jayalal vs. Union of India & others* (Two Judges), (2013) 7 SCC 150 & *Boddula Krishnaiah & another v. State Election Commissioner, A.P. & others* (Three Judges), (1996) 3 SCC 416.

9. Having considered the respective submissions and carefully gone through the relevant provisions of the Statute, we are of the considered view that action of the respondents in issuing the impugned show cause notice (Annexure P-5) cannot be said to be bad in law.

10. The distinction between 'malice in law' and 'malice in fact' stands well established. Whereas former, if established, may lead to inference that the statutory authorities had acted without jurisdiction, while exercising such jurisdiction, the latter must be pleaded and proved. {*Mukesh Kumar Agrawal* (supra)}.

11. The distinction stands appropriately discussed by the Supreme Court of India in *Smt. S.R. Venkataraman* (Supra), in the following terms:

> "5. ..... Malice in law is, however, quite different. Viscount. Haldane described it as follows in *Shearer v. Shields*, (1914) AC 808 at P. 813:-
>
> > "A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently."
>
> Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.
>
> 6. It is however not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard C. J., in *Pilling v. Abergele Urban District Council*, (1950) 1 KB 636 where a duty to determine a question is conferred on an authority which state their reasons for the decision, and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter.

7. The principle which is applicable in such cases has thus been stated by Lord Esher M. R. in The Queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras, (1890) 24 QBD 371 at p. 375:-

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

This view has been followed in *Sedler v. Sheffield Corporation*, (1924) 1 Ch 483.

8. We are in agreement with this view. It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing act or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another.

9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the 'public interest', to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power."

12. The Apex Court in *G. Jayalal* (supra), has held as under:-

"17.. ... ...

"12.... ... .. Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others". (See Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989.)"

13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object."

13. It further stands elaborated in *Ravi Yashwant Bhoir* (Supra), as follows:

"47. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice- in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. Legal malice or malice in law means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.

> 48. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for purposes foreign to those for which it is in law intended. It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (See: *Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521; *Union of India thr. Govt. of Pondicherry & Anr. v. V. Ramakrishnan & Ors.*, 2005 8 SCC 394; and K*alabharati Advertising v. Hemant Vimalnath Narichania & Ors.*, (2010) 9 SCC 437)."

14. Having noticed the aforesaid principles we observe that to begin with there is no foundation of malice of fact laid down in the petition. Change of the guard of the political executive took place not in April, 2018, but in December, 2017. That apart, there is nothing on record to even remotely demonstrate/suggest that the authority issuing the notice was directly or indirectly under the influence of the political executive. Such person is not impleaded as a party. Also there is nothing on record indicating that respondent No.2 had any personal malice against the petitioner. As such, we are not in agreement with the submissions made on behalf of the petitioner that the action is either politically motivated or is based on extraneous factors/ considerations or out of malice.

15. We may notice that the impugned action stands taken against 16 persons all of whom were functioning as Members of the Board of respondent No.3-Bank and only one of them has assailed the same. Well, it is a mere statement of fact and nothing more, for nothing would turn out thereupon, for even if one of them demonstrates the action to be bad, it would be held so. But what we would like to point out is that only the petitioner, who himself is politically affiliated and has such background, as is so evident from the petition, lays challenge to the impugned order.

16. Perusal of the impugned show cause notice reveals respondent No.2 to have (a) issued show cause notice calling upon the petitioner to respond to the same as to why no action for removal be taken and (b) in the interregnum suspended the Board.

17. We notice that the detailed show cause notice itself is self explanatory indicating various acts of irregularities and illegalities committed by the Board, continuously over a period of time. Also prior to the issuance of the said show cause notice, the authority examined the statutory inspection reports of NABARD, statutory audit reports for different years and statutory inquiry report and other record pertaining to the Bank, whereafter, it formed a view that the noticees, 16 in number, committed various acts of illegalities and irregularities and violations.

18. Further an inquiry under Section 67 of the Act was ordered to be conducted and preliminary report dated 04.04.2018 stands submitted. In its latest statutory inspection report, NABARD itself noticed that 90 individual loans beyond risk limit were sanctioned by the Board. This was up to 31.12.2017. Also it was found that 119 individual loans in violation of the norms were sanctioned. The Chartered Accountants of the Bank, in their audit reports of 2014-15, 2015-16, 2016-17, also pointed out various irregularities resulting into increase of NPA from 11.43% to 16.25%. According to the auditors, the Board had been rephrasing big loans/advances frequently to camouflage the NPA with a motive that such advances do not become sub-standard as per NPA classification. On 08.02.2018, the Managing Director of the Bank had instituted a fact finding inquiry, report whereof was submitted on 04.04.2018, whereafter only action against the Board was initiated on 6.04.2018. Paragraph 14 of the show cause notice indicates at least 9 such instances where loans were granted in a manner so as to jeopardize the creditworthiness of the bank, making

it a dying asset. The major violations noticed by NABARD indicated in the notice itself read as under:-

> "(a) Violating exposure norms prescribed for financing to individuals and units vide circular No.NB.DOS.CMA/768/A-75/2008-09 dated 12th May, 2008 (Inspection Reports of 2015, 2016 and 2017);
>
> (b) sanctioning of big loans to individuals in violation of the CMA norms, fixed by the Reserve Bank of India (Inspection Reports of 2015, 2016 and 2017);
>
> (c) exceeding the prescribed ceiling for financing under Housing Loan sector and bringing the House Loans within the specified ceiling fixed by the RBI vide circular No.RPCD.CO.RCBD.BC. No.48 / 03.03.01/2010-11 dated 20.01.2011 (Inspection Reports of 2015, 2016 and 2017);
>
> (d) failing to take action and adequate steps for the recoveries of money involved in fraud and review of such cases (Inspection Reports of 2015, 2016 and 2017);
>
> (e) granting commercial loans for real estate in violation of RBI guidelines contained in circular No. RPCD/109/07.38.01/2008-09 dated 25-05-2009 (Inspection Report of 2015, 2016 and 2017); and
>
> (f) formulating wrong policies for NPA management resulting into increase in NPA during the last three years."

19. That the action is not motivated, much less on account of political reasons, we notice, is evident from the facts narrated in paragraphs 16 to 22 of the notice, for the events which took place in the month of September, October and December, 2017, *prima facie* reveals that loans were disbursed contrary to the settled principle of law for which *ex post facto* approval of NABARD was sought, which, as it appears, never came. In the month of September and October, 2017 itself, dissent amongst the Members of the Board stood recorded amplifying the illegalities continuously perpetuated in exposing the risk factor of the Bank, with the disbursement of loans in violation of settled principles and procedures.

20. We clarify that we have not gone into the correctness of contents of the show cause notice, but *prima facie*, are of the considered view that there was material before the authority to have formed an opinion of initiating action under Section 37 of the Act.

21. Now this takes us to larger issues, which we have formulated as questions.

22. For understanding and answering the questions, we deem it appropriate to reproduce the relevant provisions of the Statute:-

> "37. Supersession of Committee :—
>
> (1) If, in the opinion of the Registrar, a committee of any co-operative society or any member of thereof persistently makes default or is negligent in the performance of the duties imposed on it or him by this Act or the rules or the bye-laws, or commits any act which is prejudicial to the interest of the society or its members, the Registrar may, after giving such committee or member, as the case may be, an opportunity to state its objections, if any, by order in writing—
>
> (a) remove the committee; and—
>
> (i) order fresh election to the committee; or

(ii) appoint one or more administrators who need not be members of the society, to manage the affairs of the society for a period not exceeding one year specified, in the order which period may, at the discretion of the Registrar, be extended from time to time, so however, that the aggregate period does not exceed five years; or

(b) remove the member and get the vacancy filled up for the remaining period of the out going member, according to the provisions of this Act, the rules and the bye-laws.

(1-A) Where the Registrar, while proceeding to take action under sub-section (1) is of the opinion that suspension of the committee or any member during the period of proceedings is necessary in the interest of the Co-operative society, he may suspend such committee or member, as the case may be, and where the committee is suspended, make such arrangements as he think proper for the management of the affairs of the society till the proceedings are completed:

Provided that if the committee or member so suspended is not remove, it or he shall be re-instated and the period of suspension shall count towards its or his term; ... ...

(2) ... ...

(3) ... ...

(4) ... ...

(5) Before taking any action under sub-section(1) in respect of a Co-operative society, the Registrar shall consult the financing institution to which it is indebted.

(6) A member who is removed under sub-section (1) may be disqualified for being elected to any committee for such period not exceeding three years as the Registrar may fix and the said period shall commence after the expiry of the term of the committees from which he is removed. ... ..."

"67. Inquiry by the Registrar:-

(1) The Registrar may, of his own motion, by himself or by a person authorized by him, by order in writing, hold an enquiry into the constitution, working and financial condition of a society.

(2) An inquiry of the nature referred to in sub-section (1) shall be held on the application of –

(a) a society to which the society concerned is affiliated; or

(b) a majority of the members of the managing committee of the society; or

(c) not less than one-third of the total number of members of the society.

(3) ... ...

(4) ... ..."

23. Sub-Section (1) of Section 37 states that (a) if in the opinion of the Registrar (b) a Committee or any Member of any Cooperative Society (c) persistently makes default or is negligent in the performance of duties imposed under the Act, Rules etc. or (d) commits

any act (e) which is prejudicial to the interest of the Society and its Members (f) he may, (g) after giving such Committee or Member an opportunity to state its objections (h) by order in writing remove the Committee (i) and take resultant consequential action for proper management of the affairs of the Society.

24. For the purpose of instant case, we notice that all the essential ingredients stand fulfilled inasmuch as (a) Registrar has formed his opinion; and (b) an opportunity to object stands afforded. The opinion based on cogent material, *prima facie* finds the act of the Members to be of persistent default and prejudicial to the interest of the Society.

25. What is 'consultation' and whether it is mandatory or directory stands explained by the Apex Court in *Indian Administrative Service (S.C.S.) Association, U.P. and others vs. Union of India and others,* 1993 Supp (1) SCC 730 in the following terms:-

> "26. The result of the above discussion leads to the following conclusions:
>
> (1 Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.
>
> (2 When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.
>
> (3 When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.
>
> (4 When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.
>
> (5 When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action "after consultation".
>
> (6 No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the court to determine in each case in the light of its facts and circumstances whether the action is "after consultation"; "was in fact consulted" or was it a "sufficient consultation".
>
> (7 Where any action is legislative in character, the consultation envisages like one under Section 3 (1 of the Act, that the central Government is to intimate to the State governments concerned of the proposed action in

> general outlines and on receiving the objections or suggestions, the central government or Legislature is free to evolve its policy decision, make appropriate legislation with necessary additions or modification or omit the proposed one in draft bill or rules. The revised draft bill or rules, amendments or additions in the altered or modified form need not again be communicated to all the concerned State governments nor have prior fresh consultation. Rules or Regulations being legislative in character, would tacitly receive the approval of the State governments through the people's representatives when laid on the floor of each House of Parliament. The Act or the Rule made at the final shape is not rendered void or ultra vires or invalid for non-consultation."

26. The issue which arises for consideration is as to whether prior to the issuance of notice, provisions of Sub-Section (5) of Section 37 of the Act would come into play or not.

27. Answer to the same in our considered view is in the negative for the following reasons: Sub-Section (5) does not refer to Sub-Section (1-A). It only refers to Sub-Section (1) and expression "any action" stipulated therein necessarily has to be in relation to the consequential action of removal of the Committee, which is after the issuance of show cause notice calling upon the noticee to show cause and state its objection, for after all, the Registrar may after affording opportunity, himself come to the conclusion that no action for removal is required to be taken in view of justification, plausible in nature, if any, furnished by the noticee. For formation of opinion in the issuance of notice no prior consultation is required. Otherwise for everything and anything he would have to rush to the bank seeking its opinion, which would not only stifle the power to be exercised by the Registrar but make his authority otiose. Removal of the Committee and the resultant consequential actions are definitely of serious nature. It is in this backdrop, safe guard of Sub-Section (5) is prescribed in the Statute. The safe guard is also stipulated considering the disqualification which a Member entails by virtue of Sub-Section (6) of the very same Section, in the event of his removal.

28. The view we take is fortified by law. The principles of interpretation of a statute are now well settled. A statute is an edit of the Legislature {*Vishnu Pratap Sugar Works (Private) Ltd. v. Chief Inspector of Stamp, U.P.,* AIR 1968 SC 102 (Three Judges)}, and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker {*RMD Chamarbaugwala v. Union of India,* AIR 1957 SC 628 (Five Judges)}.

29. The Court has to look essentially to the words of the statute to discern the 'referent' aiding their effort as much as possible to the context.

30. The legal maxim *mens or sententia legis* {*Abhiram Singh v. C.D. Commachen (Dead) by Legal Representatives & others,* (2017) 2 SCC 629 (Seven Judges)}, and *Generalia specialia non derogant* {General Things do not derogate from special things, OSBORNS Law Dictionary}, are well settled.

31. It is also settled principle of law that the statute must be read as a whole and one provision of the Act should be construed with respect to the other provisions in the same Act, so as to make a consistent enactment of the whole statute. This, in fact, is the elementary rule of interpretation. {*AG v. HRH Prince Ernest Augustus,* (1957) 1 All ER 49; *Philips India Ltd. v. Labour Court,* (1985) 3 SCC 103 (Two Judges)}.

32. Every clause of a statute should be construed with reference to the context and other *clauses* of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter. {*M. Pantiah and others v.*

Muddala Veeramallappa and others, AIR 1961 SC 1107 (Five Judges)}. The principle for such construction is *ex visceribus actus* {*Newspapers Ltd. v. State Industrial Tribunal, U.P. & others,* AIR 1957 SC 532 (Three Judges)}.

33. It is also a settled principle of law that the same word may mean one thing in one context and another in a different context. For this reason the same word used in different sections of a statute or even when used at different places in the same clause or section, may bear separate meanings. {*D.N. Banerji v. P.R. Mukherjee,* AIR 1953 SC 58 (Five Judges); *Ramnarayan Mor v. State of Maharashtra,* AIR 1964 SC 949 (Five Judges); and *Anand Nivas (P) Ltd. v. Anandji Kalyanji,* AIR 1965 SC 414 (Three Judges)}.

34. In *Macquarie Bank Limited* Vs. *Shilpi Cable* Technologies Limited, (2018) 2 Supreme Court Cases 674, Hon'ble Supreme Court has held that the task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but to interpret the provision keeping in mind the Parliament's language and the object that Parliament had in mind.

35. In *K.P. Sudhakaran and another* Vs. *State of Kerala and others, (2006) 5 Supreme Court* Cases 386, Hon'ble Supreme Court has held that once a statutory rule is made without providing any exceptions, it is not possible to carve out exceptions to such rule by judicial interpretation.

36. For ascertaining the legislative intent, it is the basic rule of statutory construction that the construction preferred should be the one which advances the purpose and object of legislation and the one which leads to anomalies, injustice or absurdities should be overruled. {*M/s Girdhari Lal* (supra)}. Also, the provisions have to be read harmoniously to provide meaning and purpose. {*T.M.A Pai Foundation* (supra)}.

37. The Apex Court in *Bhatia International* (supra), has observed as under:

> "15. ..... The conventional way of interpreting a statute is to seek the intention of its makers. If a statutory provision is open to more than one interpretation then the Court has to choose that interpretation which represents the true intention of the legislature. This task often is not an easy one and several difficulties arise on account of variety of reasons, but at the same, it must be borne in mind that it is impossible even for the most imaginative legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. It is in such a situation the Courts' duty to expound arises with a caution that the Court should not try to legislate. While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion. Notwithstanding the conventional principle that the duty of judges is to expound and not to legislate. The Courts have taken the view that the judicial art of interpretation and appraisal is imbued with creativity and realism and since interpretation always implied a degree of discretion and choice, the Court would adopt particularly in areas such as constitutional adjudication dealing with social and (sic) rights. Courts are therefore, held as "finishers, refiners, and polishers of legislatures which gives them in a state requiring varying degrees of further processing". (See *Corocraft Ltd. v. Pan American Airways*, (1968) 3 WLR 714 at page 732; *State of Haryana v. Sampuran Singh,* (1975) 2

SCC 810 at page 1957. If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. (See *Johnson v. Moreton* (1978) 3 All ER 37 and *Stock v. Frank Jones (Tipton) Ltd.* (1978) 1 All ER 948). In selecting out of different interpretations the Court will adopt that which is just reasonable and sensible rather than that which is none of those things, as it may be presumed that the legislature should have used the word in that interpretation which least offends our sense of justice. In *Shanon Realites Ltd. v. Sant Machael* (924) AC 185 at page 192-93 Lord Shaw stated,

> "where words of a statute are clear, they must, of course, be followed, but in their Lordships opinion where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system".

This principle was accepted by Subba Rao, J. while construing Section 193 of the Sea Customs Act and in coming to the conclusion that the Chief of Customs Authority was not an officer of custom. {Collector of Customs v. Digvijaysinhji Spg. & Wvg. Mills Ltd., (AIR 1961 SC 1549}."

38. Repetitive though it may appear, but as already noticed, we reiterate that Sub-Section (1) of Section 37 provides for (a) formation of an opinion in the issuance of show cause notice; and (b) passing a written order in removing the Committee. It is only when the Registrar deems it appropriate to remove the Committee, in our considered view, he has to necessarily consult the Financial Institution to which a Cooperative Society is indebted. In any event, no prior consultation stipulated under Sub-Section (5) is required for initiating action under Sub-Section (1-A) of such Section. Question No.(a) is answered accordingly.

39. The next issue, which arises for consideration, is as to whether Sub-Section (1-A) is subject to completion of all the actions stipulated under Sub-Section (1) or not?

40. The language of Sub-Section (1-A) is plain, simple and unambiguously clear. It uses the expression “while proceeding to take action under Sub-Section (1)” the Registrar is of the opinion that suspension of the Committee or any Member is necessary and in the interest of Society, he may take action of suspending the Committee or such Member and thereafter make proper arrangements for the management and affairs of the Society “till the proceedings are completed”. So what is important is contemplation of action under Sub-Section (1) and the Registrar deciding to proceed in that direction, a Committee/ any Member can be suspended where it is deemed necessary in the interest of the Society to do so, till such time proceedings under Sub-Section (1) are completed.

41. It may well occur, is not the power exercised by the Registrar, draconian in nature, inasmuch as a duly elected Member or a Committee is obstructed from discharging and performing constitutional obligations and statutory duties? Well the answer to the same lies in the proviso to the said Sub-Section, wherein it is categorically provided that in the

event of non removal of the Committee or Member so suspended, the same, "shall be reinstated".

42. The word "suspension" cannot be construed to mean "supersession" which in fact is replacement. Suspension is a stop gap temporary measure. We see no reason as to why pending such inquiry, petitioner places the entire material before the authority; argues his case; persuades and convinces the said authority in dropping the proceedings so initiated. This in fact, would only help the petitioner, for all facts can best be understood, appreciated and applied for taking decision on the action so initiated. We clarify that we have not gone into the factual aspect. We are of the considered view that in the interpretation of the Statute all factual pleas on merits can be best taken note of by the said authority.

43. In fact, this issue in our considered view, is no longer res *integra*. While dealing under similar circumstances, the Constitution Bench of the Apex Court (Five Judges) in *Veerpal Singh vs. Registrar, Co-Operative Societies U.P. and others,* (1973) 1 SCC 456, observed as under:-

> "13. These provisions indicate the circumstances under which the Registrar has power to supersede or suspend the committee of management and to appoint an administrator. Section 35 (2) of the Act confers power on the Registrar to suspend the committee of management during the period of proceedings for supersession. The Registrar has also power under Section 35 (2) of the Act to make arrangement as he thinks proper for the management of the society till the proceedings are completed. The power to suspend the committee of management during the period of proceedings is exercisable when proceedings for supersession have commenced. Section 35 (1) of the Act shows that when the Registrar is of opinion that the committee of a co-operative society makes default or is negligent in the performance of duties or is otherwise not functioning properly the Registrar may supersede the committee of management and has to give an opportunity to the society to be heard in that behalf. The Registrar has also to obtain the opinion of the general body of the society. Therefore, the opinion of the Registrar is to be followed by some definite act which will commence the proceedings for supersession. The provisions in the Act indicate that some definite step like the issue of a notice must be taken under the provisions of Section 35 (1) of the Act with a view to show that proceedings for supersession of the committee are set in motion.
>
> 14. It is therefore manifest that power exercisable under S. 35 (2) of the Act is confined to the time during the period of supersession proceedings. Unless the proceedings have started as indicated earlier the Registrar cannot call in aid the power exercisable under Section 35 (2) of the Act.
>
> 15. The second question which has to be decided is whether the Registrar could appoint an administrator in the present case. The Registrar could not appoint an administrator. The reasons are these. The proceedings for supersession of the committee of management have not commenced. The proceeding can commence only when the necessary step to commence it is taken. The interim suspension of the committee of management under Section 35 (2) of the Act is made when in the opinion of the Registrar the suspension of the committee of management during the period of proceedings is necessary in the interest of the society. As no proceedings have been set in motion in accordance with the provisions of the statute, the

> interim suspension of the committee of management is bad. An appointment of administrator is specifically dealt with in sub-sections (3), (4), (5) and (6) of S. 35 of the Act. The appointment of administrator is normally after the supersession of the committee of management. It is true that there is no specific provision for an appointment of administrator during the interim period. But Section 35 (2) of the Act states that the Registrar may make such arrangement as he thinks proper for the management of the affairs of the society till the proceedings are completed. An appointment of administrator during the interim period is therefore not ruled out of the provisions of Section 35 (2) of the Act, but the prerequisite condition to the appointment of the interim administrator has not been fulfilled in the present case, because no proceedings for the supersession of the committee of management of the society have commenced."
>
> (Emphasis supplied)

44. Questions No.(b) and (c) are answered accordingly.

45. Much emphasis is laid on *Sanjay Nagayach* (supra). Having carefully gone through the said report, we are not in agreement with the submissions made by the learned counsel for the petitioner, for the ratio of law laid down therein is not only distinguishable but totally inapplicable to the instant facts. There the Court was dealing with a case where the alleged acts of malfeasance and misfeasance were not that of the persons in control of the affairs, but their predecessor-in-interest. Also for a period of 2 ½ years, no action on the show cause notice was taken and suddenly, one fine day, without consultation of the concerned financial institution, the appropriate authority superseded the Board by appointing an Administrator. It is in this backdrop that the order of the authority was found to be ultra vires the provisions of the Statute, for there was no consultation prior to supersession which is not so done in the instant case. Hence the said decision has no bearing to the instant facts and the impugned action cannot be found to be contrary to the ratio of law laid down therein. Question No.(d) is answered accordingly.

46. This takes us to another issue and that being as to whether the provisions of Section 37 are subject to Section 67 or not? In our considered view inquiry contemplated under Section 37 is totally different and distinct than the one contemplated under Section 67, both with regard to its object, scope and purpose. Inquiry under the latter is with regard to the constitution, working and financial condition of the Society to be initiated as per procedure prescribed therein, *suo motu* by the Registrar himself or through an authorized person on the asking of the Society and/or its Members. This is unlike the inquiry contemplated under the former section, where the Registrar himself, after forming an opinion after issuing show cause notice has to pass an order with regard to the acts of negligence, inactions, defaults, which are prejudicial to the interest of the Society or its Members. Also the Section itself provides for resultant consequence which would follow thereafter.

47. Further Section 37 and Section 67 of the Act are not in conflict with each other. Section 37 which provides for supersession of committee, is part of Chapter-IV of the Act, which deals with Management of Cooperative Societies. On the other hand, Section 67 which casts duty on the Registrar to hold an inquiry, finds mention in Chapter-VIII of the Act, which Chapter deals with Audit, Inquiry, Inspection and Surcharge etc. Thus, it is apparent that both these Sections operate in totally different and distinct spheres. Section 67 of the Act confers upon the Registrar the duty, either on his own motion or on an application, as envisaged in Sub-section (2) thereof to hold an inquiry. Now incidentally, language of the said Section is unambiguous that if an application, as envisaged in Sub-

section (2) thereof is received by the Registrar, then it is mandatory for him to hold an inquiry. This is unlike the provisions of Sub-section (1) thereof, wherein, the Registrar "may" of his own motion hold an inquiry. Sub-section (4) thereof further envisages that where an inquiry is made under Section 67, then the Registrar shall communicate the result of the same to the society or the cooperative society, if any, to which the said society is affiliated and to the persons or authority, if any, at whose instance the enquiry is made. Thus, it is apparent from the perusal of this Sub-section that Registrar, Cooperative Societies has no role more than holding of an inquiry and thereafter submitting the result of the same in the mode and manner prescribed under Sub-section (4). Neither this Section nor Chapter-VIII of the Act envisages any action on the said inquiry report by the Registrar. However, when one peruses the provisions of Section 37 of the Act, therein the authority stands conferred upon the Registrar for the supersession of the committee in the mode and manner envisaged in the said Section. What is required while exercising powers conferred under Section 37 of the Act is the satisfaction of the Registrar, which has to be so formed by following the procedure as provided under this Section. The authority conferred upon the Registrar under Section 37 is *quasi* judicial in nature, whereas the same cannot be said with regard to the provisions contemplated in Section 67 of the Act. Whereas Section 37 confers upon the Registrar an affirmative power of superseding the committee, Section 67 only confers upon the Registrar the duty to hold an inquiry and thereafter submit the report in the mode and manner, as envisaged in Sub-section (4) thereof. The purpose of incorporating Section 37 in the Act is totally different from the intent behind Section 67. There is neither any conflict in the Scheme of the Statute nor it can be said that the powers and duties conferred upon the Registrar under Sections 37 and 67, respectively either overlap each other or outreach the intent of each other. Question No. (e) is answered accordingly.

48. The action cannot be said to be violative of the Statute, equity or fair play only for the reason that no action, similar in nature stands taken against the Government Officers/nominees placed on the Board. Such representation by nomination can always be recalled /changed by the Government. Similarly, it cannot be argued that in the absence of any action taken against the entire Committee, the impugned action is unsustainable in law. To contend that out of seven allegations six are pursuant to various directions issued by the Court, at this stage, does not weigh with us, in the petitioners support. For one, there is no such material before us and second it is always open for the petitioner to take all such factual pleas in response to the show cause notice. And Article-14 would not apply in the negative.

49. It is also not that the Registrar is Judge in his own cause. He has statutory duty to perform which in the instant case, is so being performed by another incumbent.

50. Whether the complaint is anonymous or not also would not matter, for what is important is the contents thereof and not the source.

51. The order of suspension cannot be said to have been passed without any material or application of mind. Significantly the action cannot be said to be malafide; ultra vires the Statute; and the principles of natural justice. Questions No.(f) and (g) are answered accordingly.

52. Decisions in B.C. Chaturvedi (supra); *Boddula Krishnaiah* (supra); *Commercial Tax Officer* (supra); *Reliance Airport Developers (P) Ltd.* (supra); *Sam Built Well Private Limited* (supra); *Brahm Datt Sharma* (supra); *Vicco Laboratories* (supra); *Special Director* (supra); *Kunisetty Satyanarayana* (supra); and *Shadi Singh* (supra) referred to and relied upon by the learned Advocate General as also decision rendered in *Ragho Singh* (supra) referred to and relied upon by the learned counsel for the petitioner, are not relevant,

for they are based on the scope of judicial review by the Courts, more so in a case where prayer is made to interfere with the process of election.

In view of the aforesaid discussion, present petition, being devoid of any merit, is dismissed. Pending application(s), if any, also stand disposed of.

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

Virender Singh .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr. Revision No. 170 of 2009
Decided on: October 25, 2018

Indian Penal Code, 1860- Sections 279 and 337- Rash and negligent driving – Proof – Trial Court convicting and sentencing accused on finding that he was rash and negligent in driving Ambassador car and as result thereof, injuries were caused to wife and daughter of complainant who was driving Fiat car – Appeal of accused also dismissed by Addl. Sessions Judge- Revision – Evidence showing that wife and daughter of complainant not even cited as witnesses – Spot map revealing that complainant himself had gone toward his wrong side of road – Road at relevant point too wide – Held, probability of accident having taken place on account of rashness of complainant, cannot be ruled out – Lower Courts fell in grave error while appreciating evidence on record – Revision allowed – Conviction and sentence set aside. (Paras- 8 to 10 & 17)

Cases referred:
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 Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 SCC 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 SCC 241

For the petitioner Ms. Shivani Kanwar, Advocate.
For the respondent Mr. S.C. Sharma and Mr. Dinesh Thakur, Addl. AG's with Mr. Amit Kumar, DAG.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant criminal revision petition filed under S. 397 read with S. 401 CrPC, is directed against judgment dated 22.10.2009, passed by the learned Additional Sessions Judge, Solan, District Solan, Himachal Pradesh in Cr. Appeal No. 22-S/10 of 2009, affirming judgment/order of conviction dated 6.6.2009, passed by the learned Chief Judicial Magistrate, Solan, District Solan (HP) in Criminal Case No. 171/2 of 2003, whereby learned trial Court while holding petitioner-accused (hereinafter, 'accused') guilty of having

committed offences punishable under Ss. 279 and 337 IPC, convicted and sentenced the accused to undergo simple imprisonment for six months and to pay Rs.500, each and in default of payment of fine, accused has been ordered to further undergo simple imprisonment for a period of one month under both the offences.

2. Briefly stated the facts, as emerge from the record, are that PW-1 (Complainant) Dr. U.K. Neogi, got his statement recorded under S. 154 CrPC, on 10.1.2005, alleging therein that on the intervening night of 13th and 14th June 2003, at about 2.30 am, at place "Suki Johari" on National Highway 22, accused was driving Ambassador car bearing registration No. HR-49A(T)-0111, in a rash and negligent manner, so as to endanger human life and personal safety of others, as a consequence of which, he hit his (complainant's) Fiat car bearing registration No. DL-3CQ-1763 being driven by him. On account of aforesaid accident, wife of the complainant Smt. S. Neogi and daughter D. Neogi, who at the relevant time, were traveling alongwith the complainant suffered injuries, whereas, huge damage was caused to his Fiat car. Complainant specifically alleged that the accused was driving his vehicle in a rash and negligent manner at the time of alleged accident. On the basis of aforesaid statement, having been made by the complainant, a formal FIR Ext. PW-4/A dated 12.1.2005 came to be registered against the accused under Ss. 279 and 337 IPC at Police Station, Dharampur, District Solan, Himachal Pradesh.

3. After completion of investigation, police presented *Challan* in the competent Court of law i.e. Chief Judicial Magistrate, Solan, District Solan, Himachal Pradesh, who being satisfied that prima facie case exists against the accused, put notice of accusation to accused for having committed offences punishable under Ss. 279 and 337 IPC, to which he pleaded not guilty and claimed trial. Learned trial Court, subsequently, vide judgment/order dated 6.6.2009, held accused guilty of having committed offences punishable under Ss. 279 and 337 IPC and accordingly, convicted and sentenced him as per description given herein above. Being aggrieved and dissatisfied with the impugned judgment/order of conviction passed by learned trial Court, accused preferred an appeal under S. 374 CrPC, before the learned Additional Sessions Judge, Solan, who vide judgment dated 22.10.2009, dismissed the appeal and upheld the judgment of conviction passed by trial court. In the aforesaid background, accused has approached this court in the instant proceedings, seeking his acquittal, after setting aside the judgments/order of conviction recorded by learned Courts below.

4. Ms. Shivani Kanwar, learned counsel representing the accused, while referring to the judgments/order of conviction passed by learned Courts below, vehemently argued that the same are not sustainable in the eyes of law being not based upon correct appreciation of evidence adduced on record by the respective parties and as such, deserve to be quashed and set aside. With a view to substantiate her aforesaid submission, she made this court to travel through the evidence adduced on record by the prosecution and contended that there is no evidence, if any, on the record led by prosecution suggestive of the fact that the offending vehicle was being driven rashly and negligently, at the time of alleged accident, as such, there was no occasion for the learned Courts below to have held accused guilty of the commission of offences under Ss. 279 and 337 IPC. Ms. Shivani Kanwar, further contended that there is no explanation rendered on record as to why the wife and the daughter of the complainant, who at the relevant time were traveling with the complainant, were not cited as prosecution witnesses, because their testimony, if any, could be material for the learned Courts below to adjudicate the controversy at hand. While referring to the statement of PW-1 (complainant), Ms. Shivani Kanwar strenuously argued that that this witness nowhere stated that the accident occurred on account of fault, if any, of the accused. While inviting attention of this Court to the spot map, Ext. PW-5/A, prepared immediately after the incident by the investigating agency, Ms. Shivani contended that the

bare perusal of same itself suggests that the vehicle being driven by the complainant was on the wrong side. Lastly, Ms. Shivani Kanwar, contended that since it has come on record that the accident took place near a *Dhaba*, it is not understood why efforts were not made by the prosecution to associate independent witnesses, though they were available in abundance.

5. Mr. Dinesh Thakur, learned Additional Advocate General, while supporting the impugned judgments/order of conviction recorded by learned Courts below, contended that keeping in view the reasoning assigned by the learned Courts below for holding the accused guilty of having committed offences punishable under Ss. 279 and 337 IPC, there is no scope of interference by this court, especially in view of the concurrent findings of facts and law recorded by the learned Courts below. He further contended that bare perusal of judgments passed by learned Courts below clearly suggests that both the learned Courts below have dealt with each and every aspect of the matter meticulously leaving no scope of interference by this court to re-appreciate the evidence that too in the present proceedings. While refuting the contention of Ms. Shivani Thakur, learned counsel representing the accused that prosecution was not able to prove beyond reasonable doubt that the offending vehicle was not being driven rashly and negligently by the accused, Mr. Dinesh Thakur, learned Additional Advocate General, while inviting attention of this Court to the statements of PW-1 (complainant) and PW-5 H.C. Anil Kumar contended that both these witnesses in unison have stated that at the time of alleged accident, vehicle i.e. Ambassador car was being driven rashly and negligently by the accused, as a consequence of which, wife and daughter of complainant, suffered injuries. Mr. Thakur, learned Additional Advocate General, further contended that true it is that correct dimensions have not been mentioned in the spot map, Ext. PW-5/A, but if it is read in its entirety, it clearly suggests that accused was on the wrong side whereas complainant was on his right side, while driving his vehicle. Mr. Thakur, learned Additional Advocate General, further contended that it has specifically come in the statement of PW-1 that at the time of alleged accident, vehicle was being driven by accused in a rash and negligent manner, as such, it can not be said that there is no evidence, if any, with regard to rash and negligent driving of the accused.

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

7. Having heard the learned counsel representing the parties and perused the evidence adduced on record by respective parties vis-à-vis impugned judgments/order of conviction, this court finds that there is no dispute, if any, with regard to the accident, rather, accused has admitted the factum of accident but in his statement recorded under S. 313 CrPC, he has stated that the accident occurred on account of fault of the complainant, who was allegedly driving on the wrong side.

8. Prosecution in the case at hand, with a view to prove its case, examined as many as nine witnesses, but PW-1, complainant, is the sole eye witness of incident, which allegedly happened at 2.30 am. It is not in dispute that at the time of alleged accident, wife and daughter of complainant, who allegedly received injuries in the accident, were also traveling in the Fiat car, but it is not understood that what prevented the prosecution from citing them as witnesses. If the statement of Dr. U.K. Neogi, PW-1 is perused in its entirety, it compels this court to agree with the contention of Ms. Shivani Thakur, learned counsel representing the accused that there is no specific assertion/allegation, if any, of rash and negligent driving by the accused, at the time of alleged incident. Though, this witness has stated that the accident occurred due to rash and negligent driving of accused, which itself is not sufficient to prove rashness and negligence of accused. He has stated that the vehicle was being driven in high speed. Hon'ble Apex Court and this court in a catena of judgments have repeatedly held that speed is not the sole criteria to ascertain rashness

and negligence but in this case, PW-1, in his statement has stated that the accident occurred on account of high speed and wrong direction of the vehicle being driven by accused. In his cross-examination, this witness admitted that three buses could easily pass from the place, where alleged accident took place. He also admitted that he had seen the offending vehicle coming from a distance of 50 metres.

9. PW-2 Constable Durga Dutt, who after having received telephonic information reached the spot, though stated in his statement that the offending vehicle i.e. Ambassador car was being driven in a rash and negligent manner by accused, but his statement may not be very relevant since he had no occasion to witness the accident, if any, with his own eyes, rather he can be termed to be merely a hearsay witness. Simply, statement, if any, with regard to rash and negligent driving, having been made by PW-5 also needs to be ignored because he came on the spot after the alleged accident. PW-5 H.C. Anil Kumar, who investigated the matter, also stated that the car bearing registration No. HR-49PA(T)-0111 was being driven rashly and negligently but it is not in dispute that this witness had no occasion to see accident with his own eyes.

10. Otherwise also, if the spot map, Ext. PW-5/A is perused, it completely demolishes the case of prosecution. Careful perusal of Ext. PW-5/A (Spot map) suggests that the vehicle i.e. Fiat Car bearing registration No. DL-3CQ-1763 being driven by complainant, was on the verge of crossing the centre line, meaning thereby accused was correct while making statement under S. 313 CrPC that the accident occurred on account of fault of complainant, who was on the wrong side.

11. By now, it is well settled that rashness and negligence can not be presumed, rather, same need to be proved by leading cogent and convincing evidence. 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."

12. 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."

13. Leaving everything aside, this court is unable to lay its hands on any specific statement made by these prosecution witnesses, with regard to rash and negligent driving, if any, by the accused at the time of accident. It was incumbent upon the prosecution to prove the guilt, if any, of the accused under Ss. 279 and 337 IPC to the effect that the vehicle in question was being driven in rash and negligent manner, so as to endanger human life or likely to cause injury to other person. 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. But, interestingly, in the case in hand, both these conditions as taken note above, are missing. It has been repeatedly held by Hon'ble Apex Court as well as this court that there can not be any presumption of rashness or negligence rather onus is always upon prosecution to prove beyond reasonable doubt that the vehicle in question was being driven rashly and negligently. In the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking the maxim *res ipsa loquitur*.

14. 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."

15. At this stage, learned Additional Advocate General placed reliance on judgment passed by the Hon'ble Apex Court titled ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri*** *(*1999)2 SCC 452, to suggest that this court has limited jurisdiction under Section 397 of the Cr.PC.

16. 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 SCC 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."

17. Consequently, in view of detailed discussion made herein above as well as law taken note herein above, this court has no hesitation to conclude that both the learned Courts below have fallen into grave error while holding accused guilty of having committed offences punishable under Ss. 279 and 337 IPC, especially when there is no evidence worth the name available on record suggestive of the fact that vehicle in question was being driven rashly and negligently on the date of alleged accident. Resultantly, present petition is allowed. judgment dated 22.10.2009 passed by the learned Additional Sessions Judge, Solan, District Solan, Himachal Pradesh in Cr. Appeal No. 22-S/10 of 2009 and judgment/order of conviction dated 6.6.2009, passed by the learned Chief Judicial Magistrate, Solan, District Solan (HP) in Criminal Case No. 171/2 of 2003 are quashed and set aside. Accused is acquitted of the offences punishable under Ss. 279 and 337 IPC. Bail bonds, if any, furnished by him are discharged. Fine amount, if any, paid by him, is ordered to be refunded to him.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Parvesh Kumar @ Vikkey ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

CrMP(M) No. 1121 of 2018
Decided on October 26, 2018.

Code of Criminal Procedure, 1973- Sections 164 and 439- Protection of Children from Sexual Offences Act, 2012 **–** Sections 4 and 12- Bail- Grant of – Status report of police revealing that prosecutrix though minor but having given statement under Section 164 of Code before Magistrate of going with accused of her own and accused doing nothing wrong with her – Prosecutrix also having refused to undergo medical examination – During trial, all material witnesses turned hostile – On facts, bail granted subject to conditions. (Paras-3, 8 & 14).

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. R.L. Verma, Advocate vice Mr. Vinod K. Sharma, Advocate.
For the respondent : Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.
ASI Sant Pal Sharma, I/O, Police Station Bangana, Una, H.P.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioner, who is behind the bars since 22.2.2018, has approached this court in the instant proceedings under S. 439 CrPC, praying therein for grant of regular bail in case FIR No. 27/18 dated 22.2.2018 under Ss. 363, 366A and 376 IPC, and Ss. 4 and 21 of the Protection of Children from Sexual Offences Act, registered at Police Station, Bangana, Una, Himachal Pradesh.

2. Sequel to order dated 20.9.2018, ASI Sant Pal Sharma, 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 the record reveals that FIR, detailed herein above, came to be lodged at the behest of the complainant namely Mukhtyaro Devi, who alleged hat her minor daughter i.e. prosecutrix has been kidnapped and sexually assaulted by the present bail petitioner. After lodging of aforesaid complaint, police recovered the prosecutrix from one tea shop at place called, 'Dhundhla'. Prosecutrix in her statement given to the police, categorically stated that she, of her own volition, had joined the company of bail petitioner and he has not committed any offence, much less, offence under S. 376 IPC. Status report further reveals that the prosecutrix refused to undergo medical examination. Police also got her statement recoded under S. 164 CrPC before the concerned Magistrate, wherein she reiterated that she, of her own volition, had joined the company of the bail petitioner and at no point of time, he had compelled her to join his company. Though, initially, prosecutrix had refused to under go medical examination but after lodging of FIR, detailed herein above, she was got medically examined, report whereof indicates that she was subjected to sexual intercourse. Further, the prosecutrix in her statement given before Magistrate under S. 164 CrPC, categorically stated that bail petitioner has not committed anything wrong with her and she, of her own volition, had joined his company. *Challan* in the case stands filed in the competent Court of law and as per record made available to this court, all the material prosecution witnesses have not supported the case of the prosecution.

4. Learned counsel for the bail petitioner, while referring to the record/status report, vehemently argued that no case, if any, is made out against the bail petitioner under S. 376 IPC, because all the material prosecution witnesses have resiled from their initial statements given to the police. While specifically inviting attention of this court to the statement of prosecutrix recorded under S. 164 CrPC, learned counsel representing the bail petitioner contended that it clearly suggests that the prosecutrix was not kidnapped rather, she, of her own volition, joined the company of the bail petitioner and as such, no case, if any, could be made against bail petitioner under S. 376 IPC.

5. During proceedings of the case, learned counsel for the bail petitioner also made available certified copies of the statements/ depositions having been made by the material prosecution witnesses during trial to demonstrate that no case is made out against the bail petitioner and as such, he deserves to be enlarged on bail.

6. Mr. Dinesh Thakur, learned Additional Advocate General, on the instructions of the Investigating Officer, who is present in the court, fairly acknowledged that all the material prosecution witnesses i.e. complainant, prosecutrix, father and aunt of prosecutrix, have resiled from their initial statements and as such, possibility of bail petitioner being convicted in the present case is very bleak and remote. Mr. Thakur, learned Additional Advocate General also contended that though the record clearly suggests that the prosecutrix at the time of alleged accident was a minor but since she has categorically stated before the court below that no wrong has been committed upon her in the alleged incident and she, of her own volition, had joined the company of the bail petitioner, there is no

likelihood of bail petitioner being punished for the committed offence punishable under S. 376 IPC and S. 4 of Protection of Children from Sexual Offences Act.

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

8. Having heard the learned counsel representing the parties and perused the material available on record especially, statements/depositions having been made by the material prosecution witnesses during trial, which are taken on record and made part of the case, file, this court finds that the chances of bail petitioner being convicted in the present case, are very bleak/remote. In the case at hand, prosecutrix from day one has maintained that the bail petitioner has not committed any wrong upon her and she, of her own volition, had joined his company, as such, this court sees no reason to allow the bail petitioner to incarcerate in jail for indefinite period, especially when he has already suffered for more than eight months. Though, aforesaid aspects of the matter are to be considered and decided by the learned trial Court, in the totality of the evidence available on record, but this court having perused record sees no reason to keep the bail petitioner behind the bars for indefinite period and as such, he deserves to be enlarged on bail.

9. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his 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."

10. 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."

11. In **Manoranjana Sinh alias Gupta** versus **CBI,** (2017) 5 SCC 218, Hon'ble Apex Court has held as under:

> "This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

12. 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.

13. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(xi) reasonable apprehension of the witnesses being influenced; and

(xii) danger, of course, of justice being thwarted by grant of bail.

14 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:

(f) 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;

(g) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(h) 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

(i) He shall not leave the territory of India without the prior permission of the Court.

(j) He shall surrender passport, if any, held by him.

15. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

16. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of instant petition alone.

The petition stand accordingly disposed of.

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

Ramesh Chand .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 643 of 2017
Reserved on: 12.10.2018
Decided on: 30.10.2018.

Indian Evidence Act, 1872- Section 3- Appreciation of evidence – DNA report – Held, DNA profiling being accurate is conclusive proof of fact that DNA derived from vaginal swab of victim was that of accused. (Para-25).

Indian Penal Code, 1860- Sections 376 & 506(II)- Protection of Children from Sexual Offences Act, 2012 **–** Section 6 - Aggravated penetrative sexual assault and criminal intimidation –Trial court convicting and sentencing accused on finding accused being on management staff of hospital and having raped victim a minor, in premises of hospital itself- Appeal – Accused assailing judgment of trial court on grounds inter alia, there is no evidence of his being on management staff of hospital, material collected during investigation of another case could not have been used against him, sampling of DNA not done as per procedure etc. – Evidence revealing that victim had initially lodged FIR against one 'K' of sexual assault and during medical examination, her vaginal swabs were taken – Vaginal swabs however linking accused – Victim during her interrogation revealing sexual assault by accused, and loading FIR against him – Accused admittedly working as driver in hospital – Blood sample of accused also taken before medical officer – No tampering with samples till examination in FSL – Documentary and medical evidence proving victim to be below 18 years on date of offences – Held, accused rightly convicted and sentenced by Special Judge – Appeal dismissed. (Paras- 15 & 26 to 28)

Cases referred:
Mohd. Imran Kahan vs. State (Govt. of NCT of Delhi), 2011(4) Criminal Court Cases 398 (SC)
State of H.P. vs. Mehboon Khan and other connected matters, Latest HLJ 2014 (HP) (FB) 900
Rajiv singh vs. State of Bihar & another, Criminal Appeal No. 1708 of 2015 (arising out of SLP (Crl.) No. 8111 of 2014

For the appellant: Mr. Ashwani Dhiman, Advocate.
For the respondent/State: Mr. Vikas Rathore, Additional Advocate General with Mr. J.S. Guleria, Deputy Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/accused/convict (hereinafter referred to as "the accused"), laying challenge to judgment dated 05.07.2017, passed by learned Special Judge, Bilaspur, District Bilaspur, H.P., in Sessions Trial No. 1/7 of 2016, C No. 1 of 2016, whereby the accused was convicted and sentenced for the commission of offences punishable under Sections 376 and 506(ii) of Indian Penal Code,

1860 (for short "IPC") and Section 6 of the Protection of children from Sexual Offences Act, 2012 (hereinafter referred to as "POSCO Act").

2. The factual matrix of the prosecution case can tersely be summarized as under:

On 22.08.2015, in the morning hours, within the premises of District Government Hospital, Bilaspur, the accused, being in the management staff of the hospital committed rape on the prosecutrix, who was less than 18 years of age. The accused also intimidated the prosecutrix to eliminate her and her family members, in case she divulge the incident to anyone. On the anvil of the statement of the prosecutrix made to the police under Section 154 Cr.P.C. a case was registered against the accused and the investigation ensued. The prosecutrix, in her statement made under Section 154 Cr.P.C., stated that she is 13 years old and studying in 9th standard in Government High School, Bhager. On 22.08.2015, at the instance of her mother, who was ill, she went to Government Hospital, Bilaspur, for bringing medicines for her mother. The prosecutrix has further stated that she was acquainted with the accused, as she used to tie *'rakhi'* to the son of the accused and he is resident of their village. As per the prosecutrix, the accused took her to a room in the hospital, where he committed rape on her and he threatened her to do away with her life in case she divulges the incident to anyone. The prosecutrix has further stated that on 12.08.2015 and 17.08.2015 one Kuldeep also assaulted her and the matter was reported to the police, but on that day, due to fear, she could not lodge report against the accused. Police got the accused medically examined and his medico legal certificate was obtained. Police recorded the disclosure statement of the accused made under Section 27 of the Indian Evidence Act and the accused got identified the spot of occurrence in presence of Shri Sohan Lal and Shri Madan Gopal. The prosecutrix was also medically examined and her medico legal certificate was also obtained. Police prepared the spot maps and photographs of the spot were clicked. Records qua date of birth of the prosecutrix were obtained from Secretary, Gram Panchayat, Amarpur, and Headmaster, Government High School, Bhager. After receipt of the report of the forensic analysis of the samples and completing all other formalities, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as twenty two witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he pleaded not guilty. The accused did not lead any evidence in his defence.

4. The learned Trial Court, vide impugned judgment dated 05.07.2017, convicted the accused for the offence punishable under Section 6 of POCSO Act and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.10,000/-. In default of payment of fine the accused was ordered to undergo imprisonment for six months. Under Section 376 IPC the accused was convicted and sentenced to rigorous imprisonment for a period of ten years and to pay fine of Rs.10,000/-. In default of payment of fine, he was ordered to undergo further imprisonment for six months. The accused was also convicted under Section 506(II) IPC and sentenced to undergo rigorous imprisonment for a period of six months and fine of Rs.5,000/-. In default of payment of fine he was ordered to undergo further imprisonment for three months, hence the present appeal maintained by the appellant (accused/convict).

5. Shri Ashwani Dhiman, learned Counsel for the appellant, has argued that the appellant has been falsely implicated in the case in hand and the judgment, as passed by the learned Trial Court, is without appreciating the evidence and the law to its true and correct perspective. He has further argued that the DNA profiling was not scientific and the prosecution has failed to prove the fact that the DNA was of the appellant and taken as per the procedure prescribed. He has argued that in the present case, the prosecution has used

the investigation made in another case, which is not permissible, so the appellant be acquitted, as the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Shri Dhiman has further argued that there is no evidence on record to remotely show that the appellant was working in the hospital. Conversely, the learned Additional Advocate General has argued that at the relevant time the appellant was working as ambulance driver and he lodged a false complaint with regard sexual offence on the prosecutrix against another person, but when the DNA profiling was done, it came to the notice that it was the appellant who committed rape on the prosecutrix. He has further argued that subsequently FIR was registered against the appellant and separate investigation was carried out and the prosecution successfully proved the guilt of the accused by leading cogent and reliable evidence. He has further argued that the prosecution has proved the guilt of the appellant (convict) conclusively and beyond the shadow of reasonable doubts, so the judgment, as passed by the learned Trial Court, needs no interference by this Court, so the appeal be dismissed.

6. In rebuttal, Shri Dhiman, the learned Counsel for the appellant, has argued that the investigation carried out by the prosecution is marred by infirmities, so the present appeal be allowed and the appellant be acquitted. He has further argued that the report of the expert is merely piece of corroborative evidence and not conclusive proof of fact. In order to draw lateral support to his arguments he has relied upon the following judicial pronouncements:

1. ***Mohd. Imran Kahan vs. State (Govt. of NCT of Delhi), 2011(4) Criminal Court Cases 398 (SC):***
2. ***State of H.P. vs. Mehboon Khan and other connected matters, Latest HLJ 2014 (HP) (FB) 900; &***
3. ***Rajiv singh vs. State of Bihar & another, Criminal Appeal No. 1708 of 2015 (arising out of SLP (Crl.) No. 8111 of 2014.***

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

8. Avowedly, in sexual offences medical evidence is crucial aid to Courts to convict or acquit the accused, however, the same cannot at all be read in isolation without important ancillary material. In the case in hand, in the morning of 05.07.2017 the prosecutrix was allegedly raped by the accused in District Hospital, Bilaspur. As per the prosecution case, the prosecutrix went to the hospital for bringing medicines for her mother. So, the testimony of the prosecutrix, who was examined as PW-2, is very vital in the case in hand.

9. The prosecutrix was examined as PW-7. She deposed that she is studying in 9th class and her date of birth is 04.06.2002. She has further deposed that in the morning of 22.08.2015 she went to R.H. Bilaspur, for bringing medicines to her mother. As per the version of the prosecutrix, the accused, who is her uncle, took her in a room in the upper storey of the hospital building and she handed over to him prescription slip and money for the medicines. The accused told her to sit in the room and that he will bring the medicines, but the accused bolted the door from inside, laid her on the bed and committed sexual assault on her. As per the prosecutrix, the accused also threatened her to kill her and her parents in case she discloses the incident to anyone. The accused also gagged her mouth. Subsequently, the prosecutrix came back to her home and earlier she could not report the matter owing to fear. As per the testimony of the prosecutrix, police got her medically examined in R.H. Bilaspur and after couple of months police made inquires from her. Her statement, Ex. PW-1/A, was recorded by the police and she was taken by the police to the

room of the hospital, where the accused committed rape on her. Police clicked photographs of the spot, which are Ex. PA-1 to Ex. PA-8, and she was medically examined. The prosecutrix, in her cross-examination, has admitted that on 22.08.2015 she went to Police Station, Ghumarwin, but did not divulge that the accused committed rape on her due to fear. She did not divulge even before the Magistrate that the accused committed rape on her while her statement under Section 164 Cr.P.C. was being recorded. The prosecutrix has deposed that another case was against Kuldeep Singh. She did not divulge the fact qua rape by the accused to anyone outside the hospital or in the bus. On 22.08.2015 she went to hospital and came back home alone.

10. PW-2, Dr. N.K. Sankhyan, medically examined the accused on 10.11.2015. He has preserved the blood of the accused in EDTA tube and also on FTA card for DNA profiling and other tests. As per the opinion of this witness, there was nothing suggestive of the fact that the accused could not perform sexual intercourse. PW-2 issued medico legal certificate of the accused, which is Ex. PW-2/B. As per report of SFSL, Junga, Ex. PW-2/C, blood and semen were not detected on the underwear of the accused. This witness, in his cross-examination, has deposed that he handed over the blood sample in a sealed condition to the police.

11. PW-21, Dr. Bandana Gautam, deposed that on 22.08.2018 the prosecutrix, who was 13 years of age, was brought by the police before her for her medical examination with alleged history of sexual assault. She medically examined the prosecutrix and observed as under:

> ***"1. There was no scar/injury/swelling noted on face, neck, breasts and around the vaginal region,***
>
> ***2. Secondary sexual organs well developed,***
>
> ***3. Hymen was not intact,***
>
> ***4. No undergarments were worn by the victim at the time of examination."***

She preserved vaginal swab, slides, FTA card for DNA profiling, pubic hair and all the items were sealed with seal of C.H. Ghumarwin and handed over to Police for chemical analysis. This witness issued medico legal certificate, which is Ex. PW-21/B. On receipt of report, Ex. PW-21/C, from RFSL, Mandi, she opined that possibility of intercourse could not be ruled out. However, she reserved her final opinion till the final report of DNA profiling. She did not find any injury on the person of the prosecutrix when she medically examined her. The samples were preserved and handed over by her to lady Constable Sarita on the same day.

12. PW-17, Dr. Anupam Sharma, deposed that the prosecutrix was referred to her for determination of her age. She advised X-ray of right shoulder, elbow and wrist and X-ray pelvis AP view. As per this witness, after the forensic opinion, the age of the prosecutrix was found about thirteen years and half plus minus half year.

13. In the case in hand the police booked the accused only after receipt of DNA profiling report. DNA report is Ex. PW-19/A, which reveals as under:

> ***"1. the DNA profile obtained from Exhibit-1 (vaginal swab, prosecutrix) matched completely with the DNA profile obtained from Exhibit-1b (blood sample of same victim, i.e., prosecutrix) recevied vide file No. 2136/SFSL/DNA(293)/15,docket No. 8856/5a dt 30.09.15 P.S. Ghumarwin.***

2. The male DNA profile obtained from Exhibit-1a (vaginal swab, prosecutrix) received vide file no. 2136/SFSL/DNA(293)/15, docket No. 8856/5a dt 30.09.15 P.S. Ghumarwin matched completely with the DNA profile obtained from Exhibit-4 (Blood sample, Ramesh Chand).”

Thus, DNA profiling report, Ex. PW-19/A, clearly goes against the accused. Now, it is to be seen that the samples sent for carrying out DNA profiling were of the accused and that of the prosecutrix and the same were drawn by the medical expert and safely handed over to the police and lastly the police deposited the same in the laboratory without tampering the same.

14. PW-21, Dr. Bandana Gautam, categorically deposed that she preserved vaginal swab, slides, FTA card for DNA profiling, pubic hair and sealed the same with C.H. Ghurmarwin seal and handed over it to the police for chemical analysis. Another key witness in the present case is PW-16, HHC Kewal Kishore. He has specifically deposed that on 17.11.2015 he took two sealed parcels, which were sealed with seals of R.H. Bilaspur, two sealed envelopes, specimen of seals used vide R.C. No. 316/15, dated 16.11.2015, to SFSL, Junga. On his return, he handed over the receipt to MHC. PW-4, HC Mohinder Singh, MHC Police Station, Ghumarwin, deposed that on 22.08.2015 LC Sarita Devi deposited with him a sealed envelope, which was with seals of C.H. Ghumarwin. He made entry to this effect in the *malkhana* register, copy of which is Ex.PW-4/A. This witness has further deposed that on 26.09.2015 LC Sarita Devi brought RFSL report, Ex. PW-1/H, alongwith the case property and the same were deposited with him in the *malkhana.* On 30.09.2015 he sent a sealed envelope, which was sealed with two seals of seal of C.H. Ghumarwin and two seals of RFSL, Mandi, which were stated to have contained blood sample, vaginal swab, slide, pubic hair, FTA card of the victim, a sealed parcel sealed with seven seals of seal ‘M’ and a seal of RFSL, Mandi, parcels containing blood sample and nails of the accused for being deposited with SFSL, Junga, for DNA profiling. As per this witness, after deposit of the parcels at SFSL, Junga, Constable Sunil Kumar deposited the receipt with him, copy of RC is Ex. PW-1/G.

15. Now, it is to be seen whether the accused perpetrated the crime or not. The testimony of PW-10 is germane. PW-10, Shri Sohan Lal, Driver in the Health Department, deposed that accused, in his presence, showed the room where he committed rape on the prosecutrix. As per this witness, to this effect police prepared memo, Ex. PW-10/A, which bears his signatures and the signatures of witness Madan Gopal. As per this witness, accused was serving as Ambulance driver at Regional Hospital. Thus, it is clear from the deposition from PW-10 that the accused identified the spot of occurrence in his presence where he had committed sexual intercourse with the prosecutrix, who was minor. The accused did not dispute the statement made by PW-10, so it is rather accepted by the accused that at the relevant time he was serving as Ambulance driver at R.H. Bilaspur.

16. Admittedly, one of the focal point in the case in hand is the age of the prosecutrix and as per the prosecution she was born on 04.06.2002, as such she was less than 18 years of age at the time of occurrence. The accused has mainly endeavored hard to dispute the age of the prosecutrix. As per the testimony of the prosecutrix her date of birth is 04.06.2002. The prosecutrix stepped into the witness-box on 02.09.2016 and she has categorically deposed that she is student of 9th class in Government Senior Secondary School, Amarpur. The accused has not specifically disputed the age of the prosecutrix while the prosecutrix was cross-examined. The prosecution, in order to strengthen its case examined PW-12, Shri Vivek Kumar, TGT, Government High School Chuwari, Tehsil Ghumarwin. As per this witness, police vide application, Ex. PW-12/A, requested him for

providing record qua date of birth of the prosecutrix. This witness has further deposed that as per the school record the date of birth of the prosecutrix is 04.06.2002. Now, the tentative age of the prosecutrix has been fortified by the medical evidence. PW-2, Dr. N.K. Sankhyan, Medical Officer, has deposed that on 20.12.2012 he examined X-ray films, Ex. PW-2/D to Ex. PW-2/F, of the prosecutrix and he found that acromion and corocoid appeared, but acromion not fused. He has further deposed that that head of humerous was not fused – 13 to 14 years. All epiphysis at elbow appeared and fused-more than 13 years. Epiphysis of radious and ulna at wrist not fused, pisiform was present – 12 TO 15 years. Iliac crest started appearing. Head of femur and lessor trochonter not fused. Epiphysis of ishial tuberosity not appeared. Triratriate cartilage is almost fused – about 13 to 14 years. The cumulative effect of the deposition of PW-2, Dr. N.K. Sankhyan, is that in any case the age of the prosecutrix at the time of occurrence was about thirteen and half years plus minus half year. PW-2 has been cross-examined at length and he has deposed that he considered all the conditions, i.e., fusion of epiphysis depends upon the environmental condition and nutrition and hereditary etc. at the time of giving opinion qua the age of the prosecutrix. Thus, in view of the statement of PW-2, Dr. N.K. Sankhyan, Medical Officer, P.G. Forensic Medicines and Toxicology, lucidly shows that in any case age of the prosecutrix at the time of the occurrence was less than 14 years after considering plus minus of half year. PW-17, Dr. Anupam Sharma, who conducted X-ray examination of the prosecutrix also opined that the prosecutrix was about thirteen years of age half plus and minus half year.

17. As per the prosecution story, the accused made a disclosure statement and in order to prove this fact the prosecution has examined PW-9, Constable Chanchal Singh. He has deposed that on 12.11.2015 accused made a disclosure statement that he could identify the place where he had committed rape on the prosecutrix. The disclosure statement is Ex. PW-9/A, which is signed by him and by Constable Sandeep Kumar.

18. The prosecutrix (PW-7) deposed that the accused, who is known to her, as she used to tie *rakhi* to the son of the accused, took her to a room when she had gone to the hospital for bringing medicines to her mother. She has further deposed that the accused committed sexual intercourse with her and thereafter he threatened her to do away with her life in case she divulges the incident to anyone.

19. The blood of the accused was taken by PW-2, Dr. N.K. Sankhyan, and it was sealed by him and thereafter the same remained in safe custody, so there is nothing to doubt DNA profiling report, Ex. PW-19/A.

20. The versions of other prosecution witnesses, which are formal in natures, can be succinctly looked into. PW-1, Inspector Ashok Chauhan, deposed that he was investigating a matter which was registered vide FIR No. 179 of 2015 wherein the prosecutrix herein alleged that one Kuldeep Singh inserted fingers in her private part/vagina. He has further deposed that after receipt of report from chemical examiner it was noticed that semen was found on the vaginal swab and slides of the prosecutrix, so the prosecutrix was interrogated on 10.11.2015 and her statement was recorded under Section 154 Cr.P.C., which is Ex. PW-1/A, in the presence of her mother in their house. On the anvil of this statement, FIR was registered.

21. PW-4, HC Mohinder Singh, the then MHC Police Station, Ghumarwin, deposed that on 22.08.2015, Lady Constable Sarita Devi deposited with him a sealed envelope, having seals of C.H. Ghumarwin. He incorporated entry to this effect in the *malkhana* registered, copy whereof is Ex. PW-4/A. This witness has further deposed that on 26.09.2015, Lady Constable Sarita Devi brought result (Ex. Pw-1/H) from RFSL, Mandi, alongwith the case property and deposited the same in the *malkhana.* As per the testimony

of this witness, on 30.09.2015 he sent the sealed envelope and two seals of RFSL, Mandi, which stated to have contained blood sample, vaginal swab, slide of victim and pubic hair of victim and FTA card of victim, one sealed parcel sealed with seven seals of seal 'M' and a seal of RFSL, Mandi, which stated to have contained blood samples and nails of the accused for being deposited in SFSL, Junga. Constable Sunil Kumar handed over receipt to him. He has further deposed that copy of RC is Ex. PW-1/G.

22. PW-6, Lady Constable Sarita Sharma, deposed that on 22.08.2015, she took the prosecutrix to C.H. Ghumarwin for her medical examination and after her medical examination, medico legal certificate of the prosecutrix was handed over to her. She has further deposed that the medical officer also handed over to her an envelope containing the samples preserved during examination, which she safely deposited with MHC, Police Station, Ghumarwin. The prosecutrix also handed over to her white school uniform *salwar*, which was containing soil and the same was sealed in a parcel, which was sealed with seven seals of impression 'M' and taken into possession vide memo, Ex. PW-6/A. This witness, in her cross-examination, has deposed that on 22.08.2015 Dr. Bandana, Medical Officer, C.H. Ghumarwin, handed over to her the articles and Dr. Bandana herself prepared the parcels.

23. PW-15, HC Lalit Kumar, deposed that on 10.11.2015 ASI Rajinder deposited a sealed parcel, which was duly sealed with three seals of R.H. Bilaspur, stated to have contained blood sample of FTA card and underwear of the accused, one sealed envelope addressed to DNA section, SFSL, Junga alongwith specimen of seal used at R.H. Bilaspur with him. He has further deposed that entry qua the deposit of the aforesaid case property is made at Sr. No. 140/15 in the *malkhana* register. As per the deposition of this witness, on 16.11.2015 the above said parcels were sent to SFSL, Junga, through HHC Kewal Kishore, vide RC No. 316/15, and receipt, qua deposit of the same, was handed over to him by HHC Kewal Kishore on his return. The copy of *malkhana* register is Ex. PW-15/B and copy of RC is Ex. PW-15/A.

24. PW-20, SI Naresh Kumar, deposed that accused made disclosure statement, Ex. PW-9/A, and consequent thereto he got identified room No. 17 in the second floor of trauma centre, where he committed sexual assault on prosecutrix. As per this witness, to this effect he prepared spot map, Ex. PW-20/A, and memo, Ex. PW-10/A, was also prepared. He also clicked photographs, Ex. PA-1 to Ex. PA-8 and recorded the statements of witnesses Madan Gopal and Sohan Lal.

25. From the above discussion it is clear that the prosecution has clearly proved that the blood sample of the accused was taken by PW-2, Dr. N.K. Sankhyan, and it remained in safe custody till the DNA profiling was done and the same matches with sperm profiling of the vaginal swab of the prosecutrix. This scientific evidence is completely corroborated by the testimonies of the prosecution witnesses, as enumerated hereinabove and other circumstantial evidence, including the disclosure statement made by the accused and all other circumstances, which have come on record, are so well connected leaving any scope of doubt. The participation of the accused while getting a false case registered against one Kuldeep son of Mansa Ram and other material, which has come on record, the prosecution has clearly proved its case and the available material leads to only one conclusion that the accused had committed the offence. In the instant case, DNA profiling is accurate and conclusive proof, as the prosecution has proved that it was the DNA derived from the blood of the accused and from the vaginal swab of the prosecutrix which matches and the prosecution has also proved that sample of the blood of the accused was taken by PW-2, Dr. N.K. Sankhyan, and the sample remained intact. The prosecution has also successfully proved that the sample of blood of the accused was not tampered with till DNA profiling was done. So, the judgment rendered by Hon'ble Supreme Court in ***Rajiv Singh***

vs. State of Bihar & another, Criminal Appeal N o. 1708 of 2015 (arising out of SLP (Crl.) No. 8111 of 2014), whereupon the learned counsel for the appellant has placed reliance, is not applicable to the facts of the present case, as in the case supra the Hon'ble Supreme Court noticed shortcomings and deficiencies in the DNA sampling, test etc. and thus the DNA report was not accepted. However, in the instant case, there is nothing to doubt the DNA report, as the testimonies of prosecution witnesses remain unshakable and inspire confidence qua drawing of samples, samples remaining intact till the DNA profiling was done and there is nothing to suspect the accuracy of DNA matching report, Ex. PW-19/A.

26. The learned counsel for the appellant has also placed reliance on a judgment of this High Court rendered in ***State of H.P. vs. Mehboon Khan (alongwith connected matters), Latest HLJ 2014 (HP) (FB) 900,*** wherein Hon'ble Full Bench has held that report of an expert is merely a piece of evidence and not conclusive proof of a fact. It has also been held that opinion of the expert is only of advisory in nature, which enables the Court to form its independent opinion. The judgment (supra) relates to Narcotic Drugs and Psychotropic Substances Act, 1985. Now, as far as the DNA profiling is concerned, it cannot be compared with the narcotic material analysis, as in the case of narcotics the analysis is not as accurate as the DNA profiling. Thus, the judgment (supra) is of no help to the appellant, when further other evidence also leads to only conclusion, i.e. guilt of the accused.

27. The learned counsel for the appellant has placed reliance on another judgment of Hon'ble Supreme Court rendered in ***Mohd. Imran Khan vs. State (Govt. of NCT of Delhi), 2011(4) Criminal Court Cases 398 (S.C.),*** wherein vide para 14 it has been held as under:

> ***"AGE:***
>
> ***14. Both the courts below have laboured hard to find out the age of the prosecutrix for the reason that defence produced certificate from Safdarjung Hospital, New Delhi to create confusion and the I.O. in order to help the appellants had made a statement that the certificate on record did not belong to the prosecutrix. The medical report of the Radiologist issued by Ram Manohar Lohia Hospital, New Delhi revealed that age of the prosecutrix was between 16 and 17 years. The Birth Certificate issued under Section 17 of the Registration of Birth & Death Act, 1969 reveals that a female child was born on 2.9.1974 by the wedlock of Prabhu Dass and Devki, residents of Sector 12/69, R.K. Puram, New Delhi and its registration number had been 4840. It also reveals that number of live children including this child had been two. However, this certificate has been duly proved by Vijay Kumar Harnal, Medical Record Officer, Safdarjung Hospital, New Delhi (PW.9), who explained that one female child was born in Safdarjung Hospital at 7.15 a.m. on 2.9.1974. Her mother's name was Devki, wife of Prabhu Dass and her address was R.K. Puram, New Delhi. He also explained that the other Birth Certificate produced by the defence according to which a female child was born on 12.9.1971 was of a different female child who was born to one Devi Rani, wife of Prabhu Dayal, residents of Kotla Mubarakpur and thus, it did not belong to Monika, prosecutrix. Similar evidence had been given by Dr. R.K. Sharma, C.M.O.,***

N.D.M.C., Delhi (PW.7). According to him, the female child was born with Registration No.4840 on 2.9.1974 and he further explained that the name of the parents and address of another female child born on 27.9.1971 bearing different registration no.4502 had been totally different, i.e. Prabhu Dayal and Devi Rani, residents of Kotla Mubarakpur . The number of living children with that family is also different from that of the prosecutrix. These documents have thoroughly been examined by the courts below and we do not see any cogent reason to examine the issue further.

The medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2 years on either side. In Jaya Mala v. Home Secretary, Government of J & K & Ors., 1982 AIR(SC) 1297, this Court held:

"However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

(See also: Ram Suresh Singh v. Prabhat Singh @ Chhotu Singh & Anr., 2009 6 SCC 681; and State of Uttar Pradesh v. Chhotey Lal, 2011 2 SCC 550)

In view of the above as we have seen the original record produced before us, we are of the considered opinion that the prosecutrix was less than 16 years of age on the date of incident."

It is settled law that the medical report and the deposition of the Radiologist cannot with certainty predict the exact date of birth and it only gives an idea with a long margin of 1 to 2 years on either side. However, in the case in hand there is not only medical evidence which establishes the tentative age of the prosecutrix at the relevant time to be 13 years, but the medical evidence is also supported by other material, i.e., record of the school, where the prosecutrix was studying and as per this record, she was born on 04.06.2002. Thus, in all cases the age of the prosecutrix was less than 14 years and even if plus minus one to two years is made, the age of the prosecutrix will be less than 15 years. So, the judgment (supra) is also not applicable to the facts of the present case.

28. In view of what has been discussed hereinabove, 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. We find no reason to reverse the findings rendered by the learned Trial Court. The appeal, which sans merits, deserves dismissal and is accordingly dismissed, as the prosecution has proved the guilt of the accused conclusively and beyond the shadow of reasonable doubt.

29. 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Himanshu alias Shammi ....Appellant.
Versus
State of Himachal Pradesh ...Respondents.

Criminal Appeal No.504 of 2016
Reserved on : 11.10.2018
Date of Decision: October 31, 2018.

Indian Evidence Act, 1872- Section 118- Indian Penal Code, 1860- Sections 376 and 506- Protection of Children from Sexual Offences Act, 2012- Section 4- Child witness –Evidentiary value – Child witness whether examined on oath or otherwise if found competent to depose to facts and reliable one, such evidence could be basis of conviction – Credibility of evidence of child witness depends upon circumstances of each case – Only precaution which Court should bear in mind is that witness must be reliable and his/her demeanour must be like any other competent witness and there is no likelihood of witness being tutored - DattuRamraoSakhare v. State of Maharashtra, (1997 (5) SCC 341 referred to and relied upon. (Paras-47)

Indian Evidence Act, 1872- Section 118- Indian Penal Code, 1860- Sections 376 and 506- Protection of Children from Sexual Offences Act, 2012- Section 4- Child witnesses clearly deposing before Court that accused sexually assaulted them in his room where he had taken them on pretext of giving toffees – Accused son of landlady in part of whose building, Aganwadi, was being run by State Govt.-Victims on rolls of Aganwadi -Accused had access to children- Medical evidence of some of victims revealing hymens absent and redness of their private parts – Held, child witnesses were competent and reliable – Conviction and order of sentence recorded by Special Judge upheld. (Paras-18 & 53 to 60).

Indian Evidence Act, 1872- Section 6- Res gestae- What is? – Held, Section 6 of Act is an exception to general rule whereunder heresay evidence becomes admissible – But, what is required to be established is that it must be almost contemporaneous with acts and there should not be an interval which would allow fabrication.-Statements sought to be admitted must have been made contemporaneously with acts or immediately thereafter – Rationale in making certain statement or fact admissible under Section 6 of Act is on account of spontaneity and immediacy of such statement or fact in relation to fact in issue -It is necessary that such fact or statement must be part of same transaction - (Paras- 31 to 36).

Cases referred:
Dayal Singh v State of Uttaranchal, (2012) 8 SCC 263
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327)
State of Haryana v. Basti Ram, (2013) 4 SCC 200
O.M. Baby (Dead) by Legal Representative v. State of Keral, (2012) 11 SCC 362
State of U.P. v. Chhotey Lal, (2011) 2 SCC 550
Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
Mukesh v. State of Chhattisgarh, (2014) 10 SCC 327
Rameshwar v. The State of Rajasthan (AIR 1952 SC 54
Sukhar versus State of U.P., (1999) 9 SCC 507
Gentela Vijayavardhan Rao v. State of A. P., (1996) 6 SCC 241

Rattan Singh v. State of H. P., (1997) 4 SCC 161
Balram Prasad Agrawal versus State of Bihar and others, (1997) 9 SCC 338
J. D. Jain v. Management of State Bank of India, AIR 1982 SC 673: (1982) 1 SCC 143
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
State of Rajasthan versus Om Prakash, (2002) 5 SCC 745
Shyam Narain v. State (NCT of Delhi), (2013) 7 SCC 77
Dattu Ramrao Sakhare v. State of Maharashtra, (1997 (5) SCC 341
Golla Yelugu Govindu vs. State of Andhra Pradesh, (2008) 16 SCC 769
State of Himachal Pradesh v. Sanjay Kumar alias Sunny, (2017) 2 SCC 51
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688

For the Petitioner : Mr. Shivank Singh Panta, Advocte.
For the respondent : Mr. Ajay Vaidya, Senior Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

The following important issues arise for consideration in the present appeal: (a) As to whether the witnesses, being minors, were competent to testify in the Court in terms of Section 118 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act) and their depositions considered for examining the guilt of the accused; (b) As to whether their testimonies necessarily required corroboration; and (c) As to whether testimonies of the mothers of the victims can be considered, applying the doctrine of *res gestae,* in view of Section 6 of the Evidence Act.

2. The appellant stands convicted on the testimonies of child witnesses, three in number and their mothers, four in number, based on the corroborative medical evidence. The correctness of the reasoning and the findings returned by the trial judge are subject matter of consideration before us.

3. Accused-appellant Himanshu alias Shammi (hereinafter referred to as accused) has preferred the present appeal, laying challenge to the judgment dated 31.8.2016, passed by Special Judge, Chamba, Division Chamba, Himachal Pradesh, in Sessions Trial No.20 of 2015, titled as *State of Himachal Pradesh v. Himanshu alias Shammi*, whereby he stands convicted for having committed offences punishable under Sections 376, 506 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act), and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.10,000/- and in default thereof, to further undergo simple imprisonment for a period of six months, in relation to offence punishable under Section 4 of the POCSO Act; and rigorous imprisonment for a period of one year and fine of Rs.1,000/- and in default thereof to further undergo simple imprisonment for a period of one month, in relation to offence punishable under Section 506 of the Indian Penal Code.

4. It is the case of prosecution that an Anganwadi Centre was set up in an accommodation, rented to the State. The accused, being son of the landlady, had easy access to the said Centre and was sexually abusing the children. He sexually abused four minor victims and also threatened them of dire consequences. Such fact was discovered, when one of the victims disclosed the same to her mother, who alongwith other victims and their parents went to the Police Station and lodged FIR No.141/2015 (Ex. PW-1/A), dated 11.4.2015. Investigating Officer SI Sakini Kapoor (PW-18) got the victims medically

examined from Dr. Minakshi (PW-9) and obtained her medical opinion (Ex.PW-9/B, Ex. PW-9/C, Ex.PW-9/D and Ex.PW-9/E). Investigation revealed that the accused was in the habit of enticing the victims (four in number), on the pretext of giving toffees and after taking them to his room, subject them to sexual assault. During the course of investigation, statements of victims (Ex. PW-1/B, Ex. PW-2/A & Ex. PW-3/A) and that of Priyanka (PW-4) mother of the fourth victim, were recorded. Investigation further revealed the victims to be minors. Necessary corroborative evidence was collected by the Police and with the completion of investigation, challan presented in the Court for trial.

5. Accused was charged for having committed offences punishable under Sections 376 & 506 of the Indian Penal Code and Section 4 of the POCSO Act, to which he pleaded not guilty and claimed trial.

6. To prove its case, prosecution examined as many as 18 witnesses. Statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took the defence of innocence and false implication, on the ground that father of one of the victims had desired the property to be transferred which was so refused. He chose to lead evidence in his defence and examined his mother Bimla Devi (DW-1) as a witness.

7. Finding the testimonies of the three victims as also their mothers, four in number, to be inspiring in confidence, duly supported by corroborative evidence, trial Court found the accused to be guilty of having committed the charged offences and sentenced him as aforesaid.

8. Assailing the impugned judgment, Mr. Shivank Singh Panta, learned counsel for the accused, with vehemence, argues that the accused himself is a victim of circumstances and stands falsely implicated, for the reason that mother of the accused had refused to accede to the demand of the parents of the victims to sell her land. Also statements of the victims cannot be said to be inspiring in confidence.

9. On the other hand, with equal vehemence, Mr. Ajay Vaidya, learned Senior Additional Advocate General, supports the impugned judgment on the basis of material on record.

10. From the record as also statement of the accused recorded under the provisions of Section 313 of the Code of Criminal Procedure, it is evident that in the house owned by Bimla Devi (DW-1), the State Government had requisitioned accommodation, on rental basis, where an Anganwadi Centre stood established. Also, it was fully operational and functional.

11. Though the accused denies such fact but from the line of his cross-examination, unrebutting and undisputing, it is evident that the victims, four in number, used to play in the courtyard of the said Anganwadi Centre. It also stands admitted that the accused, who is 25-27 years of age, ordinarily resides with his mother in the very same village. Prosecution wants the Court to believe that the accused was residing in the very same building, but according to him, as is evident from the suggestions put to the witnesses, he was residing in a separate accommodation, which was close by, in fact same courtyard. Hence, presence of the victims and the accused on the spot cannot be disputed.

12. We now proceed to examine as to whether the accused has been able to probablize the defence of false implication, so taken in his statement under Section 313 of the Code of Criminal Procedure, in the following terms, or not:

> "All the witnesses deposed false as their houses were abutting to my house. Parents of victims child Lal Singh and Sudershan and approached

my father to sell his land and when my father refused to sell land, thereafter they approached me to execute the sale deed in their favour but I refused to sell my land and then all the parents of victims conspired to implicate me in a false case, the father of third victim (PW-1) is relative of Sudershan and Lal Singh and family of PW.1 is tenant of Yogesh and his uncle."

13. To probablize the same, his mother Bimla Devi stepped into the witness box and deposed as DW-1. In the examination-in-chief part of her testimony, she does state that Lal Singh, Sudershan and Puran Bhadur, fathers/relatives of the victims, had been asking her to transfer her land for construction of house/ toilet/septic tank. By mere statement of such fact, defence cannot be said to have been probablized, for in her testimony she does not state that parents of the victims had threatened of any false implication of any member of her family or in any manner, ever intimidated them. There is no history of any complaint or litigation pertaining to any land. When? Where? and in whose presence? such demand was made, remains a shrouded mystery. Significantly, she admits the parents of the victims to have owned some land. For some reason, she denies the revenue record (Ex. PX, P-1 & P-2), reflecting the parents of the victims to be owners of 11 biswas of land. It is in this backdrop that we reject the submission of the accused of having been falsely implicated on account of land dispute.

14. At this stage, we may clarify that this fact has had no bearing in our mind while arriving at our conclusion in deciding the appeal on merits.

15. In the instant case, there are four victims, whom we term as Victim No.1 (PW-1), Victim No.2 (PW-2), Victim No.3 (PW-3) and Victim No.4 (Aged 2½ years, not examined). All the four victims are girls. Victim No.1 is aged 10 years; Victim No.2 is aged 8 years; Victim No.3 is aged 10 years; and Victim No.4 is aged 2½ years.

16. In order to prove the age of the victims, prosecution examined Thakur Singh (PW-11), Secretary of Gram Panchayat, Karian, who has proven Birth Certificates in respect of Victim No.2 (Ex.PW-11/C), Victim No.3 (Ex.PW-11/D); Victim No.4 (Ex. PW-11/B) and copies of family register, in respect of Lal Singh, Sudershan Singh & Yogesh (Ex.PW-11/E, Ex.PW-11/F & Ex.PW-11/G, respectively). He further states that since date of birth of Victim No.1 was not available, he issued certificate (Ex.PW-11/H) in that respect. Thus the factum of age, in our considered opinion, stands established, in accordance with law.

17. It has come in the testimony of Dr. Kamaljeet Singh (PW-10) that the accused was got medically examined from him. He found him capable of performing sexual intercourse. MLC (Ex.PW-10/B), in this respect, is on record. Hence, plea of incapacity stands rejected.

18. It has also come in the testimony of Dr. Minakshi (PW-9) that police got all the four victims medically examined through her. In Court, she has deposed of having issued MLCs, in respect of Victim No.1 (Ex.PW-9/B), Victim No.2 (Ex.PW-9/C), Victim No.3 (Ex. PW-3/D) and Victim No.4 (Ex.PW-3/E). She states that on physical examination of Victims No.1, 2 & 3, though there were no scars, wounds or injury on body, but there was redness in the private parts and the hymens were absent. According to the Doctor, injuries on the private parts of Victim No.1 & 2 could be on account of sexual assault within one month, and that on the private part of Victim No.3 within a period of 15-20 days. With regard to Victim No.4, the Doctor has opined that in the anal region, there was redness and tenderness. Also, she took the vaginal swabs and slides of all the victims, which were handed over to the police.

19. From the cross-examination part of her testimony, we do not find her opinion of sexual assault to be rendered doubtful, in any manner. In fact, suggestion put by the

accused of the hymen having been ruptured on account of masturbation with hard object or finger is extremely shocking and preposterous. In any event, the Doctor has clarified that the victims were not of the age to have performed such an act.

20. Though, it is not the case in hand, but Mr. Shivank Singh Panta argues that medical record is at variance with the ocular version. Hence we discuss the law on the issue.

21. The Apex Court had the occasion to deal with the case where there was a conflict between medical evidence and ocular evidence of the prosecution and *Dayal Singh v State of Uttaranchal*, (2012) 8 SCC 263 (SCC p.283, paras 35036) observed that possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Only where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

22. It is also a settled principle of law that where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. [*Dayal Singh* (supra)].

23. After all the expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court.

24. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve the testimony of the prosecutrix. (See: *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327); *State of Haryana v. Basti Ram,* (2013) 4 SCC 200; *O.M. Baby (Dead) by Legal Representative v. State of Keral,* (2012) 11 SCC 362; and *State of U.P. v. Chhotey Lal,* (2011) 2 SCC 550).

25. Reiterating its earlier view in *Mohd. Iqbal v. State of Jharkhand,* (2013) 14 SCC 481; *Narender Kumar v. State (NCT of Delhi),* (2012) 7 SCC 171, the Apex Court in *Mukesh v. State of Chhattisgarh,* (2014) 10 SCC 327, has held that sole testimony of prosecutrix is sufficient to establish commission of rape, even in the absence of any corroborative evidence.

26. Hence, the contention needs to be rejected.

27. Investigation of the case was conducted by SI Sakini Kapoor (PW-18), who states that on 11.4.2015, pursuant to entrustment of the file to her, she recorded statements of the witnesses (examined in Court) and completed the investigation.

28. We now proceed to discuss the other ocular evidence. Essentially there are two set of witnesses. The first being the child witnesses and the second their mothers. We proceed to discuss the latter first. But before we do so, let us discuss the law with regard to admissibility of their statements, for they are in the nature of hearsay.

29. Section 6 of the Evidence Act reads as under:-

> "6. Relevancy of facts forming part of same transaction.—Facts which, though not in issue, are so connected with a fact in issue as to form part of

> the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

30. In *Rameshwar v. The State of Rajasthan* (AIR 1952 SC 54), the Supreme Court has held that the previous statement of the raped girl to her mother, immediately after the occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section 157 of the Evidence Act. In order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case, the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and believed.

31. The Apex Court in *Sukhar versus State of U.P.*, (1999) 9 SCC 507 has held that Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. Also "the statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus : "Under the present Exception [to hearsay] an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a carbrake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided, it is near enough in time to allow the assumption that the exciting influence continued."

32. Sarkar on Evidence (Fifteenth Edition) summarises the law relating to applicability of Section 6 of the Evidence Act thus:

> "1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous. 2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past. 3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by-standers. In conspiracy, riot &c. the declarations of all concerned in the common object are admissible. 4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

33. Earlier the Apex Court in *Gentela Vijayavardhan Rao v. State of A. P.*, (1996) 6 SCC 241, considering the law embodied in Section 6 of the Evidence Act held that the principle of law embodied in the said Section is usually known as the rule of *res gestae* recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, in exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must

have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*.

34. Further in Rattan Singh v. State of H. P., (1997) 4 SCC 161 the Court examined the applicability of Section 6 of the Evidence Act to the statement of the deceased and held thus (SCC p.167, para 16)

> ".....The aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to Section 6 makes it clear. It reads thus:
>
> > '(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.'
> >
> > (Emphasis supplied)
>
> Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act."

35. In *Balram Prasad Agrawal versus State of Bihar and others*, (1997) 9 SCC 338, the Apex Court reiterated the principle laid down in the case of *J. D. Jain v. Management of State Bank of India*, AIR 1982 SC 673: (1982) 1 SCC 143 wherein a Bench of three learned Judges speaking through Baharul Islam, J. in paragraph 10 of the Report has made the following observations : (AIR p. 676, para 10: SCC p.148, paras 21 and 22)

> "The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. (See Stephen on Law of Evidence).
>
> The Privy Council in the case of Subramaniam v. Public Prosecutor, (1956) 1 WLR 965 observed:
>
> 'Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental, state and conduct thereafter of the witness or some other persons in whose presence these statements are made'."

36. Applying the aforesaid principles, we find the testimonies of the parents, even if hearsay in nature, being in close proximity to the time of crime and relating to the act which is in issue, substantially contemporaneous to the acts in issue to be proven as a fact, can be referred to and relied upon for establishing the prosecution case. From the discussion hereinafter if we find the same to be inspiring in confidence we would not hesitate in relying thereupon for ascertaining the truthfulness of the genesis of the prosecution case.

37. From the ocular version of Shakuntla (PW-5), it is evident that the incident was first brought to her notice by her daughter i.e. Victim No.1. This was on 11.4.2015. The Victim informed that 15 days ago, while she was playing with Victim No.4 in the courtyard of the Anganwadi Centre, the accused, on the pretext of giving toffees, enticed them and after taking both of them inside the room, subjected them to sexual assault. Further, the accused had also committed such act on Victim No.2 and Victim No.3. As such, she immediately informed the parents of other victims, whereafter they all went to the Police Station and reported the matter.

38. We do not find the version of this witness to have been shattered in any manner, in the cross-examination part of her testimony. Accused laid emphasis more on false implication, than the witness or victims telling lies. Suggestion that the victims did not face any difficulty while urinating is of no consequence. We find the witness to be worthy of credence and the veracity of her testimony to be unimpeachable.

39. We notice that version of Anju Devi (PW-6), mother of Victim No.3, and Kaushalya Devi (PW-7), mother of Victim No.2 is on similar lines. In fact, Kaushalya Devi, in her unrebutted testimony, has explained the reason why the victims had not earlier disclosed the incident to their parents, which was so done only with such fact having revealed on 11.4.2015.

40. Version of another parent namely Priyanka (PW-4), mother of Victim No.4, is also on similar lines. It was only on 11.4.2015 that she was informed about the incident by the mother of Victim No.1. It is true that in the cross-examination part of her testimony, she was confronted with her previous statement, wherein it never stood disclosed that one month prior to the incident she had got her daughter medically examined for having suffered some infection in her private parts, but then this fact, in our considered view, would have no bearing, for otherwise her statement of sexual assault is corroborated by Kaushalya Devi. That part, in her unrebutted testimony, to a Court question, she categorically states that when enquired, her daughter informed that she had been sexually assaulted by the accused. We reproduce the question and answer as under:

> "COURT QUESTION
>
> Did you ask or inquire your daughter when your came to know from mother of Victim No.2 (name withheld) that your daughter has been sexually assaulted by the accused?
>
> Ans: Yes Sir. She responded pointing out towards her private part with her hands."

41. In *Narender Kumar v. State (NCT of Delhi)*, (2012) 7 SCC 171, the apex Court has cautioned the Court to adopt the following approach:

> "The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

42. Hence we see no reason to disbelieve the testimonies of parents.

43. In cases involving sexual molestation and assault require a different approach – a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under penal laws. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It is a crime against humanity. In such cases, responsibility on the shoulders of the courts is more

onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted. It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39. This is what stands laid down by Hon'ble the Apex Court in *State of Rajasthan versus Om Prakash,* (2002) 5 SCC 745.

44. In Shyam *Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held that the youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court.

45. In this backdrop we proceed to discuss the testimonies of the child witnesses. But before that the issue with regard to their competence.

46. Section 118 of the Evidence Act reads as under:-

> "118 Who may testify. —All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

47. In *Dattu Ramrao Sakhare v. State of Maharashtra*, (1997 (5) SCC 341), held that: (i) A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. (ii) Even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. (iii) The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. (iv) The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. (v) The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. (vi) This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of

make beliefs. (vii) Though child witnesses are pliable and liable to be influenced easily, shaped and moulded, but if after careful scrutiny of their evidence, the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

48. In *Golla Yelugu Govindu vs. State of Andhra Pradesh*, (2008) 16 SCC 769, the Apex Court while reiterating its earlier view held that:-

> "11. 6.Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States (159 U.S. 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001) 1 SCC 1."

49. Recently, in *State of Himachal Pradesh v. Sanjay Kumar alias Sunny,* (2017) 2 SCC 51, the Apex Court held as under:

> "30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevent such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long lasting effects on such victims.
>
> 31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling

reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {See *Bhupinder Sharma v. State of Himachal Pradesh*, (2003) 8 SCC 551}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

50. In *Radhakrishna Nagesh v. State of Andhra* Pradesh, (2013) 11 SCC 688, the apex Court held as under:

"33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-

"17. ..... '16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the

> case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.
>
> 18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person."

51. Thus the children examined in Court were competent to depose as a witness in the Court.

52. When we peruse the testimonies of these victims, we find them to have fully narrated the incident of sexual assault committed by the accused.

53. Victim No.1 (PW-1), who studies in a Government Primary School, states that the accused, after enticing her and Victim No.4, took them to a room where he committed sexual assault. She understands the meaning thereof and is categorical about such fact. She states that the accused inserted his "*Peshavwali Jagaha* into her *Peshavwali Jagaha*", as a result of which she felt pain. Accused gave her toffees as also threatened her not to disclose the incident to her parents, lest he would kill them. It was only after a few days that she disclosed the incident to her mother. Accused also committed such type of acts on other victims (Victim No.2 & Victim No.3), which fact was disclosed to her by the victims. After the incident was made public, parents of the victims met and the matter was reported to the police.

54. Veracity of her statement is sought to be impeached in the cross-examination part of her testimony, with the suggestion that the insertion of his private part by the accused in the anal/vagina is not recorded in the FIR. Well, this cannot be a reason to disbelieve a witness, for FIR is not a narration of facts or encyclopedia of prosecution case. It is in conformity with the prosecution case of the victim having been subjected to sexual assault by the accused. The witness has clarified that on the date of the incident, sister of the accused was not present at home and that his mother was in another room. It is not the case of this witness that she raised hue and cry, so as to attract attention of someone in the neighbourhood.

55. One cannot ignore the fact that all of the witnesses (victims) hail from the rural background and that too the remotest corner of the State. They hail from socially and economically backward strata and area of the society and have taken the courage of speaking the truth in the Court, of which we have no doubt.

56. Similarly, Victim No.2, who was a student of third class, states that the accused used to take her to his room, on the pretext of giving her "*Chiji*" (toffee). One day, the accused had penetrative sex with her. He threatened her not to disclose the incident to her parents, lest he would kill them. She disclosed the incident to her mother, when parents of all the victims came together and reported the matter to the police. The witness was confronted with her previous statement, wherein the factum of threats is not so recorded. But then, in our considered view, this fact would be of not much consequence, for otherwise, we find her statement to be inspiring in confidence. This mere embellishment or improvement, as is so argued, does not render the witness to be unworthy of credence or her statement to be unbelievable, in the backdrop of the law laid down by the Supreme Court of India, which we have discussed earlier. The credit of this witness is sought to be impeached by suggesting that there were other children around, with whom she would play. But then

even this, in our considered view, would not render the earlier part of her testimony, to the effect that the accused used to commit sexual assault by enticing her, to be unbelievable. Suggestion that she did not find any difficulty in urinating or passing the stool or that she had changed the clothes would also not render her statement to be unbelievable.

57. We find testimony of Victim No.3 to be on similar lines that of the earlier two victims and find her version to be inspiring in confidence for the very same reasons.

58. Thus, when cumulatively viewed the testimonies of the victims and as corroborated by their mothers, squarely point towards the guilt of the accused, beyond reasonable doubt, and in our considered view the prosecution to have proved its case by leading clear, cogent, convincing and reliable piece of evidence.

59. We hold the victims to be witnesses, competent to depose in accordance with law; their testimonies fully proving the prosecution case; fully corroborated by ocular and documentary medical evidence and the testimonies of their mothers who also could depose and narrate the incident, in accordance with law.

60. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed.

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

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

Sh. Anil Sharma .....Petitioner
Versus
Smt. Meenakshi Sharma .....Respondent

CMPMO No. 312 of 2018
Decided on: 25.10.2018

Code of Civil Procedure- Sections 148, 151- Order VIII Rule 1- Written statement- Filing of – Extension of time- Trial Court granting last opportunity in filing written statement and closing defence when written statement not filed on adjourned date- Petition- Defendant contending that his counsel wrongly noted date of hearing as such written statement could not be filed on said date- Held, though no illegality can be attributed to Trial Court's order yet in interest of justice, petition allowed- One more opportunity granted in filing written statement subject o costs. (Para 5)

Code of Civil Procedure- Order VIII Rule 1- Held, provisions of Order VIII Rule 1 are not mandatory and in exceptional circumstances, Court can extend period beyond 90 days in filing written statement (Para 6)

For the Petitioner : Mr. Neeraj Sharma, Advocate.
For the Respondent **:** Nemo

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dis-satisfied with the passing of order dated 29.5.2018, passed by the learned Civil Judge (Jr. Div.) Court No.4, Shimla, in CS No. 22-1 of 2017, whereby application filed under Sections 148 read with Section 151 of CPC, seeking therein extension of time to file written statement, having been filed on behalf of the defendant-petitioner *(hereinafter referred to as "the defendant"*) came to be dismissed, defendant has approached this Court in the instant proceedings filed under Article 227 of the Constitution of India.

2. Despite service, none has come present on behalf of the plaintiff-respondent (*hereinafter referred to as "the plaintiff")* and as such, she is ordered to be proceeded ex-parte.

3. Having heard learned counsel for the parties and perused material available on record vis-à-vis impugned order, this Court finds that court below vide order dated 27.4.2018, while disposing of the application filed under Order 8 Rule 1 read with Sections 148 and 151 CPC on behalf of the defendant, had granted time till 24.5.2018, to the defendant to file written statement, however fact remains that same was not filed on or before the stipulated date.

4. On 24.5.2018, defendant moved an application under Section 148 read with Section 151 CPC (Annexure P-5), praying therein for grant of two days' time to file written statement, averring therein that counsel representing the defendant had wrongly noted the date to be 26.5.2018 instead of 24.5.2018. Applicant further averred in the application that fact with regard to the listing of the case on 24.5.2018, only came to the notice of the counsel, who was sitting in the other court in connection with some other case and as such, he of his own moved an application, seeking therein two days' time to file written statement, but his prayer was not accepted on that day and ultimately, application having been filed by him, came to be rejected vide order dated 29.5.2018 (impugned herein), whereby court below struck off the defence of the defendant. In the aforesaid background, defendant has approached this Court in the instant proceedings.

5. Though, having perused orders dated 27.4.2018, passed by the court below (Annexure P-4), this Court finds no fault in the reasoning rendered by the court below while passing order dated 29.5.2018, because admittedly court below while passing aforesaid order had categorically recorded that written statement be filed on or before 24.5.2018, and no further opportunity shall be afforded, but in case explanation rendered in the subsequent application having been preferred on behalf of the defendant, is perused, this Court is of the view that court below could grant one more opportunity to the defendant subject to payment of costs.

6. Hon'ble Apex Court in plenty of cases, which have been otherwise taken note of by the learned court below in its earlier order dated 27.4.2018, has observed that provisions contained in order 8 Rule 1 CPC are not mandatory, rather same are directory in nature and as such, in exceptional circumstance, court can extend period beyond 90 days as far as filing of written statement is concerned.

7. In the case at hand, it is not in dispute that application for extension of time to file written statement came to be filed on 24.5.2018 i.e. the day when matter was fixed for fling written statement in terms of order dated 27.4.2018 and as such, it cannot be said that defendant was not diligent enough while prosecuting his case.

8. Consequently, in view of the above, this Court without going into the correctness of the impugned order passed by the court below, deems it fit to dispose of the present case by affording one last opportunity to the defendant to file written statement

subject to payment of costs amounting to Rs. 5,000/-, payable to the plaintiff. Mr. Neeraj Gupta, learned counsel for the defendant, undertakes to file/present written statement as well as pay the costs either to the plaintiff or counsel representing him on or before **30.10.2018**, failing which impugned order passed by the court below shall automatically revive. It is made clear that no more opportunity shall be afforded to the defendant to file written statement.

In the aforesaid terms, present petition stands disposed of, so also pending application(s), if any.

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

Kuldeep ...Petitioner

Versus

State of Himachal Pradesh and another ...Respondents

CrMMO No. 332 of 2018
Decided on: October 22, 2018

Code of Criminal Procedure, 1973- Section 482- Inherent powers- Exercise of- Held, though in exercise of inherent jurisdiction High Court may quash proceedings pursuant to compromise of parties even in non-compoundable cases, yet power should be exercised sparingly and with great caution to further ends of justice and prevent abuse of process of Court- Such power should not be exercised in prosecutions involving heinous offences and offences which are not private in nature- FIR registered for offences under Sections 363, 366-A of Indin Penal Code ordered to be quashed pursuant to solemnizing of marriage between accused and victim. (Paras 7 & 11)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 SCC 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. Sudhir Thakur, Advocate.

For the respondents: Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General, for respondent No.1.
Respondent No.2 in person.
ASI Sanjay Kumar, IO, Police Station Baddi, Solan, HP.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition having been filed by the petitioner under Section 482 CrPC, prayer has been made for quashing of FIR No. 247 of 2014 dated 27.10.2017, under Ss. 363, 3661 and 34 IPC, registered at Police Station Baddi, District Solan, Himachal Pradesh as well as consequential proceedings pending in the court of learned Judicial Magistrate 1st Class, Court No. 1, Nalagarh, District Solan, Himachal Pradesh in case titled as State vs. Kuldeep and others.

2. Parties i.e. petitioner Kuldeep and respondent No.2 namely Santosh Kumar are present in the court alongwith Ms. Navita, daughter of respondent No.2 and wife of petitioner.

3. Facts, as emerge from the record are that respondent No.2 Santosh Kumar, who happens to be father of Navita, lodged the FIR as detailed herein above, against the present petitioner, alleging therein that his minor daughter namely Navita has been kidnapped and kept in illegal confinement by the present petitioner. Petitioner, Kuldeep by way of petition before this court has claimed that he has performed marriage with Navita daughter of respondent No.2, after her having attained age of majority on 5.2.2018, in accordance with Hindu rites and customs, of their own free will and consent at Khapalwani Temple in Village Mandap, District Mandi (HP). Petitioner has further averred that out of aforesaid marriage, one male child namely Shaurya was born on 7.8.2015 and at present they are living a happy married life.

4. Today, during proceedings of the case, respondent No.2 Santosh Kumar, father of Ms. Navita, while acknowledging the factum with regard to marriage of his daughter Navita with petitioner, Kuldeep, stated on oath before this court that in view of amicable settlement *inter se* parties, he does not intend to continue with the proceedings initiated at his behest and as such, same may be ordered to be quashed and set aside. He also stated that since his daughter Navita is residing happily with her family, he has no objection in case, case, if any, registered against the petitioner and his family members is ordered to be quashed and set aside. Statement having been made by respondent No.2 before this court on oath is made part of the case file.

5. Mr. Dinesh Thakur, learned Additional Advocate General, on the instructions of the Investigating Officer, who is present in the court, states that parties have amicably settled their dispute and as such, there is no impediment in accepting the prayer having been made by the petitioner in the present petition.

6. This court further finds from the record that Ms. Navita wife of the petitioner, has also filed an affidavit dated 9.7.2018, sworn by her before Executive Magistrate, Solan, averring therein that she of her own volition, without there being any external pressure solemnized marriage with the petitioner. Even during proceedings of the case Ms. Navita, who is present in the court, reiterated that at present she is living a happy married life with the petitioner.

7. Since the instant petition has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the same in light of the judgment passed by Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466, whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases

which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

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

basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

8. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

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

"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.

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

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

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides.

In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

11. In the case at hand, the offences alleged against the accused are under Ss. 363 and 366A/34 IPC, which do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder etc. and as such, with a view to maintain harmony and peace in society, this court deems it appropriate to quash the FIR as well as consequential proceedings, especially keeping in view the fact that the petitioner has solemnized marriage with Ms. Navita, daughter of the complainant/ respondent No.2 and they have a son born out of their union, and as such no fruitful purpose shall be served by continuing with the criminal prosecution of the petitioner, who is now husband of the daughter of complainant.

12. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 247 of 2014 dated 27.10.2017, under Ss. 363, 3661 and 34 IPC, registered at Police Station Baddi, District Solan, Himachal Pradesh and consequential proceedings pending in the court of learned Judicial Magistrate 1st Class, Court No.1, Nalagarh, District Solan, Himachal Pradesh in case State vs. Kuldeep, are quashed and set aside and the petitioner-accused and other co-accused /family members of the petitioner/accused are acquitted of the charges framed against them.

13. The petition is disposed of in the aforesaid terms, alongwith all pending applications.

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

Sirat Sood .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr. Revision No. 347 of 2018
Decided on: October 22, 2018

Indian Penal Code, 1860- Sections 279, 337 & 338- Rash and negligent driving- Trial Court convicting accused on allegations that accused negligently reversed his vehicle and hit against factory wall which collapsed and fell on labourers resulting in injuries to them- On appeal, Sessions Judge acquitting accused of offences under Section 279 of Code on ground that vehicle was not being plied on public highway but maintaining conviction for offences under Sections 337 and 338 of Code- Revision- Evidence not revealing specifically that collapse of wall was on account of strike of vehicle- Complainant and his wife, another injured not telling about cause of collapse of wall- Held, in absence of clear evidence, no findings of rash or negligent act on part of accused could have been rendered- Revision allowed- Conviction set aside. (Paras 5 to 7)

Cases referred:
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

For the petitioner Mr. Abhishek Raj, Advocate.
For the respondent Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

PW-3, Ratku Ram (complainant), in his statement recoded under S. 154 CrPC, alleged that on 26.2.2010, he and his wife, Bhimi Devi (PW-8) alongwith other labourers were engaged by contractor Roshan Lal, for laying lintel of Maharani Flour Mills at Jia. Complainant Ratku Ram (PW-3) and Bhimi Devi (PW-8) alongwith other labourers were carrying sand stacked near the wall, when at about 4.50 pm, the wall suddenly collapsed, as a result of which, bricks of wall fell on left foot of complainant and shoulder of Bhimi Devi. Subsequently, it transpired that one jeep bearing registration No. HP-63A-0838 being driven by the petitioner-accused (hereinafter, 'accused'), hit the wall, as a result of which, wall collapsed and bricks fell on complainant Ratku Ram and his wife Bhimi Devi. Allegedly, the accused while reversing the vehicle, hit the wall. Complainant and his wife were rushed by the accused to the private hospital at Shamshi, for their treatment. Complainant alleged that accident took place due to rash and negligent driving on the part of accused. On the aforesaid statement having been made by the complainant, a formal FIR No. 65/10 dated 27.2.2010 Ext. PW-9/A was registered against the accused. After completion of investigation, police presented *Challan* in the competent Court of law i.e. learned Chief Judicial Magistrate, Kullu, District Kullu, Himachal Pradesh, who being satisfied that prima facie case exists against the accused, put notice of accusation to the accused, for having committed offences punishable under Ss. 279, 337 and 338 IPC, to which he pleaded not guilty and claimed trial. Subsequently, learned trial Court, on the basis of evidence led on record by prosecution, held accused guilty of having committed offences punishable under Ss. 279, 337 and 338 IPC and convicted and sentenced accused 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 fifteen months for the commission of offence punishable under S. 279 IPC; to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 500/- and in default of payment of fine, to further undergo simple imprisonment for a period of fifteen days for the commission of offence punishable under S. 337 IPC and; to undergo simple imprisonment for a period of six months and to pay fine of Rs. 1,000/- and in default of payment of fine to further undergo simple imprisonment for one month for the commission of offence punishable under S. 338 IPC. Being aggrieved and dissatisfied with the impugned judgment of conviction passed by the learned trial Court, the accused preferred an appeal under S. 374 CrPC, before the learned Sessions Judge, Kullu, Himachal Pradesh, who vide judgment dated 25.5.2018, while partly allowing the appeal having been filed by the accused, set aside the conviction recorded by the learned trial Court under S. 279 IPC but maintained the conviction recorded against accused under Ss. 337 and 338 IPC. In the aforesaid background, accused has approached this court in the instant proceedings, seeking therein his acquittal after setting aside judgment of conviction recorded by learned first appellate Court under Ss. 337 and 338 IPC.

2. Mr. Abhishek Raj, learned counsel representing the accused vehemently argued that impugned judgment of conviction recoded by learned first appellate Court under Ss. 337 and 338 IPC, is not sustainable in law as the same is not based upon correct appreciation of evidence adduced on record by the prosecution. Mr. Abhishek strenuously argued that there is no cogent and convincing evidence led on record by prosecution to

prove rash and negligent act, if any, done by the accused, while reversing the jeep in question. Mr. Abhishek further contended that none of the prosecution witnesses stated anything specific with regard to rash and negligent driving of accused and as such, learned Court below has wrongly arrived at a conclusion that prosecution was able to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently by the accused at the time of alleged accident. While placing reliance upon a judgment rendered by this court in Cr. Appeal No. 84 of 2018 titled **State of H.P.** versus **Surinder**, decided on 1.5.2018, Mr. Abhishek contended that there can not be any presumption of rashness or negligence, rather onus is always upon the prosecution to prove beyond reasonable doubt that the vehicle in question was being driven rashly and negligently. While inviting attention of this court to the statements of prosecution witnesses namely Ratku Ram (PW-3), Mehar Chand (PW-6) and Bhimi Devi (PW-8), Mr. Abhishek made serious attempt to persuade this court to agree with his contention that none of the prosecution witnesses stated that complainant and his wife, Bhimi Devi (PW-8) suffered injuries on account of rash and negligent act, if any, of the accused. He further contended that aforesaid material prosecution witnesses rather turned hostile and nowhere supported the prosecution case, but despite that learned Courts below merely on the presumptions, proceeded to hold accused guilty of having committed offences punishable under Ss. 337 and 338 IPC.

3. Mr. Dinesh Thakur, learned Additional Advocate General, while refuting aforesaid contentions having been made by the learned counsel representing the accused, contended that impugned judgment of conviction recoded by learned first appellate Court is based upon correct appreciation of evidence adduced on record by the prosecution and there is no illegality or infirmity in the same as such, there is no scope of interference especially when it clearly emerges from the bare reading of impugned judgment of conviction that the learned Court below has dealt with each and every aspect of the matter meticulously. He further contended that it stands duly proved on record that accused while reversing the jeep, miserably failed to take precaution so as to prevent danger, if any, to human life, as such, he rightly came to be convicted for having committed offences punishable under Ss. 337 and 338 IPC. Mr. Thakur further contended that if statements of prosecution witnesses, PW-3, PW-6 and PW-8 are read in conjunction, same clearly suggest that all these prosecution witnesses in one voice stated that the vehicle in question was being driven rashly and negligently by the accused at the relevant time, as a consequence of which, PW-3(complainant) and PW-8, Bhimi Devi, wife of complainant, suffered simple as well as grievous injuries.

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

5. Having carefully perused the material available on record, this court finds that there is no dispute, if any, so far factum of accident allegedly occurred on 26.2.2010 is concerned, rather, accused in his statement recorded under S. 313 CrPC himself admitted the factum of accident. Learned Court below, though had held accused guilty of having committed offence punishable under S. 279 IPC, but said finding was subsequently reversed by learned first appellate Court in the appeal having been preferred by the accused on the ground that prosecution was not able to prove that at the time of accident, offending vehicle was being driven on a public path/way. Since there is no challenge, if any, to the aforesaid finding returned by the learned first appellate Court by the respondent-State, there is no occasion for this court to go into correctness of findings returned by the learned first appellate Court qua commission of offence, if any, by accused under S. 279 IPC. Question, which needs to be adjudicated in the present proceedings is that whether there was sufficient evidence on record led by prosecution suggestive of the fact that the vehicle in question was being driven rashly and negligently by the accused at the time of alleged

incident. No doubt, careful perusal of medical evidence led on record, proves beyond reasonable doubt that PW-3 (complainant Ratku Ram) and PW-8 Bhimi Devi, wife of complainant, suffered simple as well as grievous injuries, after being hit by bricks fallen from the collapsed wall but having carefully perused the statements of material prosecution witnesses, this court is persuaded to agree with the contention of Mr. Abhishek Raj, learned counsel representing the accused that there is no cogent and convincing evidence adduced on record by the prosecution to prove rash and negligent act, if any, on the part of accused, while reversing the vehicle. Though, PW-3 and PW-8, who happened to be victims of alleged accident, have stated that they suffered injuries on their persons i.e. foot of complainant and shoulder of PW-8 Bhimi Devi on account of collapse of the wall but they have not stated anything specific that the wall collapsed on account of negligent act, if any, of accused, rather, PW-3 (complainant) in his cross-examination has admitted that the vehicle being driven by accused struck against outer side of wall. This witness, who was victim, though turned hostile, but even in his cross-examination, prosecution was not able to extract anything contrary to what he stated in his examination-in-chief. Similarly, another victim, PW-8 Bhimi Devi feigned ignorance with regard to mode and manner of accident. She simply stated that she suffered injury after being hit by bricks fallen from the collapsed wall. She categorically stated in her cross-examination that she does not know that due to whose fault, wall collapsed. PW-6, Mehar Chand, so called independent witness, associated by prosecution also not supported case of prosecution. Though this witness deposed that the wall collapsed after being hit by jeep but he nowhere stated that at that time vehicle/jeep was being driven rashly and negligently by the accused. Though this witness stated that he had seen the jeep coming towards wall, but he nowhere stated that he had signalled the driver to stop the vehicle.

6. Conjoint reading of the statements having been made by PW-3, PW-6 and PW-8 nowhere suggests that prosecution was able to prove beyond reasonable doubt that the vehicle in question was being driven rashly and negligently by the accused on the date of alleged accident. All the aforesaid witnesses especially PW-6 in a very casual manner stated that accident took place due to rash and negligent driving of the accused but in their cross-examination, they have feigned ignorance with regard to mode and manner of accident.

7. Having perused the versions put forth by PW-3, PW-6 and PW-8, this court has no hesitation to conclude that there are material contradictions and inconsistencies in the statements made by the prosecution witnesses as such no much reliance could be placed upon the same by the learned Courts below, while ascertaining guilt, if any, of accused.

8. 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."

9. 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."

10. Leaving everything aside, this court is unable to lay its hands on any specific statement made by these prosecution witnesses, with regard to rash and negligent driving, if any, by the accused at the time of accident. It was incumbent upon the prosecution to prove the guilt, if any, of the accused under Ss. 337 and 338 IPC to the effect that the vehicle in question was being driven in rash and negligent manner, so as to endanger human life or likely to cause injury to other person. 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. But, interestingly, in the case in hand, both these conditions as taken note above, are missing. It has been repeatedly held by Hon'ble Apex Court as well as this court that there can not be any presumption of rashness or negligence rather onus is always upon prosecution to prove beyond reasonable doubt that the vehicle in question was being driven rashly and negligently. In the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking the maxim *res ipsa loquitur*.

11. 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."

12. Consequently, in view of detailed discussion made herein above as well as law taken note herein above, this court has no hesitation to conclude that both the learned Courts below have fallen into grave error while holding accused guilty of having committed offences punishable under Ss. 337 and 338 IPC, especially when there is no evidence worth the name available on record suggestive of the fact that vehicle in question was being driven rashly and negligently on the date of alleged accident. Resultantly, present petition is allowed. Judgment dated 25.5.2018 passed by the learned Sessions Judge, Kullu, Himachal Pradesh in Cr. Appeal No. 03 of 2018 is quashed and set aside. Accused is acquitted of the offences punishable under Ss. 337 and 338 IPC. Bail bonds, if any, furnished by him are discharged. Fine amount, if any, paid by him, is ordered to be refunded to him.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

State of H.P. .....Appellant.
Versus
Mast Ram Kashyap & others .....Respondents.

Cr. Appeal No. 117 of 2012
Reserved on: 20th September, 2018.
Date of Decision: 28th September, 2018.

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 467, 468 & 120-B- **Indian Forest Act, 1927-** Section 33- Forgery and illicit felling under criminal conspiracy- Proof- Prosecution alleging illicit felling of trees in Government forest by Forest Labour Supply Mate in conspiracy with forest officials- And also that accused forged documents to commit such offences and caused loss to Government property to extent of Rs.12,67,609/- -Illicit felling said to be by way of overmarking of trees by forest officials and also by way of cutting of unmarked trees- Special Judge acquitting accused- Appeal by State on ground that Special judge did not appreciate evidence correctly- On facts, found that (i) Road construction was in progress through lots allocated to Forest Labour Supply Mate "R" (ii) Dmage was caused to trees during construction of road also (iii) People of area having TD rights in that forest/ lots (iv) Witnesses not telling as to number of stumps of recently cut trees vis-à-vis old fellings (v) Some of stumps very old (vi) No evidence qua identity of persons who illicitly cut trees (viii)Unmarked felled trees were near under-construction road- Held, evidence on record does not reveal illicit felling of trees by accused under some conspiracy- Appeal dismissed- Acquittal upheld. (Paras 16 to 22)

For the Appellant: Mr. Hemant Vaid, Addl. A.G., with, Mr. Y.S. Thakur, Dy. A.G.
For Respondents No. 1 to 5: Mr. J.N. Kanain, Advocate

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands, directed by the State, against, the pronouncement made by the Special Judge (Forests), Shimla, H.P., upon, Corruption case No. 5-S/7 of 2008, whereunder, the accused/respondents herein stood acquitted.

2. The facts relevant to decide the instant case are that the then Additional Principal Conservator of Forest, reported the matter to the police, on the basis of which FIR No.22/99 of 18.08.1999 came to be registered at Police Station South Zone, Vigilance Shimla carrying allegations that a fire broke out in Sharontha depot of the Forest Working Division, Sawara, on 8.2.1999, adjoining to forest lot No.3/98-99, 4/98-99 and 5/98-99 and inquiry so conducted by the department unravels that 22 green trees stood felled in lot No.4/98-99 and 45 illicit stumps were found in the same very lot. In lot No.5/98-99, 11 trees were illicitly felled, thus causing loss of Rs.12 lacs to the State. The investigation was carried out. After investigating in brevity, the case against each accused alleged in the report under Section 173 of the Cr.P.C., is as under:-

Mehar Singh

3. He remained posted as Dy. Ranger from 1996 to 31.10.2002 in Tikkar Block and salvage marking was done in three lots namely 133 Kail tree in lot No.3/98-99, 261 kail and deodar tees in lot No.4/98-99 and 275 Kail and deodar tees in lot No.5/98-99 and the forest was handed over to the Forest Corporation for working. The Forest Corporation awarded the work to Rameshwar Nand Sharma, Labour Supply Mate, who felled 43 Kail, 2 deodar trees in lot No.4/98-99 DPF Sharontha illicitly. He also felled 11 Kail trees illicitly in lot No.5/98-99 UF Tangri, thus causing loss of Rs.12,67,609-89/-. Similarly labour Supply Mate in lot No.3/98-99 Bagdhar did not fell 38 marked trees and in lot No.5/98-99 UF Tangri 41 Kail trees were not felled. Mehar Singh, being Dy. Ranger did not take action on illicit felling, nor informed the department and, thus, abused his office. The marking list in respect of lot No.3/98-99 Bagdhar (Field Bag) was forged one in as much as 18 green Kail trees were shown as dried one. He is alleged to have committed offences under Section 467, 468, 471, 120 B, IPC, Section 13(2) of P.C. Act and Section 14 of the H.P. Prevention of Specific Corrupt Practices Act.

LACHHI RAM

4. He remained posted as Forest Guard from July, 1997 to February, 1999 at Sharontha Beat and in this beat salvage marking was done in three lots namely 133 Kail tree in lot NO.3/98-99, 261 Kail and deodar trees in lot No.4/98-99 and 275 Kail and deodar tees in lot No.5/98-99 and the forest was handed over to Forest Corporation for working. The Forest Corporation awarded the work to Rameshwar Nand Sharma, Labour Supply Mate, who felled 43 Kail, 2 deodar trees in lot No.4/98-99 DPF Sharontha illicitly. He also felled 11 Kail trees illicitly in lot No.5/98-99 UF Tangri, thus, causing loss of Rs. 12, 67,609-89. Accused Lachhi Ram did not issue damage reports, but on the oral instruction of RO, 22 stumps were marked and allowed the same as unfelled. He showed 18 Kail trees green as dried and marking list of lot No.3/98-99 was forged one. He got hammer mark deblazed and issued forged certificate in respect of lot No.5/98-99 showing that no illicit felling had taken place, whereas, 11 kail trees were found to have been illicitly felled. He is alleged to have committed offences under Section 467, 468, 471,, 201, 120 B, IPC, Section 13(2) of P.C. Act.

Mast Ram Kashyap

5. He was Assistant Manager from July 1996 to February, 1999 in the Forest Corporation, Sawara. In the year 1998, Forest Department handed over three lots No.3/98-99 UPF Bagdhar, Lot No.4/98-99 DPF Sharontha c-7 and lot No.5/98-99 UP Tangri in which 103 Kail tees, 261 Kail and deodar tees and 275 kail and deodar trees were marked as salvage marking and handed over to the Forest Corporation. The Work was handed over by the Forest Corporation to Rameshwar Nand Sharma and felling was done under his supervision. Chanchal Singh was Deputy Ranger, Bhinder Dutt was Forest Guard, Lahori Singh was Timber Watercher. Rameshwar Nand felled 43 kail and 2 deodar tees in lot No.4/98-99 DPF Sharontha illicitly and in lot No.5/98-99 UPF Tangri, 11 kail trees. As such, the value of these trees stood Rs.12,67,609-89. Rameshwar Nand allowed 38 Kail trees so marked unfelled in lot No.3/98-99 and 41 kail trees in lot No.5/98-99. He did no take any action nor informed his higher officers. He committed misconduct by not exercising proper control. He issued and verified first and final bills in respect of lot No.5/98-99 UP Tangri certifying that no illicit felling had taken place, whereas, 11 trees were found to have been illicitly felled. Similarly certificate was given by him in lot No.3/98-99 in which 18 green kail trees were found to have been illicitly felled. He is alleged to have committed offences under Section 467, 468, 471, 120 B, IPC, Section 13(2) of P.C. Act.

Chanchal Singh

6. He remained posted as Deputy Ranger in Sawra Division from 1994 to 12.10.1998 and salvage marking was done in three lots namely 133 kail tree in lot No.3/98-99 and 275 Kail and deodar trees in lot No.4/98-99 and 275 kail and deodar trees in lot No.5/98-99 and the forest was handed over to Forest Corporation for working. The Forest Corporation awarded the work to Rameshwar Nand Sharma, Labour Supply Mate, who felled 43 kail, 2 deodar tees in lot No.4/98-99 DPF Sharontha illicitly. He also felled 11 Kail trees illicitly in lot NO.5/98-99 UF Tangri, thus causing loss of Rs.12,67,609.89. Similarly, Labour Supply Mate in lot No.3/98-99 Bagdhar did not fell 38 marked trees and in lot No.5/98-99 UF Tangri 41 Kail trees were not felled. Chanchal Singh being Dy. Ranger did not take action for illicit felling nor informed the department and thus, abused his office. He is alleged to have committed offences under Section 120 B, IPC and Section 13(2) of P.C. Act and Section 14 of the H.P. Prevention of Specific Corrupt Practices Act.

Bhinder Dutt.

7. He remained posted as Forest Guard (Officiating Deputy Ranger) at Rohru from 12.10.1998 to 2000. Forest Department had in the year 1998 handed over three lots namely 133 kail tree in lot No.3/98-99, 261 kail and deodar trees in lot No.4/98-99 and 275 kail and deodar trees in lot No.5/98-99. In the aforesaid lots, the Forest Corporation awarded the work to Rameshwar Nand Sharma, Labour Supply Mate, who felled 43 kail, 2 deodar trees in lot No.4/98-99 DPF Sharontha illicitly. He also felled 11 Kail trees illicitly in lot No.5/98-99 UF Tangri, thus, causing loss of Rs.12,67,609-89/- to the State. He is alleged to have committed offences under Section 467, 468, 471 an 120 B, IPC and Section 13 (2) of the P.C. Act.

Lahori Singh.

8. He remained as Timber Watcher in Forest Working Division, Rohru from 1984 to 1999. Forest Department had in the year 1998 handed over three lots namely 133 Kail tree in lot No.3/98-99, 261 kail and deodar trees in lot No.4/98-99 and 275 kail and deodar trees in lot NO.5/98-99. In the aforesaid lots, the Forest Corporation awarded the work to Rameshwar Nand Sharma, Labour Supply mate, who felled 43 kail, 2 deodar trees in lot No.4/98-99 DPF Sharontha illicitly. He also felled 11 Kail trees illicitly in lot No.5/98-99 UF Tangri, thus, causing loss of Rs.12,67,609-89/- to the State. He gave false certificate in respect of lot No.5/98-99 that no illicit felling had taken place whereas 11 trees were found to have been illicitly in this lot. He is alleged to have committed offences under Sections 467, 468, 471 and 120B, IPC and Section 13(2) of the P.C. Act.

Rameshwar Nand Sharma.

9. In the year 1998, he was Labour Supply Mate with Forest Corporation and Forest Corporation were granted lots for working in Sharontha Beat, i.e. lot No.3-98-99UPF Bagdhar, 4/98-99 DPF Sharontha C-7 and 5/98-99 UP Tangri being salvage marking. In lot No.3/98-99 133 kail tree were marked, in lot No.4/98/99, 261 kail and deodar trees were marked, whereas, in lot No.5/98-99, 275 Kail and deodar trees were marked. He had applied for working, i.e. felling, conversion, transportation etc., to Forest Corporation. His tenders were accepted and he was allowed to work in these lots. He allowed 38 kail trees unfelled in lot No.3/98-99 which were at some distance from the road, whereas in lot NO.5/98-99, 41 kail trees were allowed unfelled and similarly in lot No.4/98-99, he allowed trees marked alongside the road standing, instead felled 43 kail and 2 deodar trees illicitly felled and in lot No.5/98-99 UPF Tangri, he felled 11 kail trees illicitly, thus causing loss of Rs.12,67,609-89 and thus, he did it in connivance with officials of the Forest Department and Forest Corporation. He gained pecuniary advantage to this extent. He is alleged to have

committed offences under Sections 379, 420, 467, 468, 471, 120B, IPC and Section 33 of Indian Forest Act.

10. 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.

11. The accused/respondents herein stood charged, by the learned trial Court, for, theirs committing offences, punishable under Sections 379, 420, 468, 471, 120-B, IPC, Section 33 of the Indian Forest Act, Section 13(2) of PC. AC and Section 14 of the H.P. Prevention of Specific Corrupt Practices Act. In proof of the prosecution case, the prosecution examined 28 witnesses. On conclusion of recording, of, the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

12. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/ respondents herein.

13. The appellant herein/State, stands aggrieved, by the findings of acquittal, recorded, by the learned trial Court. The 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 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 being replaced by findings of conviction.

14. On the other hand, the learned counsel appearing for the respondents 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.

15. 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.

16. Three lots, bearing Lot No.3/98-99 UPF Bagdhar, Lot No.4/98-99 UPF Sharontha CN-7, and, Lot No.5/98-99, (a) were handed over by the forest department to the Forest Corporation, for working, by way of salvage marking, of 133 Kail trees, 261, Kail and deodar trees, and, 275 Kail tees respectively, (b) and, the work of felling, sawing, conversion, and, transportation, stood, alloted to Rameshwar Nand, Labour Supply Mate. However, illicit felling of trees occurred thereat, hence, the State, allegedly suffered a loss of Rs.12,67,609-89/-. It is also alleged that for legalizing the illicit felling of trees, forged documents standing prepared.

17. PW-2 S.D. Sharma, the then DFO, Rohru had conducted, a, preliminary inquiry qua the illicit felling, and, over marking of trees, and, had prepared report, borne, in, Ex.PW2/A. He had also reported the matter, to, the Conservator of Forests. PW-2 in his testification, has, rendered a version qua his visiting the lots, from, 7.3.1999 to 10.03.1999, and, his recording the statements of Lachhi Ram, Mehar Singh, and, Harjap Singh. He has further testified, in his testification, qua it being a routine checking, and, work, of, all lots being in progress. He has further testified qua Sharotha-Tikkar road being constructed through these lots. He has also testified qua the people of the area having TD rights, and, other rights including felling of trees, for, religious and other ceremonies, in these lots. He has further testified that during the construction of road, damage being caused to trees. He, during the course of his cross-examination, showed his inability to disclose, qua, the

number, of, stumps, appertaining, to, freshly felled trees, and, vis-a-vis, old felling(s). The testification of PW-1 clearly unravels (a) qua his being unaware qua the identity, of, persons, who had illicitly felled the trees in the afore lots. (b) His testification also discloses that the ongoing construction of the afore road, also hence damaging the green trees, (c) thereupon no incriminatory role is fastenable, upon, the accused.

18. PW-1 Onakar Chand, Kaundal, has, conducted a detailed inquiry with respect to the afore lots. He in his testification has testified, qua, his on 25.04.1999 along with two Deputy Ranger, and, two Forest Guards, conducting the inspection, and, his noticing that some marked trees, still standing there, and, some of the unmarked trees, rather standing felled. He submitted his report, borne, in, Ex.PW1/A. He testifies, qua, the dried and fallen trees being marked. He has also testified that a road being constructed, through, lots No.3/98-99 and 5/98-99. He in his report disclosed qua some unmarked trees near the road, standing, felled, whereas, some marked trees, rather standing at a distance, from, the road, rather remaining unfelled. An incisive perusal of report, borne in Ex.PW1/A, unravels (i) that in lot No.3/98-99 Bagdhar 133 dry standing/uprooted kail trees, being marked and 18 uprooted trees of kail, being also marked alongside the road, yet stumps of afore trees, being found to stand buried under the debris. His report Ex.PW1/A is based on the statement of R.O. Tikkar. However, Range Officer Tikker, remains unexamined by the prosecution, hence, to support his version, thereupon, for want thereof, the echoings occurring in Ex.PW1/A, hold no probative vigour. Both PW-1 and PW-2 in their respective testifications admitted qua a road being constructed, through, the afore lots, and, during construction whereof, damage being caused to the trees. Consequently, no liability can be fastened, upon, the officials. According to report, borne in Ex.PW1/A, 89 marked kail trees were found standing in the lot, yet PW-1 omitted to testify qua the existence, of, hammer marks thereon, hence in the absence, of, occurrence, of, hammer marks, on the afore kail trees, it cannot, be construed qua theirs, being marked for felling. Furthermore, the contention of the prosecution, that, 18 uprooted trees, were felled, while constructing the road, also cannot be accepted, given their stumps being not found, nor hence, it can be construed, that, unmarked 18 kail trees, being illicitly felled. Furthermore, PW-1 testified that in lot No.5/98-99 UPF Tangri, 275 dry standing/uprooted trees were marked, and, handed over to Forest Corporation, but they remained unfelled. However there is no detail, in Ex.PW1/A, qua, the number of unfelled marked trees, and, qua the marks affixed thereon. Report, borne in Ex.PW1/A also discloses qua illicit felling of trees, however, there exists no evidence on record that the said illicit felling, was, done by Rameshwar Nand. It has also come on record that the people of area are also having TD rights, and, they are also having rights to fell trees for religious, marriage ceremonies etc. It has also further come in evidence, that, a road was being constructed through the afore lots, and, damage was caused by the contractor to the trees, while constructing the road, hence, given the afore material, no incriminatory liability can be fastened upon the accused.

19. In lot No4/98-99, UPF Sharontha, CN-7, 261 dry/uprooted trees of kail and deodar were marked. According to report, borne in Ex.PW1/A, 76 trees of kail and two deodar trees rather were found unfelled. However, owing to occurrence, of, fire, vis-a-vis, this lot, PW-1, was unable to disclose with certainty, qua, the number of marked, and, unmarked trees, as, stood purportedly felled, nor, he could detect 16 marked trees or stumps, nor he can validly claim, that, 43 kail trees, and, two deodar trees being illicitly felled. Furthermore, no reliance can be placed upon the report, borne, in, Ex.PW1/A, given PW-1 not checking and counting, the total number of stumps existing in these lots, whereas, he held the marking lists with him, and, rather was well equipped, to notice the hammer mark, on, the unfelled trees. However, there is no mention in Ex.PW1/A, qua whether hammer marks being found by him, on the afore trees, trees whereof, are, claimed to be

unfelled. Reiteratedly, since there is no direct evidence on record, qua Rameshwar Nand, felling the unmarked or green trees, from these lots, and, more so when it is admitted case, of the prosecution, that, the people of area having their TD rights and other religious rights in the lots, for, cutting the wood therefrom, hence, no incriminatory liability can be assuredly fastened upon the accused.

20. PW-23, Suresh Kumar, who, remained posted as Field Mand in Sharontha Beat we.f. 1996 to 2005, has deposed qua his remaining present at the relevant lots, at, the time when, the, marking was done. He has also testified qua his being deputed as Chowkidar, to look after, the converted timber. He has further testified qua his duty being, to keep a watch, qua the labour not resorting to illicit felling. He in his testification has testified that, no, illicit felling of trees, was done, in the aforesaid lots, and, no unmarked trees were felled, hence, he has not supported the prosecution case. There exists no other evidence on record to support the prosecution case. As per PW-1 Onkar Chand, stump counting register standing maintained by the Forest Corporation, and, progress reports being sent thereat. Admittedly, the running bills Exts. PW9/B, PW9/C and Ex.PW9/D were duly submitted by Rameshwar Nand, bills whereof were checked by accused Lachhi Ram, Binder Dutt, Chanchal Singh and Mast Ram, however, there is no evidence on record to display qua false certificates, being issued or forged documents hence being prepared. Further, it is also an admitted fact that in Sharontha Beat, where, timber was stacked by the Forest Corporation, there was fire, and, a damage bill, standing raised against the forest corporation, yet it being returned by the corporation.

21. PW-10, Kishore Lal, Naib Tehsildar in presence of Enforcement Officials Padam Singh, RO, Adarsh Mohan, BO, Surinder Singh and others, on 26.10.2005, conducted the demarcation, and, after demarcation, of, Khasra No.186, 11 stumps were noticed to be illicitly felled. His testification, unravels, qua his not measuring other khasra numbers i.e. 283, 14 and 56, and, his not affixing three permanent points. He has testified in his testification, that, trees for TD, funeral etc, standing felled by the people, of area, as they hold TD rights, in Khasra No.186. PW-18 Satya Prakash remained present, at the time of demarcation, and, he had prepared lists, of stumps, illicitly felled. He has admitted in his cross-examination qua the stumps being old ones. He has, in his testification, also stated qua his being unaware, about, the fixation of permanent points by the Naib Tehsildar. Similarly, PW-19 Padam Singh also remained present at the time of demarcation, and, he also echoes qua the demarcation being carried, from, Khasra No.14, and, three permanent points, being taken near Khasra No.186, and, other kahsra numbers being also demarcated. However, his testification, rather contradicts, the testification of, PW-10, Kishori Lal, hence, no reliance can be placed, on the testimony of PW-19. PW-27, Hari Ram, IO has in his testification admitted that he did not seize any record qua number of trees felled from 1997 to 1999, nor, the record qua grant of trees under TD, and, damage reports, from 1999 to 2005. Accordingly to him, all unmarked stumps were considered illicitly felled. PW-3 Basant Lal, had prepared reports borne in Ex.PW3/A and Ex.PW3/B, reports whereof, unfolds, felling of trees without marking, and, qua trees standing duly marked, yet theirs not being felled. PW-3 visited the spots/lots on 16th, and, on 17th September, 1999. In his testification, he is categorical qua his inability, to, dislcose, the identity, of, those, who had done the illicit felling. Ex.PW3/A, and, Ex.PW3/B, as testified by PW-3 Basant Lal, and, PW-28 Madan Lal, were prepared at the time of demarcation, and, the demarcation(s) of the lots, as testified by PW10, were conducted on 26.10.2005, hence, it cannot be construed that the lists/reports, borne in Ex.PW3/A, and, in Ex.PW3/B, standing prepared, in, the apt year 1999.

22. Furthermore, PW-2 S.D. Sharma, during the course of preliminary inquiry recorded statements of accused Mehar Singh Lachhi Ram, statements whereof, are

respectively borne in Ex.PW2/D-1 to Ex.PW2/D-3. PW-2 at the relevant was DFO and the accused were working under him. During the course of his cross-examination, he, has admitted that he had, not, recorded the statement, of, the accused. He has also admitted that he cannot tell as to what hammer mark, was carried, upon, the trees, which he had counted. He has also admitted that his report was entirely based on the admission made by the accused Mehar and Lachhi Ram. However, he has admitted that he has not recorded the statement of the aforesaid accused, yet they were claimed to be made before him, hence, it was enjoined, upon, the prosecution to examine the person, who has recorded in writing the statements, of, the aforesaid accused, statements whereof, are alleged to be made, before PW-2. However, the prosecution has omitted to examine the said person as a witness. Consequently, no reliance can be placed, upon, the statements of the aforesaid accused, respectively borne in Ex.PW2/D-1 to Ex.PW2/D-3. Moreover, given recitals, borne in the aforesaid statements, standing not supported by any of the prosecution witness, also renders them to be incredible.

23. 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.

24. 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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